NO. 23-1191

In The

United States Court Of Appeals

For The Fourth Circuit

O.W., a minor, by his next friend and parent Santrayia Bass,

Plaintiff – Appellant,

v.

MARIE L. CARR, police officer in her individual and official capcities; REID BAKER, assistant principal in his individual and official capacities; SCHOOL BOARD OF THE CITY OF VIRGINIA BEACH, VIRGINIA, a body corporate; CITY OF VIRGINIA BEACH, a body politic and corporate; AARON C. SPENCE, Superintendent in his individual and official capacities; DAN EDWARDS, school board members in their individual and official capacities; CAROLYN T. RYE, school board members in their individual and official capacities; KIMBERLY A. MELNYK, school board members in their individual and official capacities; BEVERLY M. ANDERSON, school board members in their individual and official capacities; SHARON R. FELTON, school board members in their individual and official capacities; DOTTIE HOLTZ; LAURA K. HUGHES, school board members in their individual and official capacities; VICTORIA MANNING, school board members in their individual and official capacities; TRENACE B. RIGGS, school board members in their individual and official capacities; JOEL MCDONALD, school board members in their individual and official capacities; PATTI T. JENKINS, Principal in her individual and official capacities; CAROLYN D. WEEMS, school board members in their individual and official capacities,

Defendants – Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY BRIEF

I. INTRODUCTION

The Court should reverse the district court's grant of summary judgment to the Appellees because disputed issues of material fact still remain and the court applied incorrect legal standards in resolving O.W.'s claims.

Despite the material facts in dispute, circuit courts should not "pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Camreta v. Greene*, 563 U.S. 692, 729 (2011) (quoting *Scott* v. *Harris*, 550 U.S. 372, 388 (2007)).

II. JURISDICTION

Appellees contend that the district granted O.W. leave to amend, and that either the district court's Order granting summary judgment to the Appellees was not a final judgment or O.W. waived his amended pleading by filing his timely notice of appeal. The Appellees' argument is without merit because the district court did not grant O.W. leave to amend.

The Order granting summary judgment was final and appealable because it resolved all of O.W.'s claims without leave to amend. *See Britt v. Dejoy*, 45 F.4th 790, 796 (4th Cir. 2022) ("[W]hen a district court dismisses a complaint or all claims without providing leave to amend, [this Court] need not evaluate the grounds for dismissal or do anything more—the order dismissing the complaint is final and appealable.").

Appellees confuse "leave to amend" and the option of filing a renewed motion for leave to amend, which is available to all litigants without invitation, even after a final adjudication. *See Adbul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 293 (4th Cir. 2018) ("Plaintiffs whose actions are dismissed are free to subsequently move for leave to amend pursuant to Federal Rule of Civil Procedure 15(b) even if the dismissal is with prejudice."). Here, the district court only invited O.W. to do what Rule 15 authorizes.

O.W. would have forfeited his right to appeal had he filed a renewed motion for leave to amend and awaited the court's decision on the motion before noticing his appeal. A cautionary tale for litigants, in *Calvary Christian Ctr. v. City of Fredericksburg*, 710 F.3d 536, 538 (4th Cir. 2013), this Court dismissed an appeal as untimely because the appellant filed a motion for leave to amend thirty days after the court dismissed all his claims. His failure to file his notice of appeal within thirty days of the court's opinion and order left him with nothing to appeal but the orders denying his motion for leave to amend and subsequent motion for reconsideration. *Id*.; *see also Calvary Christian Ctr. v. City of Fredericksburg*, 3:11-cv-342-JAG, ECF Nos. 36, 37 (Opinion and Order). O.W. was required to appeal within thirty days of the final order or otherwise forfeit his right to do so.

O.W. timely filed his notice of appeal within thirty days of the final order disposing all his claims without leave to amend, and this Court can be confident of its jurisdiction under 28 U.S.C. § 1291.

III. FACTUAL DISPUTE

The Appellees' brief makes clear one succinct point: disputed issues of material fact remain on a number of issues.

But even the undisputed facts raise serious jury questions. It is not in dispute that the police department routinely coordinates with school authorities to investigate, arrest, and prosecute students. ("The MOU provides for coordination between these two entities when criminal activity occurs on campus, including specific provisions concerning police questioning and searches and seizures.") App. Resp. Br. at 8. Despite this agreed upon routine "coordination," Appellees insist that the school and police investigations are "distinct" and "independent."

The Appellees skillfully downplay the disputed material facts and ask this Court to adopt the same disputed version of events. They contend that,

1. "Baker initiated an investigation of his own volition and pulled O.W. out of class." App. Resp. Br. at 2.

    - This claim is not supported by the evidentiary record.

2. "Mr. Baker took O.W. out of class, brought him to Kempsville Middle School's printing room, and asked him about an explicit image circulating around campus."

    - This is misleading. There is no evidence on the record that the photograph had been "circulating around campus."

3. "At the request of Mr. Baker, O.W. wrote two different incident statements."

    - The record establishes that school authorities *require* students to write statements about their own suspected criminal conduct and that Baker required O.W. to write *at least* two statements on March 5, 2019. JA565 (Dep. of Sarg. Cortes); JA1022 (Dep. of O.W.); JA555-556 (Dep. of Reid Baker).

4. "Mr. Baker asked O.W. to write a second statement because he believed O.W. was not telling the entire story in the first statement."

    - Baker testified that he reviewed O.W.'s first confession, gathered more information from other sources, and "asked O.W. to expand on his previous statement" because he "believed there may have been more."

    - O.W. testified that Baker told him that he "didn't give enough information" in his first statement, JA1476, and "when I was

done, Mr. Baker said, 'Oh, that is not enough. You have got to write more.' So I wrote a second statement." JA486.

5. "Mr. Baker then took O.W. to a room connected to the guidance office and asked him further questions about his statements."

   - This statement is slightly misleading. Baker testified that — despite Officer Carr's presence inside the room and his intent to share any confession with Officer Carr, he would have told O.W.:

     > So, Sit down, like, Let's talk about the situation. We were informed that you were potentially sharing and showing inappropriate photos. Can you tell me what's going on?· Why are we getting these reports from other students and teachers in the building?· I need you to write a statement.· I need you to tell me everything of what was going on revolving [sic] this.· Write a statement.· Read the statement.· Kind of like, So this is what you wrote. Are you telling me the truth.· Is this where it happened?· If I'm doing a ·follow-up after talking with other students, like I'm getting a different version of the story, Are you telling me the truth?· Like if you're not telling me the truth, you know, there's a violation against the Student Code of Conduct where if you're not telling me the truth, that can be something else. So I need you to be honest with me, please tell me what was going on.

JA533.

6. "O.W. testified that he "immediately" told Baker the truth about transmitting the explicit photograph and was truthful in discussing his actions with Baker 'the whole time.'"

- O.W. testified that it took Officer Carr and Mr. Baker approximately thirty minutes to extract his oral confession. JA1295.
- O.W. confessed after Mr. Baker threatened to punish him if he lied. JA533.

7. "Baker used a 'normal,' not angry tone of voice during his questioning."
    - Baker testified that he used a normal tone; O.W. testified that he was scared during the questioning. JA1298.
8. "According to O.W., Carr still had not talked to him, as she was in a room with another student being interviewed by Baker."
    - For clarity, O.W. testified that Carr was only not present in the printing room, when Baker first warned O.W. about the consequences of lying, and the waiting area.
9. "It was only after Baker and O.W. moved to another room off the guidance lobby that Carr, though she was not officially invited by Baker, JA709, was physically present during the ongoing school disciplinary investigation."
    - Baker testified that he did not recall whether he invited Officer Carr inside the office, but that he would not have needed an

officer for non-criminal investigations such as food fights. JA521-522.

- In his requests for admission, Baker did not deny inviting Carr into the room with him to jointly investigate O.W.; he instead cited the memorandum of understanding as his justification for doing so. JA1142-1143.
- Carr testified that she was inside the office with O.W. and Baker to investigate O.W. for a crime, rather than to support the disciplinary process. JA860.
- O.W. testified that Carr immediately asked for his identifying information and his parents' identifying information upon his entry into the guidance office. JA1294. He further testified that Carr had been asking him questions throughout the interrogation.

10. Appellees state that Officer Carr first interreacted with O.W. "*after* O.W. acknowledged he truthfully admitted his wrongdoing to Baker during their initial discussions and then wrote two confessions regarding his conduct."

    - O.W. testified that he had not orally confessed until he was questioned inside the office, where both Officer Carr and Baker

questioned him. JA1294. This evidence is confirmed in Officer Carr's report. JA1261-1262.

- Baker admitted that Officer Carr had been asking O.W. what he described to her supervisor as "clarifying questions" throughout the interrogation. JA707.
- The undisputed evidence shows that O.W. was made to write two or three statements. Officer Carr was not present before O.W. wrote his first confession, but Baker discarded the original statement, and its contents are unknown.

11. "[T]here was no stated purpose of securing an arrest of O.W. as a result of the interview."

- The record is clear that school authorities only involve officers in criminal investigations, Baker alerted Carr of the incident because the investigation was criminal in nature, JA483 (Carr Dep. Tr. 14:14-17), and Carr testified that her only purpose was to conduct a criminal investigation (JA860, Dep. of Marie Carr).
- It is also on the record that Baker detained O.W. after school hours because Carr was not making a "paper arrest." JA864.
- Despite not having found the photograph inside O.W.'s phone, Baker still followed Carr's instructions by placing the phone in

airplane mode, powering it down, and handing it to her for criminal evidentiary purposes. JA702.

12. "During the interview in the guidance office, although O.W. had previously admitted to showing other students the photograph, he initially denied that he still possessed it."

- This statement mischaracterizes the evidentiary record and Officer Carr's own report. JA1261.
- Of note, O.W. told Baker that the other male student asked to use his phone and sent the picture to himself without permission. JA1261. O.W.'s initial statement was that he showed the photograph, without description of its contents or any information relevant to the distribution charge.

13. Appellees contend that Baker merely asked O.W. to tell the truth and that "Officer Carr did not ask O.W. any questions at this point."

- Mr. Baker told Officer Carr's supervisor that she asked O.W. clarifying questions throughout his questioning of O.W., and O.W. testified that Officer Carr asked for his identifying information as soon as he walked into the room and questioned him about his conduct throughout the interrogation. JA707; JA1294.

14. "O.W. then admitted that he still possessed the photograph on his phone and that he sent it to another student."

    - Appellees admit that O.W. initially denied having the sexting material in his possession, App. Br. at 6; O.W. also initially denied sending the photograph to the other male student. JA701.

15. "Carr reentered the room with the previously confiscated phone to ask O.W. if he still had the photo because she was 'hoping it was something else, and that [she] wouldn't have to charge [the juveniles] with a felony.'"

    - Carr searched the phone a second time because she felt she did not have probable cause to charge O.W. with a felony. JA711 (stating that Officer Carr "only asked him to show her the photo to make sure she could charge him with a felony.").

16. "In response to Officer Carr's single request, O.W. showed Officer Carr the photograph."

    - Carr used a commanding tone and was wearing her gun, badge, and uniform. JA747; JA600. O.W. was in Carr's custody and not free to leave when she elicited this incriminating response (*i.e.*, for O.W. to show her the photograph in his communications), JA603, JA147.

17. Appellees contend that Officer Carr was not present during the questioning of the female student.

- The female student testified that a female police officer was present during her questioning, the female officer questioned her directly and searched her phone before advising her of her rights under *Miranda*. JA577-580.
- She further testified that it was the female police officer, and not Baker, who told her that "lying was against school rules." JA579.
- The female student testified that Officer Carr left the room from time to time if the principal or assistant principal wanted to talk to Carr. JA580.

18. "Possession of child pornography is both a violation of the Kempsville Middle School Code of Student Conduct, JA620-621 ('possession of offensive materials such as nude photographs, pornographic videos, etc., are prohibited" as are 'Serious Violations' involving 'criminal acts in violation of local, state, or federal laws')."

- The offense of "child pornography" only violates the Student Code of Conduct to the extent that it violates criminal law.
- In fact, every single violation of criminal law violates the Student Code of Conduct. JA621 ("A student will not participate in any criminal acts in violation of local, state, or federal laws").

- Despite this fact, Appellees admit that their partnership agreement "provides for coordination between [the police department and school authorities] when criminal activity occurs on campus, including specific provisions concerning police questioning and searches and seizures."
- The Code of Conduct prohibited student insubordination including failing to comply with directions and refusing detentions JA620, ¶ 8, disrespectful behavior including "walking away" and challenging authority JA620, ¶ 6.
- A child's possession of sexting material, even if described as "child pornography" as Baker did, is not an offense for which a school official must or even may later report to law enforcement under Virginia law. *See* § 22.1-279.3:1.

19. "There is no evidence in the record that the disciplinary investigation was done with the intent Plaintiff attributes generally to school officials: to coerce 'confessions of criminal conduct' for "criminal evidentiary purposes.'"

    - The record establishes that school authorities are routinely detaining, interrogating, and searching the students in their

custody and care alongside, in conjunction with, and at the behest of police officers under the terms of a partnership agreement.

- School officials routinely require students to write confessions, in O.W.'s case multiple confessions, knowing that they would be sharing such statements with police officers to use for criminal arrests and prosecutions.
- The record establishes a routine process where school officials lead criminal investigations alongside police officers in a manner to avoid direct police detentions, interrogations, and searches.

20. Appellees contend that written incident statements are taken from students for the sole purpose of affording students Due Process.

- Sargent Cortes testified that such statements are routinely used for probable cause.
- Baker testified that he gave O.W.'s statement to Carr because she needed criminal evidence. "Q. Did you know why she needed those statements? A. I think she was conducting her own ·investigation and needed, I don't know, needed evidence, needed statements. I'm -- I –." JA550 (Reid Baker Dep. Tr. vol ii. 87:18-22).

- Each of the statements Baker gathered are part of the City's criminal investigative file, and Carr testified that she gathered the statements for criminal evidentiary purposes. "Q. And that's why you acquired the statement, to prosecute him? A. Yes." JA514-515 (Carr Dep. Tr. 66:1-3).

Appellees' reframing the disputed facts cannot quiet dispositive features. The VBPD is deeply involved in the school's disciplinary process, and school authorities routinely detain, interrogate, and search students alongside and collaboratively with police officers for criminal investigations. But the police should not be able to do — through third parties — what they cannot do directly.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT BAKER'S SEARCH OF O.W.'S CELLULAR PHONE WAS REASONABLE.

Appellees urge this Court to disregard O.W.'s legal arguments because, according to the Appellees, O.W. misunderstands the legal questions he raised in the trial court and here on appeal. They maintain that *T.L.O.*'s reasonableness standard is the appropriate legal test for searches performed by school officials on school grounds even if conducted in conjunction with law enforcement officers and intended to yield evidence for use in criminal prosecutions, and that *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), must be limited to suspicionless searches in government hospitals.

A. The Special Needs Exception Does Not Apply To Criminal Investigations.

The Appellees have not cited a single case to support their position that *Ferguson* should be limited to suspicionless searches in the hospital setting. That is because the specific administrative setting is not relevant to the special needs analysis. In fact, in *Ferguson*, the Court distinguished *T.L.O* — not due to its administrative setting or the level of suspicion required to justify the search — but because, in *T.L.O.* "[the Court] made a point of distinguishing searches 'carried out by school authorities acting alone and on their own authority' from those conducted 'in conjunction with or at the behest of law enforcement agencies.'" *Ferguson*, at 79 n.15.

Appellees rely on *Wofford v. Evans*, 390 F.3d 318 (4th Cir. 2004), where police officers were called to a school to investigate a possible gun on school campus. Notably, the police department and the school authorities were not collaborating efforts for this investigation. The police officers conducted their own independent investigation to secure school grounds. There, this Court explained that the standard governing limited police searches and detentions for weapons under *Terry v. Ohio*, 392 U.S. 1 (1968), is the exact same standard that applied to purely school disciplinary searches and detentions under *T.L.O*. For this reason alone, there is no good reason why an officer could not conduct his or her own independent criminal investigation in any setting. Nonetheless, a cellular phone search is in no fair

comparison to the limited detentions and searches *Terry* authorizes. *Wofford* illustrates that police already have all the tools necessary to investigate potential criminal activity and to keep buildings safe without collaborating with third-party administrative agencies for support.

Appellees also rely on *Piechowicz v.Lancaster Central School District*, 2022 U.S. Dist. LEXIS 8935 *9 (W.D.N.Y Jan. 18, 2022), an out of circuit district court case, where a student, much like O.W., was suspected of possessing sexted images. There, the school resource officer was present only to support the school's disciplinary investigation. For this reason, the student was not charged, arrested, or prosecuted. He was only suspended from school for three days. The key difference is that school authorities and the police department did not collaborate for criminal investigations, as they admittedly do here.

In *Greene v. Camrete*, the Ninth Circuit held that the "'special needs' doctrine did not apply to seizures on school grounds in which 'law enforcement personnel and purposes were . . . deeply involved.'" 588 F.3d 1011, 1026-27 (9th Cir. 2009) (vacated on other grounds) (citing *Ferguson*, 532 U.S. at 79 n.15). The Supreme Court granted certiorari on this issue but did not reach the merits due to mootness. *See Camreta v. Greene*, 131 S. Ct. 2020, 2026-27 (2011). Nonetheless, the Supreme Court did not express disapproval of the Ninth Circuit's reasoning. *C. B. v. City of Sonora*, 769 F.3d 1005, 1023 n.14 (9th Cir. 2014). Later, the Ninth

Circuit held that the same rule should apply to "dual-purpose investigations" and "purely investigatory examinations," "where one of the purposes is investigatory." *Mann v. Cty. of San Diego*, 907 F.3d 1154, 1162 (9th Cir. 2018).

The Tenth Circuit held in *Jones v. Hunt*, 410 F.3d 1221, 1228 (10th Cir. 2005), that "the district court erroneously concluded that the relaxed Fourth Amendment standard announced in *T.L.O.* should apply" to a case involving a social worker and deputy sheriff who detained a student on school grounds because the case involving suspected criminal conduct did not implicate the policy concerns underlying *T.L.O*. *Id*.

In *United States v. Curry*, 965 F.3d 313, 318, fn. 3 (4th Cir. 2020) (on rehr'g en banc) (collecting cases), this Court clarified that the exception "applies to programmatic searches such as vehicular checkpoints, random drug tests, and administrative searches that are motivated by 'special needs' that go 'beyond the normal need for law enforcement[and] make the warrant and probable-cause requirement impracticable.'' Here, in the case of a cellular phone search, the Appellees do not suggest that the warrant and probable cause requirements were impracticable.

B. Even if the Special Needs Exception were to Justify Departure from Standard Warrant and Probable Cause Requirements, School Authorities needed a Heightened Justification for Searching his Phone.

O.W. has argued that *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 368, 129 S. Ct. 2633, 2637 (2009), expresses the proper rule for assessing purely school disciplinary searches of spaces where there is a heightened privacy interest. Appellees do not address this holding and fail to address why a cellular phone search does not require the same "distinct elements of justification" as any other more intrusive search. *Safford*, at 374, 129 S. Ct. at 2641; *see also Jackson v. McCurry*, 762 F. App'x 919, 927 (11th Cir. 2019) (noting that "a search of a student's cellphone might require a more compelling justification than that required to search a student's other personal effects under *T.L.O.*").

C. The Appellees' Affirmative Defenses are not Properly Before the Court.

For the first time, Baker raises qualified immunity as a defense against the unlawful search because he believes that O.W. has not shown that the law was clearly established at the time of the search. App. Br. at 16, fn. 4. Baker did not raise qualified immunity in his pleading or in the district court; the defense is therefore untimely and not properly before this Court.

Appellees faintly suggest that a parent/acknowledgment form, which is not shown on the evidentiary record, confirming that O.W.'s mother read and reviewed

the code of conduct, somehow amounts to consent. "[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13, 124 S. Ct. 906, 917 (2004). A document acknowledging having read and reviewed a policy could not be held to constitute the "unequivocal and specific" consent required for a valid Fourth Amendment waiver. *Karwicki v. United States*, 55 F.2d 225, 226 (4th Cir. 1932). Whether O.W. or his mother waived his right against the search by voluntary consent is a question of fact. *Ohio v. Robinette*, 519 U.S. 33, 40, 117 S. Ct. 417, 421 (1996) ("The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and "voluntariness is a question of fact to be determined from all the circumstances."). Baker and the School Appellees also failed to plead waiver as an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1).

V. THE DISTRICT COURT ERRED IN HOLDING THAT O.W. FAILED TO SHOW APPELLEES COMMITTED A CIVIL CONSPIRACY.

Appellees do not address whether the district court applied the wrong legal test for assessing a civil conspiracy under 42 U.S.C. § 1983. Instead, the Appellees attempt to conceal the factual dispute by arguing that O.W. has taken deposition testimony out of context and lacks factual support for his claims.

Appellees stay far away from the governing legal standard. "To establish a civil conspiracy under § 1983, Appellants must present evidence that the Appellees

acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in Appellants' deprivation of a constitutional right." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 421 (4th Cir. 1996). O.W was therefore required to show that (1) the Appellees agreed and coordinated to commit an act, (2) at least one of the co-conspirators took an overt step in furtherance of the agreement, and (3) the act "resulted in Appellants' deprivation of a constitutional right," *id*.

The Appellees concede that their partnership agreement is the moving force driving the coordination between the police department and school authorities to criminally investigate students. *See* App. Resp. Br. at 8 ("The MOU provides for coordination between these two entities when criminal activity occurs on campus, including specific provisions concerning police questioning and searches and seizures."). The district court also recognized this point. *O.W. v. Sch. Bd. of the City of Va. Beach*, Civil Action No. 2:21-cv-448, 2023 U.S. Dist. LEXIS 25251, at *29 (E.D. Va. Feb. 14, 2023) (stating that, "while it is clear that there was an agreement between the City and School Board to coordinate when responding to criminal activity, it is unreasonable to infer, without more, that this was an agreement to deprive Plaintiff of his constitutional rights").

In the light most favorable to O.W., the evidence firmly establishes that Baker and Carr coordinated to arrest and prosecute O.W. Baker engaged Officer

Carr, then he detained O.W. to investigate O.W.'s suspected criminal conduct. He immediately warned O.W. against lying and threatened to punish him if he lied during the investigation. JA1478; JA533. He placed thirteen-year-old O.W. in a 72 sq. ft. office with Carr — a uniformed officer wearing her gun and badge. JA747; JA600. The door was open, but Carr stood nearest the doorway. JA1322. Carr immediately asked O.W. for his identifying information when he walked into the office, JA1294, and she and Baker began to question O.W. together, JA707; JA1294. O.W. was scared. JA1298. Baker gathered more evidence against O.W., confronted O.W. with the evidence against him, and warned O.W. that his story "did not make sense." JA533, JA1261, JA1355. Neither Carr nor Baker administered the *Miranda* warning to O.W. until he was arrested at 6:10 p.m. JA1264. O.W. was not free to leave the room and was not allowed to have an attorney, a friend, his parent, or anyone there to aid him; and he did not have the right to remain silent; and his mother was not contacted. Baker made O.W. write multiple confessions and immediately handed the best his confessions to Officer Carr for criminal evidence. JA550. Baker searched O.W.'s phone before placing it in airplane mode, powering it down, and handing it to Carr as she instructed him to — for criminal evidence. JA1261-1262, JA1298. Baker detained O.W. after school hours after learning that it wasn't a "paper arrest." JA1254. Baker threatened O.W. with school discipline if he lied, as VBCPS policy directed him to do, and Carr

went into a room with the female student and repeated the exact same warning to her. JA954; JA579-580.

Baker detained O.W. after school hours; and after such time, when O.W. was admittedly in Officer Carr's custody and not free to leave, JA495, JA603, Officer Carr questioned him and searched his cellular phone again because she still unsure of probable cause. JA711. The female student testified that the female police officer questioned her about her creation and distribution of the photograph before administering the *Miranda* warning to her, searched her phone, did not call her mother, and would leave the office to have discussions with the principal or assistant principal. JA577-580. There can be no doubt that Officer Carr and Mr. Baker took concrete steps in furtherance of the agreement. These facts also make it impossible to suggest that O.W. was not ultimately deprived of his constitutional rights.

There can be no doubt that this was a "criminal investigation." JA709 ("[Carr] stated that normally if there is a criminal investigation, she will sit in."); JA482 ("we are in partnership with the school. If they come in -- if they call me and find out there is a -- that there might possibly be a criminal investigation, they have to alert me.").

These practices have been employed for at least twenty years, and a jury would be entitled to infer that the outcome was not mere happenstance.

VI. THE DISTRICT COURT ERRED IN HOLDING THAT O.W.'S CONFESSIONS WERE NOT COERCED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

The Appellees do not dispute that voluntariness involves disputed questions of fact and nor do they address O.W.'s argument that the district court improperly resolved these facts in the Appellees' favor.

Appellees insist that Officer Carr and Assistant Principal Baker applied no coercive pressures to force his confession. But the Appellees' version of events directly conflicts with Officer Carr's own report, which she drafted within days of the incident. JA1244-1246; JA1261-1264. The Appellees' entire argument centers on O.W.'s deposition testimony that he said he had the photo and was telling the truth even though these statements fall substantially short of confessing to possessing and distributing child pornography. O.W. was required to confess more before he left that room. It was only after lengthy questioning that he ultimately confessed who he believed to be the subject of the photograph and described the contents of the photograph. Then-thirteen-year-old O.W. was up against his school assistant principal and a sworn officer of the law, with no advocate. These facts are sufficient for a jury to conclude that his confessions were coerced.

VII. THE DISTRICT COURT ERRED WHEN IT HELD THAT THE SCHOOL BOARD DID NOT VIOLATE O.W.'S RIGHT TO DUE PROCESS.

As a threshold matter, Appellees conflate O.W.'s substantive entitlement and procedural due process claims and his special relationship claim.

A claim of a substantive entitlement is not a novel one. This Court has held that "[s]tate law or policy must provide a *substantive* expectation or interest to create a liberty interest -- the 'expectation of receiving *process* is not, without more, a liberty interest protected by the Due Process Clause'" *Henderson v. City of Roanoke*, No. 20-2386, 2022 U.S. App. LEXIS 6152, at *6 (4th Cir. Mar. 9, 2022) (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983)) (alterations and emphasis in original). But a government's "use of explicitly mandatory language, in connection with [its] establishment of specified substantive predicates to limit discretion, forces a conclusion that the State has created a liberty interest." *Id*. Here, S.B. Reg. 5-64.1 uses the mandatory language (i.e, the School Board "shall") necessary to establish a liberty interest.

O.W. does not argue that he has a special relationship with the School Board by virtue of his compulsory attendance alone. The restraint of O.W.'s liberty, after school hours, is more appropriately compared to an involuntary foster care placement than imprisonment. *See Doe v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010) (holding that "when a state involuntarily removes a child from

her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause."). O.W. does not suggest that being held after school hours is equivalent to the restraints of foster care, but it was nonetheless an involuntary restraint of his liberty that triggered an affirmative duty to safeguard his interests while he was outside of his mother's care.

As a point of clarity, O.W. has also claimed that the regulation established a duty under state tort law and provides a basis for his gross negligence claim. *See Deshaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 201-02, 109 S. Ct. 998, 1006 (1989)* ("It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger."). A special relationship arises under Virginia law "(1) between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (2) between the defendant and the plaintiff which gives a right to protection to the plaintiff." *A.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 619, 831 S.E.2d 460, 468 (2019).

VIII. THE DISTRICT COURT ERRED IN HOLDING THAT O.W. FAILED TO ESTABLISH HIS MONELL CLAIMS.

O.W. will not burden the Court with a duplicative argument. As stated above, the evidentiary record firmly establishes that O.W. has been deprived of his

constitutional rights. O.W. restates and incorporates his arguments above and respectfully asks this Court to reverse the district court's judgment.

IX. THE DISTRICT COURT ERRED IN TAKING JUDICIAL NOTICE OF UNAUTHENTICATED, NON-PUBLIC RECORDS.

"It is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment." *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993). Appellees do not argue that they have satisfied any of the methods of authenticating public records, including self-authentication, which are contained in Fed. R. Civ. P. 901 and 902. Indeed, they did not offer a single witness with personal knowledge or document to vouch for the source, accuracy, or circumstances surrounding the preparation of such documents. They also do not suggest that they would have been capable of authenticating the records before trial. *See* Virginia Code § 16.1-305(D,D1) (only permitting certification of juvenile court papers in connection with guilty adjudications for use in *some* subsequent criminal proceedings).

Appellees further argue that "O.W. admits these records are not dispositive of any issue on appeal." App. Resp. Br. at 25. Here, Appellees avoid the critical point. "Adjudicative facts must, by definition, be relevant." *United States v. LaRouche*, No. 92-6701, 1993 U.S. App. LEXIS 23412, at *13 (4th Cir. Sep. 13, 1993) (citing 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5104 at 483-84 (1977)); *see also, e.g.*, *Davis v. United States*, 569

F. Supp. 2d 91, 98 (D.D.C. 2008) (noting "evidence that does not make 'any fact that is of consequence . . . more probable or less probable than it would be' otherwise, is not admissible." (internal citations omitted)).

"[W]hether information is the proper subject of judicial notice depends on the use to which it is put." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 558 (4th Cir. 2013), abrogated on other grounds, as recognized in *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015). "The party requesting judicial notice of the particular fact bears the burden of proving that Rule 201's standard is satisfied." *Loftus v. FDIC*, 989 F. Supp. 2d 483, 490 (D.S.C. 2013) (citing 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 2.3, at 344 (3d ed. 2007)).

The City Appellees ostensibly offered the purported state court records to support their defenses of jurisdictional bar under the *Rooker-Feldman* doctrine and preclusion under state court principles of res judicata. The Appellees did not plead estoppel in their answer, JA170-193, and unattested state court records are not eligible for full faith and credit in the first instance, *see* 28 U.S.C. § 1738. Nonetheless, both bar and preclusion concern only final judgments. *Hulsey v. Cisa*, 947 F.3d 246, 251 (4th Cir. 2020) (noting "the discovery rulings thus were not 'final state-court judgments'"); *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980). Therefore, anything more than a final order was not even slightly relevant to these defenses. But the juvenile court order dismissing O.W.'s

case was never in dispute and never of any consequence. ANSWER, JA178, ¶ 51, JA202-203.

It cannot be ignored that the facts, as represented, in the purported records differ sharply from the evidentiary record here. *See* JA1385-1390. But this case is not about what happened or did not happen in juvenile court.

X. THE DISTRICT COURT ERRED IN DENYING O.W.'S MOTION FOR LEAVE TO AMEND AND FOR LIMITING FUTURE MOTIONS FOR LEAVE TO AMEND.

O.W. restates on his jurisdictional argument above, *supra* at sect. II.

Appellees do not address whether the district court properly denied O.W.'s motion for leave to amend; they instead focus on the claim that O.W. has waived his right to file a motion for leave to amend. The district court denied leave to amend, without finding any of this Court's declared reasons. *Ward Elecs. Serv., Inc. v. First Commercial Bank*, 819 F.2d 496, 497 (4th Cir. 1987). Because all litigants have an option to seek leave to amend at any time, the district court erred when it limited the extent to which O.W. could do so.

O.W. would have lost his right to appeal important Fourth and Fifth Amendment claims by continuing litigation under the terms imposed by the district court. As noted *supra* at II, he could have filed a renewed motion for leave to amend thirty days after the final order and waited for the court to deny his motion before noticing his appeal. In such case, he would have forfeited his right to appeal

and been limited to appealing only the denial of his motion for leave to amend. Even if ultimately granted, O.W would have waived his right to appeal by filing a superseding complaint not incorporating or "rehashing" his old claims. The rules must not be construed to limit the fundamental right to appeal.

XI. THE DISTRICT COURT ERRED IN DENYING O.W.'S MOTION FOR SUMMARY JUDGMENT WITH PREJUDICE.

O.W. does not argue that the district court only lacked explicit authority under Rule 56 to deny a motion for summary judgment with prejudice, he argues that the district court had no authority to do so. Appellees argue that "O.W. has not cited caselaw directly holding that FRCP 56 does not authorize district courts to deny motion for summary judgment with prejudice." While they distinguish *Andes v. Vesant Corpo*., 788 F.2d 1033, 1037 (4th Cir. 1986), on the basis that it pertains to a dismissal and not a motion for summary judgment, they do not cite a single case to counter O.W.'s position.

As an adjudication on the merits, a **granted** motion for summary judgment operates as a dismissal with prejudice because of its res judicata effect. The same is not true for a **denied** motion for summary judgment, as it merely means that "there is a genuine issue for trial," *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986), which should not trigger a res judicata effect. Here, the district court's order denying O.W.'s motion for summary judgment with prejudice ostensibly does more than what Rule 56 authorizes.

The district court lacked authority under Fed. R. Civ. P. 56 to deny O.W.'s motion with prejudice and the Court should grant O.W.'s relief.

XII. AMICI ARGUMENTS

The Appellees argue that this Court should discard all the arguments of interested amici — not because their legal arguments are without merit — but because amici raise important public policy concerns about over-criminalizing students in the school setting. Appellees summarize amici arguments in a provocative one-liner — that "police should be effectively barred from schools as a way to curtail student arrests for violations of the law." This summary is not only untrue, but it wrongly assumes that longstanding Supreme Court precedent is not already consonant with the States' routine crime control interests. The Court has accepted the briefs of interested amici and should assess legal and policy arguments as it deems appropriate.

CONCLUSION

The Court should reverse the Order appealed from, remand for proceedings consistent with its Opinion, and grant O.W. all relief the Court deems just and appropriate, including, at a minimum vacating the district court's judgment and allowing O.W. to proceed to trial on the merits of his claims.

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CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, the undersigned counsel for appellant certifies that the accompanying brief is printed in 14 point typeface, with serifs, and, including footnotes, contains no more than 13,000 words. According to the word-processing system used to prepare the brief, Microsoft Word, it contains 6,465 words.

By: /s/

Makiba Gaines, Esq.