IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-2769-SKC-MDB

J.R., a minor, by and through his mother and general guardian,

Plaintiff,

v.

HARRISON SCHOOL DISTRICT TWO, *et al.*,

Defendants.

OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS
[ECF 51, 52 & 53]

CERTIFICATION REGARDING THE USE OF ARTIFICIAL INTELLIGENCE (AI) FOR DRAFTING

Undersigned counsel hereby certifies that no portion of this filing was drafted by AI.

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INTRODUCTION[1]

Plaintiff J.R. is the type of engaged, thoughtful student that schools should be thankful for. At the age of 13, he has taken an interest in politics and political theory. He is willing to speak his mind, even if his views are unpopular, and to listen to and learn from others' views. It is good for other students—especially ones who disagree—to be exposed to his ideas. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 541 (2022) ("[L]earning how to tolerate diverse expressive activities has always been part of learning how to live in a pluralistic society.") (cleaned up).

Sadly, the adults who should have been encouraging J.R. to speak did exactly the opposite: they repeatedly barred his expression *not because they anticipated disruption, but because they disagreed with his opinions*. It is no secret that J.R.'s views—in favor of small government, personal responsibility, and traditional values—are increasingly out of vogue among cultural elites. And while school employees are entitled to their opinions, they may not use their power to silence dissenters, including their pupils.

[1] The Court previously granted Plaintiff's motion to file a single consolidated brief in response to Defendants' three separate motions to dismiss. ECF 69. While Defendants' separate briefs totaled 65 pages, Plaintiff offered to limit his consolidated brief to 55. ECF 62 ¶¶ 13-14. In granting Plaintiff's motion, the Court ordered him to separate his arguments "so that the Court (and the Defendants) can parse which arguments apply to which motions to dismiss" and to avoid giving disproportionate attention to any one motion such as "devot[ing] only 1 page of argument against a motion to dismiss, [while] devot[ing] 30 pages against another motion to dismiss." ECF 69. Plaintiff has complied with the Court's directives. The instant brief signposts the arguments that apply to each individual motion to dismiss. Moreover, for additional ease of reference, Plaintiff is submitting a table to help navigate Defendants' various motions and arguments along with a tally of the number of pages devoted to each motion. *See* Ex. A.

Not only did Defendants violate the First Amendment, but they set the absolute worst example, signaling that when someone says something with which you disagree, the best thing to do is to shut him down. It is no understatement to say that an educational system in which public officials routinely suppress ideas—even controversial ones—endangers our democracy. *See Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021) ("Democracy only works if we protect the 'marketplace of ideas.' . . . Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'") (cleaned up); *id.* ("Schools are the nurseries of democracy.").

J.R. brings this 42 U.S.C. § 1983 action to redress violations of his First Amendment rights committed by public officials at his middle school and school district. There are three sets of Defendants:

(1) Harrison School District Two (the "District"), District Superintendent Wendy Birhanzel, and District Assistant Superintendent Mike Claudio (collectively the "District Defendants");

(2) The Vanguard School (the "School"), Vanguard's Executive Director Renee Henslee, and Vanguard's Director of Operations Jeff Yocum (collectively the "School Defendants");

(3) Former Vanguard School Assistant Principal Beth Danjuma.

Plaintiff asserts claims for violations of his free speech rights as a public school student pursuant to *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393

U.S. 503 (1969), claims for violations of his rights against content and viewpoint discrimination, a claim alleging facial overbreadth of a district policy, and a claim for unconstitutional retaliation.

In their motions to dismiss, Defendants hardly defend the constitutionality of their conduct. Indeed, only one (Defendant Danjuma) seeks dismissal of J.R.'s content and viewpoint discrimination claims. The other Defendants do not address these claims in their motions at all. As for the other claims in the complaint, although the individual Defendants each take a shot at asserting qualified immunity, Defendants' primary focus is to point fingers at each other. The District Defendants say their charter school contract with the School gets them off the hook; while the School Defendants say the opposite: that the District was calling the shots, and that School officials are not to blame. Indeed, the District Defendants and the School Defendants have acknowledged that their motions to dismiss are "mutually exclusive" in this way. ECF 68 at 3.[2]

Defendants' acknowledgement that their motions to dismiss contradict each other amounts to a concession that at least *one* of their motions will be denied. After

[2] Note that this issue came up in the context of Defendants' motion to stay discovery, where Magistrate Judge Dominguez-Braswell stated that "the fact that [the motions] are mutually exclusive" potentially streamlined the case in a way that narrowed discovery. Ex. B, Tr. of Feb. 26, 2024 Motion Hearing at 21:1-10 (suggesting that the mutual exclusivity means that, while one motion to dismiss must be denied, another may be granted, in which case "it [would] get[] us really clear on who is or who isn't in the case and what issues are or are not live, which would streamline discovery"). While J.R. respectfully disagrees that the motions to dismiss will narrow discovery at all—because all three ought to be denied—it is the case that Defendants' binding judicial admission that at least some of J.R.'s claims will go forward formed part of the basis for the extant stay of discovery. ECF 81.

all, *someone* made the decision to violate J.R.'s constitutional rights. But in fact, as the allegations in the First Amended Complaint ("FAC") make clear, *all* of the Defendants bear responsibility for violating J.R.'s rights. The court should thus deny all three of Defendants' motions, in full.

FACTUAL BACKGROUND

I. Defendants Suppressed J.R.'s Non-Disruptive Speech Due to its Content and Viewpoint.

J.R. attends The Vanguard School, a public charter school in Harrison School District Two. ECF 43, FAC ¶¶ 14-15, 18, 55-57. J.R. is fiercely patriotic. *Id.* ¶ 55. He believes in traditional values such as limited government, personal freedom, and the right of individuals to secure their self-defense, including through responsible firearms ownership. *Id.* ¶¶ 1, 55-57, 68.

The officials in charge of J.R.'s School and the School District disagree with his values. *Id.* ¶¶ 1-2, 180. Those officials find J.R.'s points of view "distasteful," *id.* ¶ 180, as they are "decidedly out of vogue," *id.* ¶ 1, and not in step with allegedly "progressive" values such as being "anti-gun" and "pro-government-control," *id.* ¶ 180. Indeed, the District is so hostile to traditional and conservative values that it has adopted an official policy that the mere slogan "Make America Great Again," may not be displayed. *Id.* ¶¶ 38, 41, 43.

The District has also banned pro-law enforcement messages such as "I salute the flag and back the badge . . ." *Id.* ¶ 39, 50. And in their zeal to suppress everything except fashionable left-wing ideologies, the officials in charge of J.R.'s schooling at the Vanguard School have even banned bona fide historical symbols if

there is any hint that they have been endorsed by modern-day conservatives. For example, because the Revolutionary War-era "DONT TREAD ON ME" flag (officially known as the "Gadsden Flag") has been displayed at "political protests . . . opposing restrictions on gun ownership and objecting to rules imposed in 2020 to slow the spread of the coronavirus" as well as what are described as "hard-line Republican anti-tax [rallies]," *id.* ¶ 108, the Gadsden flag is banned both in the District and the School, *id.* ¶¶ 40-41, 43.[3]

The policies banning "Make America Great Again," "I salute the flag and back the badge," the Gadsden Flag, and other disfavored messages were announced by Defendant Claudio in a presentation to the District Board of Education on August 3, 2023, mere weeks before the start of the 2023-24 school year. *Id.* ¶¶ 17, 36-41. The District has also imposed a longstanding ban on items that "refer to . . . weapons." FAC ¶¶ 29-30. This overbroad policy bars a great deal of constitutionally protected expression, *id.* ¶ 31, and can also be selectively enforced to target specific messages on the basis of their viewpoint. In contrast to the intolerance shown to traditional views like J.R.'s, the officials in charge of his education freely endorse the right of students and staff to express left-wing sentiments such as "Make America Green Again" and "Don't mess with Trans kids." *Id.* ¶¶ 46, 48.

In the midst of this stifling climate (at least for those with disfavored opinions), J.R. chose to express himself by passively displaying patches on his backpack. *Id.* ¶ 59-60. Among other things, J.R. displayed cryptocurrency icons,

[3] Not only for students. On at least one occasion, the District has "terminated an employee" for wearing the Gadsden Flag to work. *See, infra* Argument § I.D.1 at 36.

religious symbols, patches displaying his support for Second Amendment rights, and, yes, a miniature Gadsden Flag. *Id.* ¶¶ 61, 63-64; *see also id* ¶ 62 (J.R. also displayed a variant of the Gadsden Flag bearing the text "DONT TELL ON ME" (the "Gadsden Variant")). None of J.R.'s patches carry a threatening message. *Id.* ¶ 71. None of them were displayed in a threatening manner. *Id.* ¶ 72. None of them promote illegal conduct. *Id.* ¶ 73. None of them advocate for violence. *Id.* ¶ 74. Neither the manner in which J.R. displayed his messages, nor the content of the messages themselves carried any risk of disrupting the educational environment. *Id.* ¶¶ 76-80, 83. Indeed, school officials knew with virtual certainty that J.R.'s expression would *not* disrupt school, because he *had been wearing the same or similar patches for years without a single incident*. *Id.* ¶¶ 5, 8, 76-80, 83.

Nevertheless, at the start of the 2023-24 School Year, consistent with Defendant Claudio's August 3, 2023 presentation, Defendants took a more aggressive approach, and barred J.R. from expressing himself through his patches. *Id.* ¶¶ 83-107. Specifically, on August 25 and 28, 2023, Defendants singled out and banned the Gadsden Flag and Gadsden Variant patches. *Id.* ¶¶ 90-95, 98-99, 107. J.R. and his mother were told that the Gadsden Flag was allegedly "[rooted in] slavery and the slave trade," *id.* ¶¶ 6, 102, a decidedly inaccurate modern reinterpretation of what has always been seen as a "symbol of resistance to oppression, *id.* ¶ 111; *see also id.* ¶ 134 (Governor of Colorado noting its "proud" history as an "iconic warning to . . . government not to violate the liberties of Americans."). Defendants' interpretation of the Gadsden Flag as related to slavery

or racism was not just historically inaccurate; it was mere pretext. *Id.* ¶¶ 3, 9, 180. The real reason for the ban was that District and Vanguard "staff . . . disagree[d] with J.R.'s points of view, which they f[oun]d distasteful." *Id.* ¶ 180; *see also id.* ¶ 108 (linking Gadsden Flag with "hard-line Republican[s]" and other groups).

In addition to the Gadsden Flag, J.R. was forbidden from displaying a handful of patches supporting Second Amendment rights and values, including:

- A patch displaying the words "Firearms Policy Coalition Official Member" along with the image of a firearm (the "FPC Patch"), and
- Several patches depicting Pac Man ghosts and other comical characters holding firearms (the "Ghost Patches")

FAC ¶¶ 61-62, 85-95.

Despite the fact that J.R. had displayed the same patches for years, *id.* ¶¶ 5, 76, 171, Defendants asserted in August 2023 that because the FPC Patch "referred to weapons," it was would now be deemed "disruptive or potentially disruptive to the classroom environment," and was therefore barred. *Id.* ¶¶ 91, 175. Again, there was no evidence from which a school official could conclude that the patches were "disruptive or potentially disruptive." *Id.* ¶¶ 126-131. Quite the contrary—the only available evidence showed conclusively that the educational environment was safe from J.R.'s patches. *Id.* ¶¶ 77-79, 128, 131. As with the Gadsden Flag ban, the proffered reason for banning the FPC and Ghost Patches (the alleged potential for disruption) was, in fact, a pretext. *Id.* ¶¶ 3, 180. The real reason Defendants barred J.R.'s expression was that they disagree with his point of view, and prefer policies that restrict the rights of firearms owners. *Id.* ¶ 180.

II. Each of the Defendants Played a Role in the Suppression of J.R.'s Speech.

Defendants try to muddy the waters to make it unclear whether the School District or the School was pulling the strings behind the scenes. ECF 51 at 6-10, 18-25; ECF 53 at 4-8, 10-19. And Defendant Danjuma asserts that, at least for one of the censorship decisions, she was just following orders. ECF 52 at 2, 9-14. To be sure, the various Defendants played different roles in the violations of J.R.'s rights, but each is culpable and should be held to account.

As detailed in the FAC, through a series of interactions, both the School and the District made and implemented decisions to bar J.R.'s speech. For instance, on the first Friday of the 2023-24 school year, it was then-Vanguard Assistant Principal Danjuma who pulled J.R. out of class, and ordered him to remove his firearms-related patches, based on an alleged staff complaint that they were "inappropriate." FAC ¶ 84. She did this even though there was no evidence the patches were disruptive. *Id.* ¶¶ 76-79, 83. Danjuma acknowledges in her motion to dismiss that she made this initial censorship decision, ECF 52 at 2, and in this instance, does not actually contend that she was just following orders. *Compare id.* at 7-9 (argument concerning firearms image ban) *with id.* at 9-14 (argument on Gadsden Flag ban). Due to Danjuma's censorship, J.R. removed the Ghost Patches; but he did not remove the FPC Patch. *Id.* ¶ 85.

The following Monday, J.R. was again pulled out of class, this time by Vanguard Director of Operations Yocum. *Id.* ¶ 86. Once again, there was no disruption prior to this event. As the Complaint alleges, "while admitting that the

FPC Patch was not disruptive, and that the school did not consider J.R. to represent a threat to anyone, Mr. Yocum opined that 'images [of firearms] themselves are considered not safe to be in schools.'" *Id.* ¶ 87. Although Yocum cited to the District's ban on images "refer[ring] to weapons," *id.* ¶ 86, he did not mention that, as the District Defendants point out in their motion to dismiss, the School was not contractually bound by the District's dress code. ECF 53 at 5. In any event, because he recognized that "there were potentially free speech concerns at play," Defendant Yocum suspended his decision to ban the FPC Patch until he could further "discuss the matter" with counsel and with the District. *Id.* ¶¶ 89, 91.

At some point over the next two days, Yocum discussed the situation with District Assistant Superintendent Claudio. FAC ¶¶ 89-91, 118. As part of their discussions, the two came to a joint decision to enforce the FPC Patch ban. *Id.* ¶ 90; *see also id.* ¶ 109.

Crucially, during the same interaction, "[i]n a surprise move," a decision was made to also ban a variation of the Gadsden Flag—which had not previously been at issue—from J.R.'s backpack. *Id.* ¶ 90. On this motion to dismiss, J.R. is entitled to the reasonable and highly plausible inference that, at least insofar as the Gadsden Flag and its variants were concerned, District executives— not necessarily employees of the Vanguard School—were the first to raise concerns, and were the primary (though not the sole) decision makers. Indeed, given that Defendant Claudio had only weeks before made a presentation to the District Board specifically targeting the Gadsden Flag and other expression Claudio associated

with conservatives, this inference is very strong indeed. *Id.* ¶¶ 36-41.

In any event, after J.R. did not immediately comply with the unconstitutional order to remove the FPC and Gadsden Variant Patches, *id.* ¶ 93, School Principal Henslee ratcheted up the pressure, threatening J.R. with removal from classes unless he complied, *id.* ¶ 94. J.R. then reluctantly removed those patches, but, "partially to protest the censorship that he suffered," added the traditional Gadsden Flag Patch to his backpack. *Id.* ¶ 96. When he returned to school on Monday, August 28, 2023, with the Gadsden Flag Patch, he was again pulled out of class by Defendant Danjuma. *Id.* ¶ 97-99. J.R.'s mother was called to an emergency meeting, during which she was informed by Defendant Danjuma that J.R.'s speech would be suppressed because "the District Superintendent . . . Birhanzel . . . had determined that the Gadsden Flag was unacceptable under the Dress Code." *Id.* ¶ 99. The rationale provided to J.R. and his mother was that it had "origins [in] slavery and the slave trade." *Id.* ¶ 102. Defendant Danjuma signaled her strong agreement with Superintendent Birhanzel's decision, stating, "we can't have [the Gadsden Flag] in and around other kids." *Id.* ¶ 102. J.R. was not allowed to return to class. *Id.* ¶ 107.

After the school day ended, Defendant Yocum followed up by e-mail to elaborate on Defendants' justification for barring the Gadsden Flag. *Id.* ¶ 108 (email asserting Gadsden Flag "[t]ied to" various contemporary political movements including so-called "hard-line Republican anti-tax movement[s]," and "political protests . . . opposing restrictions on gun ownership," and claiming that the originator of the Flag was associated with 18th Century slavery). Although Yocum

did not say so at the time, it appears he jointly crafted this email with District Assistant Superintendent Claudio.[4]

III. Facial Overbreadth of Dress Code Policies

In addition to claims based on the specific as-applied decisions to ban him from displaying the Gadsden Flag, the Gadsden Variant, the FPC Patch, and the Ghost Patches, J.R. brings a facial challenge to a provision in the District's dress code that bars *all* student displays that "refer to weapons."

That policy "prohibits any expression referring to weapons whatsoever, without any consideration of the definition of a weapon (such as cannons, baseball bats, swords, magic wands, etc.), or whether the particular expression could reasonably be deemed disruptive to the classroom environment." FAC ¶ 30. The policy bans a vast swath of constitutionally protected speech. *Id* ¶ 31 (examples include messages expressing support for and in opposition to gun control and images of the one dollar bill). The policy was cited as a partial justification for banning J.R.'s firearms-related patches. *Id.* ¶¶ 86, 91; *see also id.* ¶ 3, 180 (noting that these justifications were pretexts for viewpoint discrimination).

Students both at the Vanguard School and other District schools likely "have been subject to punishment" under this long-standing rule and their "disciplinary records have not been expunged." *Id.* ¶ 52. Moreover, students "have been chilled in the exercise of their First Amendment rights . . . by fear of punishment under the

[4] Evidence that this email was, at least in part, drafted by Claudio was produced as part of the School's initial disclosures after the FAC was filed. *See infra* Argument § I.D.1 at 35-36 for further discussion.

Reference to Weapons Policy." *Id.* ¶ 53.

In an apparent concession that the Reference to Weapons Policy is unconstitutionally overbroad, after this lawsuit was initiated, the District tried to hastily and secretly change its policy to remove the ban, using language from the Supreme Court's decision in *Tinker*. FAC ¶¶ 156-159. As explained below, this transparent attempt to moot J.R.'s facial challenge fails to divest this Court of jurisdiction over the claim.

IV. Retaliation

After the events of August 2023 became widely known and the Defendants were ridiculed in the press and on social media, students and staff at J.R.'s school have become upset at the publicity. *Id.* ¶ 145. Some of them have inappropriately aimed their ire at J.R., rather than at the officials who suppressed his freedom of speech and sparked media interest. *Id.* ¶ 146. Moreover, some students and staff have engaged in a campaign to threaten, harass, and intimidate J.R. *Id.* ¶¶ 145, 149. Defendants know of these ongoing problems, but, due to a desire to retaliate against J.R., they have not taken appropriate steps to address them. *Id.* ¶¶ 147-148. This is a stand-alone violation of J.R.'s First Amendment rights.

STANDARD OF REVIEW

In evaluating a motion to dismiss under Rule 12(b) (6), a court must "accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). In other words, no inferences may be drawn in favor of Defendants. *See Tyler v. Hennepin Cnty., Mn.*, 598 U.S. 631, 637 (2023) (at this stage, a plaintiff "need not

definitively prove her injury or disprove the [defendant's] defenses."). All that is required is that the plaintiff allege sufficient facts to support a "plausible" claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

Where a government official asserts qualified immunity from damages under 42 U.S.C. § 1983, "[t]he procedural posture . . . may be critical." *Thompson v. Ragland*, 23 F.4th 1252, 1255 (10th Cir. 2022). "Because they turn on a fact-bound inquiry, qualified immunity defenses are typically resolved at . . . summary judgment." *Id.* (cleaned up). "Asserting a qualified immunity defense via a Rule 12(b)(6) motion subjects the defendant to a more challenging standard of review . . . On a motion to dismiss, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for constitutionality." *Id.* (cleaned up, emphasis in original); *see also Buck v. Rhoades*, 598 F. Supp. 3d 1181, 1196 (N.D. Okla. 2022) (it is generally "premature" to decide qualified immunity on a 12(b)(6) motion) (citing *Thompson*)).

ARGUMENT

I. J.R.'s As-Applied Claims for Damages Are Well Pleaded and Should Not Be Dismissed -- Banning J.R.'s Patches Violated His Clearly Established Constitutional Rights – (Claims One & Two)

J.R.'s first and second claims seek damages based on as-applied challenges to Defendants' decisions to bar him from wearing expressive patches on his backpack. In his first claim for relief, J.R. seeks damages from the individual defendants sued in their personal capacities. In his second claim for relief, J.R. seeks damages from the two entity defendants—Harrison School District Two and the Vanguard School. The claims are well pleaded and should go forward.

A. Barring the Gadsden Flag Violated J.R.'s Clearly Established Rights under *Tinker*.

Leaving aside for the moment the question of *who* has ultimate responsibility, it is undeniably the case that some combination of District and/or School personnel personally and deliberately barred J.R. from displaying the Gadsden Flag and Gadsden Variant patches. This was a flagrant violation of J.R.'s clearly established First Amendment Rights under *Tinker* because (as they do not contest) school officials had no basis on which to predict that display of the patches would substantially disrupt the educational environment.

(1) *Banning Display of the Gadsden Flag Violated Tinker.*

For more than half a century, it has been "unmistakabl[y]" clear that schools may never suppress student speech out of a mere "desire to avoid . . . discomfort[,] unpleasantness[, or] controversy." *Tinker*, 393 U.S. at 506, 509-10. Instead, pursuant to *Tinker*, school officials may only prohibit speech that they have reason to believe will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513. The *Tinker* standard is "demanding," *Mahanoy*, 141 S. Ct. at 2048, and a school administrator's concern that speech will cause substantial disruption must be "well-founded." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001) (Alito, J.), which generally means it must be based on "past disruptive incidents arising out of [similar] speech." *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 259 n.7 (4th Cir. 2003); *Saxe*, 240 F.3d at

211; *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000).[5]

The Supreme Court has carved out "three specific categories of student speech" that schools may regulate without a showing of substantial disruption. *Mahanoy*, 141 S. Ct. at 2045. Those categories are (1) juvenile outbursts of indecent, lewd, and vulgar speech, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678, 685 (1986); (2) speech promoting "illegal drug use," *Morse v. Frederick*, 551 U.S. 393, 409 (2007); and (3) speech that others may reasonably perceive as bearing the school's imprimatur, such as speech carried by a school newspaper, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

To their credit, Defendants do not contest that J.R.'s expression was protected by the First Amendment. Nor do any Defendants argue that J.R.'s display of the Gadsden Flag qualifies for non-*Tinker* treatment under any of the theories outlined above. Nor do Defendants contest that they lacked a well-founded fear of substantial disruption to the school environment. Accordingly, the facts in the complaint plausibly allege the ban on J.R.'s display of the Gadsden Flag violated his

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[5] Notably, the threat of disruption must come from the *speech itself* and not from the reactions of listeners. For example, where student speech takes the form of a loud protest march in school hallways during classes, pulling students out of class, and forcing protest buttons on unwilling bystanders, the *speech itself* is substantially disruptive. *Blackwell v. Issaquena Cnty. Bd. of Ed.*, 363 F.2d 749, 753 (5th Cir. 1966); *see also Tinker* 393 U.S. at 513 (citing *Blackwell* as the standard for disruption). In contrast, where a student is himself not disrupting class, but *hecklers* react violently or disruptively, the school's duty is to address the disruptive reaction of the hecklers, not to shut down the peaceful speech. *Mahanoy*, 141 S. Ct. at 2056 (Alito, J. concurring) ("If listeners riot because they find speech offensive, schools should punish the rioters, not the speaker. In other words, the hecklers don't get the veto.") (cleaned up); *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1206 (10th Cir. 2002) ("[T]he state may not prevent speech simply because it may elicit a hostile response.").

rights under *Tinker*.

(2) ***J.R.'s Rights Under Tinker Were Clearly Established, and Defendants are Not Entitled to Qualified Immunity.***

Defendants Henslee and Yocum argue that, although they violated Plaintiff's First Amendment Rights, they are nevertheless entitled to qualified immunity because the "*Tinker* standard" is a "general statement[] of law," and because their counsel "cannot locate any case from any District Court that addresses the Gadsden Flag as a form of speech." ECF 51 at 17. In other words, they assert that unless there has been a prior decision *specifically involving the Gadsden Flag* in a school setting, they are immune from liability no matter how obvious it was that the display would not cause substantial disruption. But the law has never imposed such an onerous condition on plaintiffs. To the contrary, as applied to this case, *Tinker* provided exceptionally clear guideposts to Defendants warning them off of banning J.R.'s non-disruptive, peaceful, and silent expression.

Qualified immunity does not protect government officials from the consequences of their "plainly incompetent" decisions. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[P]ublic official[s] should know the law governing [their] conduct."). Accordingly, qualified immunity is reserved for cases where an official lacked "fair warning" that his actions could give rise to liability. *U.S. v. Lanier*, 520 U.S. 259, 270 (1997); *see also Harlow*, 457 U.S. at 819 ("Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate.").

As the Supreme Court has squarely held, a clearly established right does *not*

necessarily require prior cases with "'fundamentally similar' . . . [or] 'materially similar' facts." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). To the contrary, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* And, while abstract statements may *sometimes* fail to give fair notice, "general statements of the law are not inherently incapable of giving fair and clear warning." *Lanier*, 520 U.S. at 271; *Sturdivant v. Fine*, 22 F.4th 930, 938 (10th Cir. 2022); *DeSpain v. Uphoff*, 264 F.3d 965, 979 (10th Cir. 2001).[6]

In particular, "[a] general rule can serve as clearly established law when it states the contours of a constitutional transgression in a well-defined or well-marked manner without leaving a vaguely-defined legal border." *Ashaheed v. Currington*, 7 F.4th 1236, 1246 (10th Cir. 2021) (cleaned up). The test is whether, as an analytical matter, the general rule is "relatively straightforward and not difficult to apply." *Janny v. Gamez*, 8 F.4th 883, 918 (10th Cir. 2021) (cleaned up); *Sturdivant*, 22 F.4th at 938-39 (10th Cir. 2022) (70-year-old general rule sets clearly

[6] By contrast, a general statement of law that presents a "hazy border" between lawful and unlawful government conduct, may be insufficient to create "well established law." *Janny*, 8 F.4th at 917-18 (cleaned up); *Ashaheed*, 7 F.4th at 1247 n.6 ("[S]ome . . . transgressions cannot be reduced to a neat set of legal rules particularly when determining whether there is a constitutional violation is a fact-intensive inquiry that requires resolving relevant ambiguities.") (cleaned up). Rules in this category tend to be those that measure the constitutionality of law enforcement conduct against a standard of "reasonableness" or "excessiveness," especially where an officer must make an on-the-spot decision under emergent conditions. *Id.* (fact intensive, ambiguous tests include Fourth Amendment excessive force and probable cause standards); *Janny*, 8 F.4th at 918 (noting that a "Fourth Amendment challenge to an officer's split-second assessment" of whether a particular level of force was necessary would present such a "hazy border," and would make "defining clearly established law with 'specificity . . . especially important.'" (quoting *Brown*, 974 F.3d at 1184)).

established law "[e]ven without a precedent involving similar facts.").

Tinker is the paradigm of a general, yet clear and distinct statement of the law that gives fair warning to school officials when their conduct crosses the line. Indeed, in its first public school qualified immunity case under § 1983, the Supreme Court specified that among the "clearly established constitutional rights" that reasonably competent public school administrators must know were the "specific constitutional guarantees" of "*Tinker*[,] . . . *West Virginia State Board of Education v. Barnette* . . . [and] *Goss v. Lopez* . . . " *Wood v. Strickland*, 420 U.S. 308, 322, 326 (1975) (partially abrogated on other grounds in *Harlow*, 457 U.S. at 815).

The *Tinker* mode of analysis sets out very clear parameters for government actors. *Tinker* "calls for teachers to assess two factors: (1) whether a student is engaged in expression . . . and (2) whether the expression is having a non-negligible disruptive effect, or is likely to have such an effect, on classroom order or the educational process." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004). Defendants do not dispute that J.R. was engaged in expression when he displayed the Gadsden Flag and other patches on his backpack.

Accordingly, the sole question facing Defendants was whether J.R.'s expression would cause disruption. This standard "should . . . be quite effortless for an educator to apply [because a] teacher or principal should be able to instantly recognize whether a student is disrupting class, and it should not be too hard to determine whether a student's activities are likely to have such an effect." *Id.*

Given the ease with which the *Tinker* test can be applied and its lack of

ambiguity, it is "not [stated] at an unreasonabl[y] high level of generality" for purposes of determining "well established" law. *Id.*; *see also id.* ("The *Tinker-Burnside* principle gave [school officials] clear notice that their conduct violated [a student's] constitutional rights. . . . teachers are well equipped to readily determine what conduct falls within the . . . standard."); *Sagehorn v. Indep. Sch. Dist. No. 728*, 122 F. Supp. 3d 842, 862 (D. Minn. 2015) ("[G]eneral statements of law, such as those announced by the Supreme Court in *Tinker* . . . are fully capable of giving 'fair and clear warning' to officials that particular actions are unlawful.") (cleaned up).

Here, applying *Tinker* under the facts alleged in the complaint would have been an "effortless" task for any reasonable school administrator. Not only was there "no evidence that Defendants' ban of the Gadsden Flag was necessary or even helpful in maintaining discipline or the learning environment," FAC ¶ 121, the fact that J.R. had been wearing the same or similar patches *for several years without even one incident of disruption*, moves this case into the truly egregious category, FAC ¶¶ 79-78, 80, 122.

Even the governor of the State of Colorado publicly admonished Defendants for suppressing plaintiff's speech. *Id.* ¶ 134. School administrators have a duty to educate themselves on the rules governing their conduct. *Wood*, 420 U.S. at 321. That the *governor* of a state, who has far more wide-ranging duties than a local school administrator, would find it obvious that a constitutional violation had occurred only underscores Defendants' error. *Holloman*, 370 F.3d at 1278 ("While we have not traditionally called upon government officials to be 'creative or

imaginative in determining the scope of constitutional rights, neither are they free of the responsibility to put forth at least some mental effort in applying a reasonably well-defined doctrinal test to a particular situation.") (cleaned up). The qualified immunity defense has no application to J.R.'s Gadsden Flag claim.[7]

B. Barring the FPC Patch and the Ghost Patches Violated J.R.'s Clearly Established Rights under *Tinker*.

No defendant argues that the ban on J.R.'s FPC Patch or his Ghost Patches passes muster under *Tinker*. Nor could they, because (as with the Gadsden Flag Patch) there was zero evidence from which a reasonable school administrator could have predicted substantial disruption. Indeed, federal courts have routinely held

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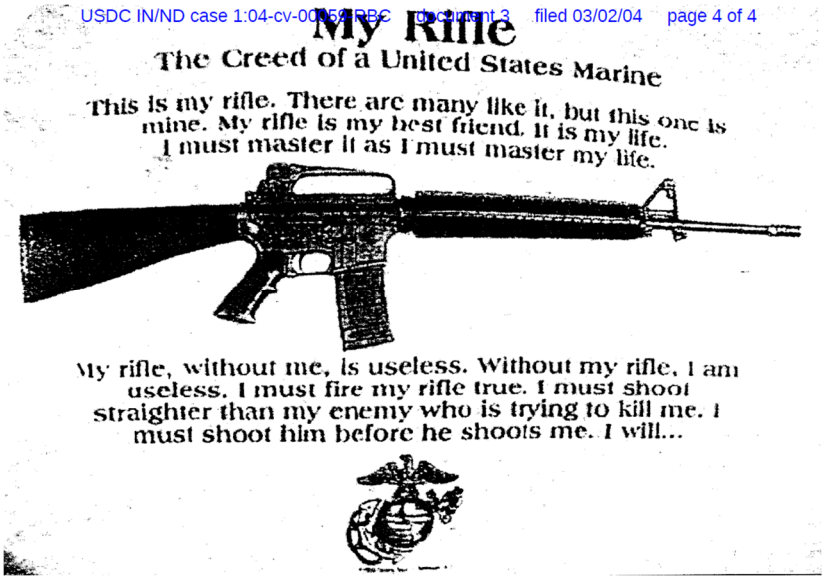
[7] In addition to these arguments, J.R. asserts—and preserves for appellate court review—the position that the entire doctrine of qualified immunity is unsupported by 42 U.S.C. § 1983, and that the cases establishing the defense, starting with *Pierson v. Ray*, 386 U.S. 547 (1967) should be overruled. *See, e.g.*, *Rogers v. Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023) (Willett, J. concurring) (highlighting "newly published scholarship that paints the qualified-immunity doctrine as flawed—foundationally—from its inception") (citing *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023)); *Oliver v. Arnold*, 19 F.4th 843, 852 (5th Cir. 2021) (Ho, J. concurring in denial of reh'g en banc) ("[T]he doctrine of qualified immunity [is] contrary to the text and original understanding of 42 U.S.C. § 1983."); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J. concurring) (noting "growing concern with our qualified immunity jurisprudence"). Moreover, J.R. also preserves for appellate review the argument that, if qualified immunity is not overruled, it should be limited to the context of split-second decisions by law enforcement officers, where lives or property are on the line. *See, e.g.*, *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J. statement regarding denial of certiorari) ("[W]hy should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?"); *Reedy v. Evanson*, 615 F.3d 197, 224 n.37 (5th Cir. 2010) ("[Q]ualified immunity [best applies where] police officers . . . are forced to make difficult, split-second decisions."). J.R. recognizes that this Court is required under binding precedent to reject both of these arguments. He nevertheless respectfully raises them to preserve the issues for possible Tenth Circuit and Supreme Court review.

under *Tinker* that school officials may not bar expression merely because it refers to or includes images of firearms. For example:

- In *Schoenecker v. Koopman*, 349 F. Supp. 3d 745, 747, 752-54 (E.D. Wis. 2018), the court held that a student's rights under *Tinker* were violated when his school barred the following t-shirts, notwithstanding that they made staff members "uncomfortable and concerned about school safety."

- In *Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 732-33, 746-47 (N.D. Ind. 2005), the court held that under *Tinker*, a school could not bar a student from wearing a t-shirt with the following text and imagery: [8]

[8] N.D. Ind. No. 04-cv-00059-RBC [Dkt. 3]. *Griggs* also analyzed the ban under the Seventh Circuit's decision in *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996), which set forth a more lenient standard for suppressing student speech. The court noted that the Seventh Circuit was alone in taking the *Muller* approach and that the other courts of appeals that had considered the issue, including the Tenth Circuit, were unanimous that "*Tinker* provides the default rule," subject only to "narrow exceptions" set forth in other Supreme Court precedent. 359 F. Supp. 2d at 739. Subsequently, in *N.J. by Jacob v. Sonnabend*, the Seventh Circuit overruled *Muller*. 37 F.4th 412, 425 (7th Cir. 2022).



- In *Newsom*, the Fourth Circuit held that "nonviolent and nonthreatening images/messages related to weapons would fall squarely under *Tinker's* disruption standard." 354 F.3d at 257. The court further held that a student's "NRA . . . SHOOTING SPORTS CAMP" shirt with three silhouetted men aiming firearms was such a message. *Id.* at 252, 259 & 261 n.10.

- *Accord Burnham v. Ianni*, 119 F.3d 668, 676 n.13 (8th Cir. 1997) (noting that a university administrator's "generalized concerns over the display of weapons [does not] advance [his] rights of suppression or attenuate [the plaintiffs'] free speech privileges . . . [The administrator's] parochial point of view on exhibiting weapons makes the censorship no less pernicious.").

In the context of the ban on J.R.'s FPC and Ghost Patches, Danjuma asserts the same argument made by Henslee and Yocum in the context of the Gadsden Flag: that *Tinker* is allegedly "too broad" to supply "clearly established" law. ECF 52 at 8. Danjuma's argument also fails.

As explained in detail above, *Tinker*, while stated in general terms, is more than enough to provide fair warning to a school administrator that they face liability if they ban student expression in the total absence of evidence that the expression will disrupt the educational environment. *Supra* Argument § I.A.2. Although Danjuma asserts that applying *Tinker* to J.R.'s FPC and Ghost Patches is

a "complex constitutional issue," ECF 52 at 9, she does not identify any particularly difficult decisions she was required to make. To the contrary, her task was very simple: like other teachers, she "should [have been] able to instantly recognize whether . . . [J.R.'s activities were] likely to have [a disruptive] effect." *Holloman*, 370 F.3d at 1279. Especially given that J.R. had worn the same patches for years, Danjuma would have known with virtual certainty that there was *no potential for disruption here*. Danjuma's qualified immunity argument therefore fails.

Essentially conceding that under *Tinker*, banning J.R.'s FPC and Ghost Patches violated clearly established constitutional principles, Henslee and Yocum try a different tact, suggesting that *Tinker* is somehow the wrong framework, and that the Patches could instead be barred under an extension of the Supreme Court's decision in *Morse v. Frederick*, 551 U.S. 393 (2007), which permits schools to bar speech advocating drug use without waiting for evidence of substantial disruption. ECF 51 at 13-16. According to Henslee and Yocum, *Morse* announced a broad exception to *Tinker*'s disruption standard for any student speech that "promotes illegal behavior" or "advocat[es] violence." *Id.* at 14, 16. This is incorrect.

In *Morse*, a high school senior unfurled a 14-foot banner bearing the phrase "BONG HiTS 4 JESUS" at a school event. 551 U.S. at 397-98. Reasoning that "peer pressure is perhaps the single most important factor leading schoolchildren to take drugs and that students are more likely to use drugs when the norms in school appear to tolerate such behavior," *id.* at 408, the Court held the school could suppress the banner without a well-founded fear of disruption under *Tinker*. The

Court noted that when the school principal was "suddenly and unexpectedly" confronted with a high school senior urging other (often younger) students to take "bong hits," she "had to decide to act—or not act—on the spot," and that "failing to act would send a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use." *Id.* at 409-10. Under these specific circumstances, the school did not act out of "undifferentiated fear," but rather for the "compelling" purpose of heading off copycat drug-use behavior by impressionable children. *Id.* at 407-08 (quotations cleaned up).

At the same time, the Court took pains to distinguish *Tinker* on the ground that, unlike in that case, where the student speech carried social and political messages and therefore "implicat[ed] concerns at the heart of the First Amendment," the "BONG HiTS 4 JESUS" message was "plainly not . . . political." *Id.* at 403; *see also id.* at 422 (Alito, J. concurring) (*Morse* does not apply to "speech that can plausibly be interpreted as commenting on any political or social issue.").

None of the concerns motivating *Morse* is implicated in J.R.'s case, and no reasonable school official could find support in *Morse* for suppressing J.R.'s speech under a non-*Tinker* framework. First, unlike in the case with unlawful drug use, "peer pressure" does not cause firearms ownership. Second, unlike the principal in *Morse*, the officials in charge of J.R.'s schooling were not "suddenly and unexpectedly" confronted with student expression that needed to be dealt with in the moment. J.R. had been wearing the same or similar patches for years, and there is no evidence whatsoever that other students were somehow influenced to purchase

firearms or to engage in "violence."[9]

Third, caselaw makes abundantly clear that *Morse* was a narrow decision addressing only drug-promoting speech. Indeed, Justice Alito's concurring opinion emphasized that, "I join the opinion of the Court on the understanding that . . . it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use." 127 S. Ct. at 2636 (Alito, J., concurring). And, in the years since *Morse*, this theme has been picked up again and again, including in binding Tenth Circuit case law. *See, e.g.*, *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1228 (10th Cir. 2009) (While "*Tinker* is not the only basis for restricting student speech, . . . [t]he *Morse* decision resulted in a narrow holding" limited to speech "reasonably view[ed] as promoting illegal drug use.") (internal quotation marks, citation omitted); *see also, e.g.*, *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3rd Cir. 2011) ("Although, prior to this case, we have not had an opportunity to analyze the scope of the *Morse* exception, the Supreme Court itself emphasized the narrow reach of its decision."); *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008).

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[9] Indeed, that school officials knew J.R. was wearing the same patches *for years* without once doing anything about them strongly undermines the position taken in this litigation that officials were reasonably concerned about copycat or spillover effects from J.R.'s patch displays. *Cf Halley v. Huckaby*, 902 F.3d 1136, 1147 (10th Cir. 2018) ("[D]elay . . . suggests the officials themselves did not believe there was an imminent threat [or else] they would have acted with more urgency."). That is to say nothing of the fact that Defendants have actual knowledge that J.R. is *currently* wearing these patches to school. ECF 57 at 5. If Defendants are violating state law by willfully ignoring a potential for violence, that is quite a concession. *See* Colo. Rev. Stat. § 24-10-106.3 (waiving sovereign immunity where school employees fail to exercise reasonable care to protect students and faculty.).

Recently, the Seventh Circuit held that the shirt below was *not* "analogous to the student's banner in [*Morse* because it was not] reasonably understood to promote illegal drug use," and that it therefore did not "fall within any of the three categories of cases that may be resolved without regard to *Tinker*'s substantial-disruption standard." *N.J. by Jacob v. Sonnabend*, 37 F.4th 412, 424 (7th Cir. 2022).

Defendants' attempt to extend the *Morse* exception to encompass speech "advocating violence" also runs into a logical contradiction. For decades prior to *Morse*, schools were empowered to suppress student speech carrying a risk of substantial disruption. Speech credibly threatening or encouraging *violence* is speech that carries a risk of substantial disruption (it is hard to think of anything more disruptive). Accordingly, schools did not need an exception to *Tinker* in order to address speech advocating violence, and no reasonable school official could believe that the Supreme Court was unaware of this when it decided *Morse*.[10]

[10] Many cases both before and after *Morse* have applied *Tinker* to violence-advocating speech. *See, e.g.*, *Cuff v. Vally Cent. Sch. Dist.*, 677 F.3d 109, 113-15 (2d Cir. 2012) (applying *Tinker* to a "threat expressed in [a] drawing."); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 981, 985 (11th Cir. 2007) (student's "dream" of shooting a teacher, "reasonably . . . construed as a threat of physical violence," analyzed under *Tinker*). If *Morse* had created the shortcut that defendants suggest, these courts need not have bothered with the "demanding" *Tinker* standard.

Finally, unlike the student speech in *Morse*, J.R.'s expression clearly *has a political message*.[11] The FPC Patch is not "gibberish," *Morse*, 551 U.S. at 402, that just happens to include the image of a firearm. As its name makes clear, the Firearms Policy Coalition is a *political advocacy organization*, and J.R.'s display of the patch unquestionably carries with it a message of approval for and alignment with the organization's social and political advocacy goals. And, while the Ghost Patches do not contain text, they are a visual play on words referencing the right of Americans to self-manufacture defensive firearms. Since the patches "comment[] on . . . political . . . issue[s]," *Morse* provides "no support" for defendants' ban. *Morse,* 551 U.S. at 422 (Alito, J. concurring); *see also, e.g.*, *Sonnabend*, 37 F.4th at 425 (because student's "Wisconsin Carry, Inc." t-shirt was "an expression of his political opinion, just like the armbands expressed the [*Tinker*] student's opposition to the Vietnam War[,] *Tinker* is the controlling authority.").[12]

Against all of this, Henslee and Yocum argue that a single district court opinion from the Eastern District of Pennsylvania issued more than fifteen years

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[11] Notably, Henslee and Yocum's interpretation of *Morse* as establishing a broad exception allowing schools to categorically ban any speech "promot[ing] illegal behavior," ECF 51 at 14, would appear to reach even obviously political speech like advocating for sit-ins at whites-only lunch counters in the south at a time when Jim Crow laws made such conduct illegal. That is surely not what the Supreme Court meant in *Morse* when it held that schools could categorically bar speech advocating illegal drug use.

[12] Notably, even the District Defendants concede that *Tinker* applies to student expression that displays firearms. In an attempt to defeat this Court's jurisdiction over J.R.'s facial challenge to its dress code, after this litigation was commenced, the District Board of Directors "reviewed District Policy JICA, and . . . decided . . . to amend the policy in order to avoid legal challenges . . . [by] replac[ing] the reference to weapons ban with language . . . taken directly from . . . *Tinker*." ECF 53-1 ¶ 5.

ago, and never followed by any court since, shows that *Morse* blew a hole in the *Tinker* rights of public school students large enough to encompass J.R.'s expression. ECF 51 at 15-16 (citing *Miller ex rel. Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606 (E.D. Pa. 2008)). Just describing the argument makes it clear why it fails.

Moreover, even on its own terms, *Miller* provides no comfort to Defendants because it was based on the district court's "threshold" finding that the "message on [the student's] T-shirt," which was "designed to replicate a hunting license issued for . . . human[s]," "*advocates the use of force, violence and violation of law in the form of illegal vigilante behavior and the hunting and killing of human beings*." 588 F. Supp. 2d at 624-25 (emphasis added). Of course, J.R.'s Patches do nothing even remotely similar to this. J.R.'s Patches merely state that he is an "official member" of the "Firearms Policy Coalition," and otherwise include comical images of ghosts carrying guns. FAC ¶¶ 61-62. In sharp contrast to the facts found by the court in *Miller*, J.R.'s expression is not "inherently threatening," FAC ¶ 71, none of his messages "has been or will be displayed in a threatening manner," *id.* ¶ 72, "[n]one of [his] messages advocates for illegal conduct [or] violence in any respect," *id.* ¶¶ 73-74; *see also id.* ¶¶ 62 & 64 (images of J.R.'s backpack).

Miller is also an outlier whose opinion on the scope of the *Morse* exception to *Tinker* has not been followed by other courts. Given the great weight of authority that *Morse* was a narrow holding, that *Tinker* applies to cases involving actual threats of violence, and that *Tinker* applies to cases involving images of firearms, no reasonable official in Defendants' positions in the summer of 2023 could have

deemed the *Morse* exception to *Tinker* to extend beyond student advocacy of illegal drug use. Reasonable officials would believe that *Morse* meant what it said: that there is a narrow exception from *Tinker*'s substantial disruption requirement solely for speech "promoting illegal drug use." 551 U.S. at 403.

C. Barring J.R.'s Patches Violated His Clearly Established Rights to be Free from Content and Viewpoint Discrimination

Separate from his claims under *Tinker*, J.R. has asserted stand-alone claims for violations of his rights to be free from content and viewpoint discrimination. FAC ¶¶ 37, 46-49, 176 ("Separately, Defendants . . . violated the First Amendment for the independent reason that they engaged in unlawful content discrimination"), 178 ("Defendants also violated the First Amendment for the independent reason that they engaged in unlawful viewpoint discrimination"), 179-180, 185, 195, 198.

Defendants School District, The Vanguard School, Birhanzel, Claudio, Henslee and Yocum do not address J.R.'s claims for content and viewpoint discrimination in their motions. ECF 51 & 53. Accordingly, these claims must go forward as against those Defendants. [13]

Defendant Danjuma does not argue that Plaintiff has failed to adequately plead content and viewpoint discrimination claims. ECF 52. Nor could she. *See, e.g.*, FAC ¶¶ 1, 13 (school officials suppressed J.R.'s expression specifically because they disagreed with his points of view); *id.* ¶¶ 3, 9 (school officials' stated concerns over

[13] To the extent they attempt to raise new arguments in reply addressing J.R.'s content and viewpoint discrimination claims, the Court should decline to consider those arguments. *See Bordertown, LLC v. AmGUARD Ins. Co.*, No. 22-CV-01683-REB-GPG, 2022 WL 17538186, at *2 (D. Colo. Oct. 5, 2022) ("[A]rguments raised for [the] first time in [a] reply brief are waived.") (collecting cases).

disruption were mere pretexts for viewpoint discrimination); *id.* ¶ 9, 114 (Defendants' acts meant to advance "highly-questionable left-wing political advocacy"); *id.* ¶¶ 46-48 (in contrast, school officials regularly allow student and staff expression of left-wing coded viewpoints).

Defendant Danjuma does argue (without any citation to relevant authority) that she is entitled to qualified immunity on these claims because, according to Defendant Danjuma, the statement "that viewpoint and content discrimination is unconstitutional" is "far too broad." ECF 52 at 8. Danjuma is wrong. *See, e.g.*, *Dodge v. Evergreen Sch. Dist. #114*, 56 F. 4th 767, 786 (9th Cir. 2022) (Several cases, including *Tinker*, "clearly establish that disagreement with a disfavored political stance or controversial viewpoint, by itself, is not a valid reason to curtail expression of that viewpoint at a public school."); *id.* at 787 ("[A] reasonable school administrator . . . would have known that [banning expression on the basis of viewpoint] was improper."); *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005); *Holloman*, 370 F.3d at 1282 (student "had the right to be free from viewpoint discrimination, and that right was clearly established (both in general as well as in the public school context)"); *Bowler v. Town of Hudson*, No. 05-11007-PBS, 2007 WL 9797643, at *3 (D. Mass. Dec. 18, 2007) (removal of posters because of conservative viewpoint violates clearly established prohibition on viewpoint discrimination); *Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ.*, 619 F. Supp. 2d 517, 528 (N.D. Ill. 2007) ("The right of high school students to not be subjected to speech restrictions based on viewpoint discrimination was well

established as of 2006.").

Indeed, given the highly detailed factual allegations in the FAC showing that Defendants singled out conservative viewpoints for suppression, this matter falls into the category of an obvious violation for which Danjuma had fair warning of liability. *Irizarry v. Yehia*, 38 F.4th 1282, 1296-97 (10th Cir. 2022) ("[A] general statement" of First Amendment principals "can supply clearly established law [where] it applies with obvious clarity to the specific conduct in question.") (cleaned up).

D. Each Defendant Is Liable for the Part They Played in the Constitutional Violations.

The three sets of defendants in this case have all raised various technical defenses that boil down to finger pointing. The District Defendants mainly argue that because their charter school contract with the Vanguard School nominally vests decisions about student dress and expression the exclusive province of the School, the School is the "constitutional tortfeasor." ECF 53 at 17. The School argues the opposite: that the District was in charge of the decisions that led to violating J.R.'s rights. ECF 51 at 17-25. And Danjuma argues that—for the Gadsden Flag ban—she was just following orders. ECF 52 at 9-14.

Under the allegations in the complaint, which must be taken as true on these motions to dismiss, all of them are incorrect. Whether or not it had formal contractual authority to force the Vanguard School to bar J.R.'s Patches, the District is liable because it set in motion a series of events that led to the deprivation of J.R.'s rights. The School and Ms. Danjuma are liable because they

directly violated J.R.'s rights, and because they jointly acted with the District.

(1) ***Harrison School District Two – Individual Defendants***

The District alleges that "[p]ursuant to the charter contract, Vanguard had independent authority to develop its own dress code and disciplinary policies." ECF 53 at 5. The District further alleges that it had no formal "legal authority" to "impose [the District's] dress code on Vanguard," *id.* at 12-13, and that its principal policy-makers—District Superintendent Birhanzel and Assistant Superintendent Claudio—lacked "legal authority to direct, control, or participate in Vanguard and/or its employees' decisions affecting J.R.," *id.* at 17 n.6. Based on these allegations, the District asserts that all Birhanzel and Claudio did was to give "bad, but non-binding advice" to Vanguard School officials to bar J.R.'s expression. ECF 53 at 17. According to the District, this shows that Birhanzel and Claudio cannot be liable because J.R. has failed to allege their "personal participation" in the deprivation of his First Amendment rights. *Id.* at 16-17 n.6.[14] These arguments fail.

It is well settled that a person may be liable under 42 U.S.C. § 1983 even if some other person took the final act in a chain of events that deprived the plaintiff's federal rights. "Anyone who *causes* any citizen to be subjected to a constitutional deprivation is also liable." *Trask v. Franco*, 446 F.3d 1036, 1046 (10th Cir. 2006)

[14] Birhanzel and Claudio also argue that they are entitled to qualified immunity against any claim for damages predicated on supervisory liability because they are not Henslee, Yocum or Danjuma's supervisors. ECF 53 at 15-18. This argument is entirely beside the point. J.R. is not asserting supervisory liability. He is seeking damages based on allegations that Birhanzel and Claudio caused the deprivation of his constitutional rights. Defendants' argument (such as it is) against J.R.'s actual theory of liability is contained entirely in footnote 6 of their brief.

(cleaned up, emphasis added). "The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of his constitutional rights." *Id.* (cleaned up). "That showing requires evidence allowing a fair inference that the events were, at least to a reasonable degree, attributable to the defendants." *Cangress v. City of Los Angeles*, No. 14-CV-1743-SVW-MAN, 2016 WL 5946878, at *6 (C.D. Cal. Mar. 22, 2016).

Here, J.R. has pled that the individual District Defendants engaged in conduct that caused his constitutional injury. On August 3, 2023, immediately prior to the start of the school year, Claudio made a presentation announcing an aggressive new approach to student and staff expression, highlighting several types of speech that would no longer be tolerated in district schools. FAC ¶¶ 36-38 & Ex. 11. Specific items were "selected because they expressed [disfavored] viewpoints." *Id.* ¶ 37. In particular, Claudio targeted expression he associated with conservative points of view, including the phrase "Make America Great Again," "I salute the flag and back the badge," and the Gadsden Flag. *Id.* Claudio justified the Gadsden Flag ban on the following ground: "Designer of the flag was Chrisopher Gadsden, a slave trader & owner of slaves. Reminder of the resentment of whites towards the slaves." *Id.* ¶ 40. Not coincidentally, the same justification was provided almost verbatim to J.R.'s mother to explain the ban on J.R.'s patches within a mere matter of weeks. *Id.* ¶ 101-103, 109.

When J.R. arrived at school, days after Claudio's presentation, he was

"suddenly and inexplicably" subjected to a number of interrogations about patches that he had worn for years. FAC ¶ 83. He was barred from displaying the FPC Patch and the Ghost Patches based explicitly on the fact that District policy forbade expression "referring to weapons." FAC ¶¶ 86-87. And, even more egregiously, he was barred from displaying the Gadsden Flag and a parody version of the Gadsden Flag. FAC ¶¶ 90-91, 98-103. As the complaint alleges, Birhanzel specifically made the decision to ban the Gadsden Flag. FAC ¶¶ 99, 101. This decision was made not only with the input of Claudio, ¶¶ 101-103, but also in joint consultation with the chief decision makers for the Vanguard School, *id.* ¶ 109.

And, as the District Defendants themselves point out, the District wields substantial regulatory power over charter schools. Indeed, charter schools are "subject to accreditation by [a] local school district's local board of education." ECF 53 at 11 (citing Colo. Rev. Stat. § 22-30.5-104(2) (b)). The District also controls annual finances and funding for school operations. ECF 53-1 Art. VII & Art. VIII. Where, as here, a regulatory authority with substantial power over another entity (here, the power of authorization, which is essentially the power to permit or forbid a charter school from operating) says that it wants a certain outcome, and the regulated entity complies, the requisite causal connection is highly plausible. *See, e.g.*, *Kennedy v. Warren*, 66 F.4th 1199, 1210 (9th Cir. 2023) (in the free speech context, where a "government official has regulatory authority over the recipient [of alleged persuasive advice]" the communication "might be inherently coercive" especially "if it were penned by an executive official with unilateral power that

could be wielded in an unfair way if the recipient did not acquiesce."); *Okwedy v. Molinari*, 333 F.3d 339, 343 (2d Cir. 2003) ("[T]he existence of regulatory . . . authority is . . . relevant to the question of whether a government official's comments . . . exert[ed] an impermissible type or degree of pressure" on the regulated entity).

Under the allegations in the complaint, along with the reasonable inferences to which Plaintiff is entitled on a motion to dismiss, J.R. has plausibly alleged that the individual District Defendants caused the deprivation of his rights. But even worse for Defendants: after the First Amended Complaint was filed in this action, the School Defendants and Defendant Danjuma made initial disclosures of documents pursuant to Fed. R. Civ. P. 26. Those documents provide even more support for J.R.'s claims.[15] Among other things, the documents show.

- Extensive email correspondence from Claudio to Colorado Governor Jared Polis defending the idea that the Gadsden Flag is "white supremacist," which is an attempt to justify a decision *that Claudio was instrumental in making* (Ex. C, BD000001-000006);
- Claudio attended a meeting with Danjuma and other Vanguard School personnel, during which he admitted that he had "instructed" Danjuma with *the exact words to say* to J.R. while banning the Gadsden Flag Patch (Ex. D, BD000007);
- Danjuma was "following direct instructions from the district and

[15] Because the documents were not yet in Plaintiff's possession at the time, they are not incorporated into the First Amended Complaint. Standing alone, the FAC contains more than enough facts to overcome Defendants' motions to dismiss. However, some of the documents produced by the School Defendants and Defendant Danjuma are attached here as a proffer of the sorts of evidence that further proves the truth of the allegations. Of course, because these documents were hand-selected by the School Defendants and Danjuma to *aid their defenses*, they surely downplay evidence of the School's involvement. The documents are just the tip of the iceberg. More evidence will come out in discovery, both in depositions and in plaintiff-driven document discovery, detailing each Defendant's culpability.

executive leadership at Vanguard" when she ordered J.R. to remove the Gadsden Flag Patch (Ex. E, BD000014);

- Claudio jointly authored an email later sent to J.R.'s mother providing the rationale for banning the Gadsden Flag (Ex. F, TVS000040);
- Claudio admitted that the District had previously "terminated an employee" for displaying the Gadsden Flag (*Id.*);
- On August 29, 2023, as Defendants' conduct was just beginning to become widely known, Claudio, Yocum, and Henslee jointly agreed to "hold firm to [J.R.] not being permitted to have the patch if he shows up with it today." (Ex. G, TVS000072);
- Later that day, after Defendants' conduct had become a viral sensation, Harrison School District Two personnel instructed the Vanguard School that it (the District) would be in charge of the public response to the controversy (Ex. H, TVS000062 (Email from Claudio re: "Hang in there with us") Ex. I, TVS000063 (Email from Claudio re: "Hold off on sending any press release. Thanks" Importance: "High"));

These various admissions and acts strongly support the inference that the District Defendants were instrumental in causing the deprivation of J.R.'s constitutional rights, along with the School Defendants, and only add to the already sufficient allegations in the FAC. The Court should deny the individual District Defendants' motion to dismiss the claims against them.

(2) ***Harrison School District Two – Municipal Liability***

The District argues it cannot be liable under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978)—*not* because Birhanzel and Claudio lack final policymaking authority for the District (the District concedes that they have such authority)—but solely for the same reason that Birhanzel and Claudio are allegedly off the hook: the purported failure to show that they caused the deprivation of J.R.'s constitutional rights because all they did was give "non-binding" advice.

But this simply ignores that, as shown above, Birhanzel and Claudio are

liable for "set[ting] in motion a series of events that the[y] knew or reasonably should have known would cause others to deprive the plaintiff of his constitutional rights." *Trask*, 446 F.3d at 1046. As final policy makers, the acts of Birhanzel and Claudio are the acts of the District. *See Simmons v. Uintah Health Care Special Dist.*, 506 F.3d 1281, 1287 (10th Cir. 2007) ("Actions taken by . . . final policymakers, even in contravention of their own written policies, are fairly attributable to the municipality and can give rise to liability."). Accordingly, the District is liable under *Monell*. None of the cases the District cites are on point, for the simple reason that they do not involve a government actor setting in motion a series of events that caused others to violate a plaintiff's constitutional rights.

(3) ***The Vanguard School – Individual Defendants***

As their sole ground to dismiss the claims against them, the individual School Defendants Henslee and Yocum argue that they are entitled to qualified immunity. ECF 51 at 12-17. As explained in detail above, *infra* Argument § I.A.2 at 16-20 & I.B at 23-29, the qualified immunity defense fails. Accordingly, the Court should not dismiss the claims against the individual School Defendants.

(4) ***The Vanguard School – Municipal Liability***

The School Defendants make the argument, which all Defendants admit is "mutually exclusive" of the District's arguments, that the District was the moving force behind the deprivation of J.R.'s rights and that, accordingly, the School cannot

be liable under *Monell* because it did not cause the constitutional deprivation.[16] This argument also fails.

Under the Supreme Court's decision in *Monell*, local governmental entities can be liable for unconstitutional conduct taken pursuant to an official policy or custom of the governmental entity. The Tenth Circuit has articulated that the "official policy or custom" requirement can be established in five different ways:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Waller v. City & Cnty. of Denver, 932 F.3d 1277, 1283 (10th Cir. 2019) (cleaned up). J.R. has adequately pleaded the first four of these grounds for Vanguard's liability.

The Vanguard School's main contention is that the dress code policy was the School District's, not the School's, and therefore it was not the policy maker who can be held liable under *Monell*. ECF 51 at 20-23. The District's contention is the opposite – that because the School was itself nominally exempt from the District Policy, it is the School, not the District, who had final policy-making authority. Both ignore the numerous allegations in the First Amendment Complaint that the School

[16] If the Court is inclined to grant the District Defendants' motion to dismiss, which is premised on the contention that the charter school contract places responsibility for the decisions at issue exclusively with the School, the Court must, as a matter of logic, deny the School Defendants' motion. The converse is also true.

and the District "acted jointly" in furtherance of its unconstitutional censorship policy. *E.g.*, FAC ¶44 ("[T]he decisions to bar J.R. from displaying patches on his backpack were made by both The Vanguard School and the District acting jointly."); *id.* ¶ 90 (Yocum related the official determination, which "was made jointly by Defendant The Vanguard School and Defendant School District."); *id.* ¶ 109 (alleging that the rationale for excluding the Gadsden Flag "was arrived at jointly by the Vanguard School Defendants . . . and by the District Defendants . . . "). It is well established that governmental entities can be held "jointly and severally liable" for constitutional injuries "that are indivisible or that result from joint or conspiratorial conduct." *Herrera v. Santa Fe Pub. Sch.*, 41 F. Supp. 3d 1188, 1284 n.90 (D.N.M. 2014) (quoting Martin A. Schwartz, SECTION 1983 LITIGATION CLAIMS & DEFENSES, § 16.5(B) (2013)).

Even if the policy at issue was solely the School District's, The Vanguard School's decision to implement and enforce that policy, either itself or through its officials to whom such authority had been delegated, is itself a policy decision subjecting the School to *Monell* liability, and that, too, is adequately pled in the First Amendment Complaint. *See, e.g.*, FAC ¶ 207 ("Defendants School District and The Vanguard School have promulgated and enforced the Dress Code . . ."); *id.* ¶¶ 19-21 (noting that School officials Henslee, Yocum, and Danjuma have or had "the authority to promulgate and enforce school policies, including policies governing student dress and other forms of expression."); *see also id.* ¶¶ 86, 87 (alleging that Yocum, who had delegated policy-making authority, interpreted and

enforced the District's dress code); *id.* ¶ 137 (alleging that, after the public outcry over the decision to ban the Gadsden Flag patch, the Board of Directors of the Vanguard School held an emergency meeting and determined to temporarily change course).

Finally, even if the individual school defendants are deemed not to have delegated policy-making authority, the First Amended Complaint also adequately alleges that the School ratified their unconstitutional conduct. *Id.* ¶ 194 (alleging that the individual defendants "repeatedly confirmed that their multiple acts of censorship were approved by Defendants School District and The Vanguard School, consistent with legal counsel's advice, and in furtherance of School District and Vanguard School policy."); *id.* ¶ 89 (alleging that Yocum said he would consult with counsel for the District and/or the School and get back to them "with an official determination."); *id.* ¶ 91 (alleging that Yocum stated he had consulted the School's attorney, as well as the District). The Vanguard School's contention that it cannot be held liable under *Monell* should therefore be rejected.

(5) ***Danjuma***

As discussed above, Defendant Danjuma asserts qualified immunity against J.R.'s claims against her, but that defense fails. *Supra* Argument §§ I.A, I.B & I.C. In addition, Danjuma seeks dismissal of the claims based on the Gadsden Flag ban—but not the claims based on the weapons-related patch bans—on the theory that she was not personally responsible. ECF 52 at 2, 7-9.

With respect to the Gadsden Flag, Defendant Danjuma characterizes her involvement as merely acting as a conduit for the decisions of others. In other

words, she asserts that she was "just following orders," and therefore cannot (consistent with clearly established law) be liable for violating J.R.'s rights. Her argument fails and her motion must be denied.

First, Danjuma argues that she merely delivered her superior's message. But that is not what the FAC alleges. The complaint shows that Danjuma was the one who took action to enforce the policy against the plaintiff. The FAC alleges that Danjuma, herself, took plaintiff out of class and told him that he had to remove the Gadsden Flag patch from his backpack. FAC ¶ 102. Danjuma falsely asserted to plaintiff and his mother that the flag had its origins in slavery and the slave trade, and then emphasized her own point of view for censoring plaintiff's speech: "we can't have [the Gadsden Flag] in and around kids." *Id.* When plaintiff's mother rejected Danjuma's false claims regarding the symbolism of the flag, Danjuma refused to respond. *Id.* ¶ 104, Ex. 6. Danjuma refused to allow J.R. to return to class with the patch on his backpack. *Id.* ¶ 107, Ex. 6. Based on Danjuma's expressed personal political opinion that "we can't have" that flag "around other kids," it is reasonable to infer that Danjuma agreed jointly with others that the flag should be banned, and that Danjuma's own political viewpoint was at least one motivation for her actions. FAC at ¶ 109.

Second, even if she did not agree with the political motivation to ban the Gadsden Flag, and even if she privately thought that J.R. should have been allowed to wear his patches, Defendant Danjuma is still liable, because public officials always have a duty to follow clearly established federal law. *See Monroe v. Pape*,

365 U.S. 167, 174 (1961), *overruled in part on other grounds by Monell*, 436 U.S. at 663. This is true even "in the midst of a contrary directive from a superior or in a policy." *Kennedy v. City of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) (finding the Supremacy Clause requires that state officials follow the constitution, not the unconstitutional orders of superiors); *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity.").

This conclusion is also supported by common-law principles. A claim brought pursuant to Section 1983 is one that sounds in tort. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999); *Myers v. Koopman*, 738 F.3d 1190, 1194 (10th Cir. 2013), *as amended on denial of reh'g* (Jan. 8, 2014). Danjuma cannot escape liability for her actions by claiming she was merely acting as an agent for the other Defendants. "Under principals of agency law, '[a]n agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal.'" *Arnal v. Aspen View Condo. Ass'n, Inc.*, 245 F. Supp. 3d 1261, 1267 (D. Colo. 2017); *see Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 694 (1949). This is the rule followed by Colorado state courts. *See Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 28 (Colo. App. 2010). Accordingly, Danjuma is not excused from liability based on her claim that she was only an agent of others.

In sum, Danjuma was not a mere relater of messages. She directly violated

J.R.'s clearly established constitutional rights. Her motion should be denied.

II. J.R.'s As-Applied Claim for Equitable Relief Should Go Forward – (Claim 3)

J.R.'s third claim is based on the same as-applied challenge set forth in claims one and two. He seeks declaratory and injunctive relief to prevent the District and the School from further enforcing their unconstitutional bans. In its motion to dismiss, the Vanguard School does not raise any arguments specific to the third claim.[17] ECF 51 at 17-23. The District argues (1) that J.R. lacks standing to bring the claim and (2) that the claim has become moot. ECF 53 at 19-25. Both arguments are incorrect.

A. Standing

As an initial matter, the District misstates the basis for J.R.'s third claim. This claim does not assert "that the School District's dress code, Policy JICA, should be enjoined and/or declared unlawful." ECF 53 at 19. While that may be a fair approximation of J.R.'s *fourth* claim for relief, it does not describe the third claim, in which J.R. seeks an injunction prohibiting the District and the School from reviving enforcement of a *specific as-applied decision* to bar him from displaying the Gadsden Flag, the FPC Patch and the Ghost Patches. Defendants "have never rescinded their ban" on the FPC and Ghost Patches. FAC ¶ 200. And even for the Gadsden Flag, while Defendants temporarily backtracked under the pressure of widespread public scrutiny and condemnation, J.R. "reasonably believes that

[17] The Vanguard School's argument that the complaint fails to adequately allege municipal liability, if true, would dispose of the third claim for relief as against Vanguard. The argument, however, is flawed, as explained *supra* at 37-40.

Defendants will re-institute the [ban] as soon as this matter fades from the headlines." *Id.*

In any event, the District argues that J.R. lacks standing to seek the relief sought in the third claim for the same reason that "J.R. does not have a claim for damages against the School District." ECF 53 at 19. In other words, the District argues that because (according to the District) it lacked formal legal authority to require the Vanguard School to ban J.R.'s patches, J.R. cannot show standing to seek injunctive relief. But, as should be obvious at this point, this argument is just as wrong when deployed as a matter of standing as it was when deployed on the merits of the claim for damages. As noted above, the mere fact (assuming it is true) that the District may have lacked contractual authority to force the Vanguard School to ban J.R.'s patches does not mean that the District, through its policymaking executives Birhanzel and Claudio, was incapable of causing the deprivation of J.R.'s rights through other means. And, in fact, the well-pleaded allegations in the complaint show that this is exactly what happened.

Moreover, the fact that the District's executives previously caused the Vanguard School to violate J.R.'s rights shows that they *can* do it again (the District still has the authority to deny renewal authorization to the School, and if it chooses to pressure the school to bar student speech, it will still get its way). Accordingly, J.R. has standing to seek an injunction against this likely course of action by the District.

While it is true that the causation and redressability elements of standing

generally require that defendants possess "authority" to enforce a challenged governmental action or rule, Defendants do not cite any caselaw showing that that authority cannot be in the form of pressure tactics employed by a government entity against an intermediary. Indeed, the Supreme Court has found precisely that. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61-62 (1963), a state-created commission on morality issued "notices" to book distributors that certain books were "objectionable for sale," and sought those distributors "cooperation" in ensuring they did not reach the general public. The book distributors understandably complied with the desires of the commission, canceling agreements to purchase the targeted books and taking other steps to "stop further circulation of copies" already purchased. *Id.* at 63. Certain publishers whose books were suppressed by the distributors sued the commission, asserting violations of their "First Amendment liberties." *Id.* at 64. Crucially, the defendant commission *did not have authority* to impose its rules or findings *on the publishers* directly. *Id.* at 66-67. Nevertheless, despite the commission's lack of formal authority, the Supreme Court held that publishers whose books had been limited had standing to challenge the commission and its rules. *Id.* at 64 n.6. The Court reasoned that because "the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants," their "standing . . . could [not] be successfully questioned." *Id.*

Bantam Books is indistinguishable from the present case. The District asserts that, like the commission in that case, it lacked contractual authority over

J.R. directly, and only gave "bad advice" to The Vanguard School to enforce the District's policies. ECF 53 at 13. But that is not true. As the allegations in the complaint show, the District set in motion a series of events that caused the deprivation of J.R.'s constitutional rights by the Vanguard School. *See supra* Argument § I.D.1 & I.D.2 at 33-37. The District argues that J.R.'s assertion of standing against the District would be indistinguishable from a claim against "an adjacent school district that had a policy identical to Policy JICA." ECF 53 at 19. But this is incorrect. The difference between suing Harrison School District Two and some hypothetical "adjacent school district" with a similar dress code is that the District's principal policymakers caused the Vanguard School to violate J.R.'s constitutional rights, while a hypothetical "adjacent school district" did no such thing. In short, the alleged lack of formal contractual authority for the District to enforce its policies against J.R. does not demonstrate a lack of standing, because the District nevertheless has the power to wield authority over J.R's freedom of expression, which it has demonstrated it will exercise with vigor.

B. Mootness

Based on the affidavit of Defendant Birhanzel, the District argues that J.R.'s third claim for relief has become moot. ECF 53 at 20-25. According to the affidavit, subsequent to the initiation of this lawsuit, in order to "avoid legal challenges" and "litigation," the District Board "replace[d] the reference to weapons ban with language [from] *Tinker*." ECF 53-1 at 27 ¶ 5. Birhanzel further states that the District has no intention to "reimpose a dress code ban on displaying or referencing weapons. . . [unless] school administration shows that [the reference] reasonably

forecasts a substantial disruption of or material interference with school activities." *Id*. at 27-28 ¶ 6 (cleaned up); *see also id.* ¶ 7 (Gadsden Flag).

Birhanzel's affidavit, even taken at face value, does *not* indicate that the District has lifted and will not re-impose specific bans on J.R.'s FPC Patch, Ghost Patch or Gadsden Flag Patch. The affidavit is carefully drafted to say that references to weapons and displays of the Gadsden Flag are still banned if "school administration shows" the likelihood of disruption. But this was, in fact, the very same basis stated (without justification) for the original ban on J.R.'s FPC and Ghost Patches. FAC ¶ 91 (FPC Patch was deemed "disruptive or potentially disruptive to the classroom environment" and was therefore barred.). Since the District does not even claim to have reversed the decision that is the subject of J.R.'s third cause of action, it is nowhere close to moot.

But even if Birhanzel's affidavit stated that the District had specifically decided to allow J.R. to wear his patches for now, that would still not moot the claim. Courts generally reject mootness arguments where a court ruling could have any real-world impact on the parties, whatsoever. "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted). By contrast, "[a]s long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot." *Id*. at 172 (emphasis added).

J.R. reasonably anticipates that Defendants will re-institute their speech

bans once this matter fades from the headlines. FAC ¶ 200. A court order prohibiting that eventuality will have immediate and concrete effects on J.R. – it will relieve him of the ongoing stress and distraction of not knowing whether today is the day that school officials will suddenly reverse course and strip him of his fundamental rights.

Even more important: where a defendant relies on its own voluntary cessation of unconstitutional conduct to show mootness, it must satisfy two factors: first, there must be no reasonable expectation that the alleged violation will recur, and second, interim relief or events must have completely and irrevocably eradicated the effects of the alleged violation. *See, e.g., Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (setting out two-part test). The government bears the burden to satisfy these two factors, and it's "burden is 'heavy.'" *West Virginia v. EPA*, 597 U.S. 697, 719 (2022); *Federal Bureau of Investigation v. Fikre*, 144 S. Ct. 771, *6 (2024) ("The Constitution deals with substance, not strategies.") (internal quotation marks omitted).

Here, the District has failed to carry its heavy burden. To the contrary, not only is there no reasonable expectation that the violations will not recur, but a mountain of evidence points to the likelihood of recurrence. Among other things:

- As documents produced via initial disclosures after the filing of the First Amended Complaint show, Defendant Claudio has made vigorous attempts to defend his decision to ban the Gadsden Flag, even going so far as to directly email the Governor of Colorado. (Ex. C). Given what appears to be a deep ideological commitment to his point of view, it strains credulity to believe that, if given the chance, the District would not reimpose its speech bans;
- This conclusion is only buttressed by the fact that J.R.'s case was *not the*

first time the District had banned the Gadsden Flag. To the contrary, it had previously gone so far as to terminate an employee for its display. (Ex. F);

- In this litigation, counsel for the District has indicated that it plans to hire an expert witness to prove the merit of the bans on J.R.'s Patches. (FAC ¶ 159(b));
- The amendment to the District's policy was undertaken in secret without notice to the public, and potentially in violation of Colorado open meetings and education laws. (FAC ¶ 159(c)).

Against this, the District relies entirely on Birhanzel's self-serving affidavit to the effect of, "trust us, we won't do it again." Respectfully, Plaintiff submits that this is simply insufficient to carry the District's burden on voluntary cessation.[18]

III. J.R.'s Facial Challenge to the Overbroad "Reference to Weapons" Policy Should Go Forward as Against Harrison School District Two – (Claim 4)[19]

In his fourth claim for relief, J.R. brings a facial challenge to the overbroad policy barring student expression that "refers to weapons." A rule is overbroad in violation of the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks, citation omitted). Here, Defendants do not contest that the reference to weapons policy prohibits a vast array of constitutionally protected expression wholly out of proportion to its legitimate sweep (if any).

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[18] At the very least, if the Court believes that Birhanzel's affidavit raises a question of fact, Plaintiff should be entitled to discovery on the mootness issue, including depositions of the District Board of Directors and other personnel involved in the decision to amend the dress code in response to this litigation.

[19] J.R. asserted Claim 4 against both the District and the School. The School has moved to dismiss this claim as against itself. Plaintiff does not oppose the School's motion with respect to Claim 4.

A. Standing

Rather than defending its policy, the District has taken evasive action, attempting to defeat this Court's jurisdiction by amending the policy in the midst of litigation. Defendant's maneuvers do not justify dismissing J.R.'s facial challenge.

The District first argues that J.R. lacks Article III standing to challenge application of the reference to weapons policy because the School District "does not have the authority to impose its dress code policy" on Vanguard students like J.R. ECF 53 at 19. As explained *supra* Argument § II.D at 44-46, while it is true that the causation and redressability elements of standing generally require that defendants possess authority to enforce a challenged rule, it is clear that the District *has authority* regardless of the terms of any formal contract, as per *Bantam Books*. For these reasons, J.R. has demonstrated Article III standing.

Having shown Article III standing for his own constitutional injuries, J.R. has broad prudential standing to bring a facial overbreadth challenge against all applications of the reference to weapons policy. *See, e.g.*, *Frank v. Lee*, 84 F.4th 1119, 1151 (10th Cir. 2023) ("The overbreadth doctrine enables persons who are themselves unharmed by the defect in a statute nevertheless to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.") (cleaned up); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The District's standing objection to claim four is off the mark.

B. Mootness

Aside from its standing argument, the District asserts that the overbreadth

claim has become moot because, after the initiation of this litigation, in order to "avoid future litigation," the District Board of Education replaced the reference to weapons policy with a policy mirroring the *Tinker* standard. This argument fails for two reasons. First, as explained above in § II.B at 48-49 the District has not met its burden under the doctrine of voluntary cessation to show that the violations will not recur.

Second, the court also retains jurisdiction over this claim for the independent reason that Defendants have not even tried to meet their heavy burden to establish that they have completely and irrevocably eradicated the past effects of their constitutional violations. As alleged in the complaint, "it is likely that students attending District schools, including The Vanguard School and other charter schools, have been subject to punishment for violations of the Reference to Weapons Policy in violation of their First Amendment rights to freedom of expression." FAC ¶ 52. As "such students' disciplinary records have not been expunged," *id.*, it is clear that Defendants have not eradicated the effects of their violations. (Or even asserted as much). *See, e.g.*, *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1269 n.4 (10th Cir. 2007) (rejecting mootness argument despite a change in policy on a going-forward basis, because the agency expressly declined to make its policy change retroactive); *American Constitutional Law Found., Inc. v. Meyer*, 113 F.3d 1245, *2 (10th Cir. 1997) (Table) (rejecting an argument advancing mootness due to an unresolved "injury caused in the past").

Even aside from the expungement of records, given that the District has

stifled the free expression of students on a District-wide basis and that "[i]t is likely that students attending District schools, including The Vanguard School and other charter schools, have been chilled in the exercise of their First Amendment rights to freedom of expression by fear of punishment under the Reference to Weapons Policy," *id*. ¶ 53, there remains the real possibility of lingering effects even after the District's nominal change to its dress code policy. After all, "once bitten, twice shy" – students who have lived under the yoke of Harrison School District Two censorship will have internalized impulses to self-censor. Granting the requested injunction would help reverse the chilling effect of the policy, and would set the groundwork to "completely and irrevocably eradicate[e] the effects" of the District's past conduct.

IV. J.R. Has Stated a Valid First Amendment Retaliation Claim – (Claim 5)

In the aftermath of the events in August 2023, students and staff at the Vanguard School inappropriately blamed J.R. for the fact that Defendants' misconduct brought negative public attention to the school. FAC ¶¶ 145-49. As alleged in the complaint, J.R. has been the victim of harassment, intimidation, and property theft by other students as a result. FAC ¶¶ 147-48.[20]

Despite being informed of these incidents, the officials at J.R.'s school have failed to address other students' mistreatment of J.R. FAC ¶ 147. In retaliation for J.R.'s free expression of ideas, they have allowed J.R. to suffer bullying and

[20] More recently, plaintiff has been physically assaulted by a fellow student, threatened with death, threatened with being "stab[bed] with . . . pencils," and accused of "want[ing] to get a teacher killed," apparently in reference to Danjuma. ECF No. 76-1 at 2 & 76-2.

harassment. *Id.* ¶ 230. This is a stand-alone violation of the First Amendment.

To state a First Amendment retaliation claim, one must allege "(1) that [he] was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the . . . protected conduct." *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (cleaned up).

Defendants do not contest the first and third elements. Yet the School Defendants assert that J.R. has failed to allege that their retaliatory actions were sufficiently adverse that they would "chill a person of ordinary firmness from continuing to engage" in protected activity for two reasons. ECF 51 at 25-26. Both are wrong.

First, The School contends that because J.R. has returned the banned patches to his backpack, this amounts to an "admission" that the retaliation was not significantly adverse. *Id.* at 26. This argument is consistently and squarely rejected as a matter of law by courts in this Circuit. *See Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) ("The focus, of course, is upon whether a *person of ordinary firmness* would be chilled, rather than whether the particular plaintiff is chilled.") (emphasis in original); *McCook v. Spriner School Dist.*, 44 Fed. Appx. 896, 905 (10th Cir. 2002) ("Both sides mistakenly assume the 'chill' standard is subjective, which it is not."); *Collopy v. City of Hobbs*, 27 Fed. Appx. 980, 986 (10th Cir. 2001) (reversing dismissal of complaint since it was an issue of fact whether defendant's conduct

constituted one of the "hazards that a judicial officer should be expected to face" under the "reasonable person" standard). In one particularly insightful application of this rule, a Court in this District previously stated:

> [It is error] to rely on Plaintiff's own conduct—i.e., his continued [exercise of First Amendment rights] in the face of [a d]efendant['s] actions—as a touchstone in determining whether a person of 'ordinary' firmness would be chilled. . . . '[I]t would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity.'

Frazier v. P. Flores, No. 14-CV-02600-CMA-MJW, 2015 WL 3636270, at *3 (D. Colo. June 11, 2015) (Arguello, J.), *aff'd sub nom. Frazier v. Flores*, 628 F. App'x 614 (10th Cir. 2016).

Second, the School asserts that the "order to remove the patches" was of such "insignificant temporal duration" that it amounted to a *de minimis* injury. ECF 51 at 26. But this argument is a misreading of the complaint. The retaliatory act is *not* the "order to remove the patches." The retaliatory act is school officials knowing that J.R. is being repeatedly harassed, bullied, and threatened by other students and *not doing anything about it*. Not only is that retaliation of "[]significant temporal duration" (indeed, it continues today), but it is of a very serious character, especially in the context of a public school's duty to ensure the safety of students on campus. The Vanguard School's motion to dismiss claim five is thus without merit.

For its part, the School District also misstates the basis of the claim. According to the District, J.R. is not suing on the basis that adverse actions taken against him in retaliation for his exercise of free speech rights violated the First Amendment. Instead, according to the District, this is a "Section 1983 failure to

intervene claim." ECF No. 53 at 15 (citing cases involving substantive due process claims that law enforcement officers and other officials failed to intervene to prevent the use of excessive force or violence against plaintiffs). This is a category error by the District. J.R.'s claim here is that Defendants sought to retaliate against J.R. for speaking his mind, and the way they did so was to *stand idly by as other students harassed, intimidated and bullied J.R.* This is not a "failure to intervene claim"—which is why it is not pleaded that way—it is a First Amendment retaliation claim, and the District's authority is wholly inapposite.

The District Defendants also assert that because they allegedly "have [no] authority to insert themselves into the operation of the Vanguard School," they cannot be liable. ECF 53 at 18. But again, the lack of formal legal authority does not show a lack of the ability to cause a constitutional violation. The District could bring to bear the same pressure that it used to cause the deprivation of J.R.'s right to display his patches in an effort to prevent his current victimization.[21]

CONCLUSION

The Court should deny Defendants' Motions to Dismiss. In the event the Court is inclined to grant any part of any Defendant's motion, Plaintiff further requests leave to amend to address any perceived inadequacies in the FAC.

[21] While the District Defendants assert that J.R. has not adequately alleged their knowledge of J.R.'s victimization at the hands of Vanguard School students, there is no doubt that the pleadings and other materials filed in this litigation contain numerous indications that J.R. is being harassed and bullied at school, and that neither the Vanguard School nor the District is taking appropriate action in response. FAC ¶¶ 145-149; ECF No. 76-1 at 2 & 76-2.

DATED this 4th day of April 2024.

Respectfully submitted,

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