No. 24-1288

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

O.W.,
Plaintiff-Appellant,

v.

MARIE L. CARR, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
No. 2:21-cv-448-EWH-LRL
The Honorable Elizabeth W. Hanes, U.S. District Court Judge

BRIEF OF THE ELECTRONIC PRIVACY INFORMATION CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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June 20, 2024

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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No. 24-1288 Caption: O.W. v. Marie L. Carr, et al.

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who is amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
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Signature: s/Megan Iorio Date: June 20, 2024

Counsel for: Electronic Privacy Information Center

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INTEREST OF THE *AMICUS CURIAE*[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., that focuses public attention on emerging privacy and civil liberties issues. EPIC routinely participates as *amicus curiae* in cases concerning emerging privacy issues, new technologies, and constitutional interests. EPIC has authored several briefs specifically concerning searches of cell phones and personal data generated by cell phones. *See*, *e.g.*, Brief of *Amici Curiae* EPIC et. al, *Carpenter v. United States*, 819 F.3d 880 (6th Cir. 2016), *cert. granted* 137 S. Ct. 2211 (2017) (No. 16-402) (arguing that the Fourth Amendment protects the right against warrantless seizure and search of location data); Brief of *Amici Curiae* EPIC et. al, *Riley v. California*, 134 S. Ct. 2473 (2014) (arguing that warrantless search of a cell phone incident to an arrest is impermissible). EPIC has filed amicus briefs in cases arguing that warrantless school searches of students' cell phones are impermissible. *See, e.g.*, Brief of *Amicus Curiae* EPIC, *Jackson v. McCurry*, 762 Fed. App'x 919 (11th Cir. 2019); Brief of *Amicus Curiae* EPIC, *Commonwealth v. White*, 475 Mass. 586 (2016).

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[1] Both parties consent to the filing of this *amicus curiae* brief. In accordance with Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

SUMMARY OF ARGUMENT

In *Riley v. California*, the Supreme Court declared that "a warrant is generally required before" searching a cell phone. 573 U.S. 373, 401 (2014). Yet, it is the policy of the City of Virginia Beach to have school officials work with law enforcement to search student cell phones without warrants. This policy violates the Fourth Amendment because such searches of student phones are unreasonable invasions of student privacy and because they are not necessary to serve the purposes underlying the school search exception described in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

"The ultimate touchstone of the Fourth Amendment is reasonableness." *Riley*, 573 U.S. at 381 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Under the Fourth Amendment, warrantless searches are unreasonable unless the search falls within a specific exception. *Id.* at 382. Exceptions to the warrant requirement are themselves based on reasonableness: the invasion of privacy from the search must be reasonable given the government's legitimate interests. *Id.*

When it comes to cell phone searches, the Supreme Court has made clear that even the most well-established exceptions may not be reasonable. In *Riley,* the Supreme Court said that law enforcement cannot search a cell phone incident to arrest without a warrant. *Riley*, 573 U.S. at 386. Police must obtain a warrant because people have a heightened privacy interest in the contents of their phones

compared to other objects. *Id.* Additionally, a warrantless search of a cell phone is not necessary to serve the interests underlying the search-incident-to-arrest exception. *Id.* As a result, the balancing of interests makes the invasion of privacy unreasonable. *Id.* The decision in effect directs courts to re-examine other well-established warrant requirement exceptions to ensure that their interests are served by a warrantless cell phone search. Otherwise, if a government official wants to search a cell phone, they must "get a warrant." *Id.* at 403.

The City of Virginia Beach's policy to conduct warrantless searches of student cell phones in coordination with law enforcement is unreasonable for two reasons. First, *T.L.O.* established a warrant requirement exception for *school officials* conducting searches to inform *school* discipline. The Supreme Court explicitly stated that its holding did not apply to searches where school officials worked in conjunction with law enforcement officials, as is the policy in Virginia Beach. Such searches would have certainly shifted the balance of the interests at stake. While it may be reasonable for school officials to search a student's possessions without a warrant to inform school disciplinary matters, the same is not the case when a search can also be used to criminally prosecute a student. Indeed, if it is unreasonable for law enforcement to use well-established *law enforcement* exceptions to search a cell phone without a warrant, it is certainly

unreasonable for them to use exceptions meant for *non-law enforcement* to do the same.

Second, when the student search exception announced in *T.L.O.* is analyzed according to the Supreme Court's decision in *Riley v. California*, it is clear that a warrantless search of a student's phone by a school official cooperating with a law enforcement official is unreasonable. As recognized in *Riley*, the general public has a heightened privacy interest in the content of their phones, but teenagers have especially significant privacy interests in their phones because of the amount of time they spend on them, the extent to which they use social media to live their lives, and their tendency to send intimate images of themselves to each other, an activity that is criminalized in some states. A warrantless search of a student cell phone might be reasonable if it is limited to informing school disciplinary matters, but a search conducted by school and law enforcement officials working together is not necessary to serve the government interests underlying the *T.L.O.* exception: maintaining a school environment where students can learn. In fact, cooperation with law enforcement can do the exact opposite by making student feel less safe and by funneling them into the school-to-prison pipeline, consequences that disproportionately impact black and brown students.

ARGUMENT

I. *NEW JERSEY V. T.L.O.* DOES NOT APPLY WHEN LAW ENFORCEMENT IS INTIMATELY INVOLVED IN THE SEARCH OF A STUDENT.

Under *New Jersey v. T.L.O.*, school officials may search students without probable cause or a warrant when the search is reasonable under all the circumstances. 469 U.S. 325, 341 (1985). A search must be justified in its inception and must be conducted in a way reasonably related to the circumstances that justified the search. *Id.* at 341–42.

The *T.L.O.* exception to the warrant requirement does not apply to this case. When *T.L.O.* established that school administrators may conduct searches without a warrant under certain circumstances, the Court explicitly did not address "the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." *Id.* at 341 n.7. The Court's rationale for lowering the Fourth Amendment standard in student searches was grounded in the special needs of the *school* environment: protecting "the swift and informal disciplinary procedures needed in the schools" and "preserving the informality of the student-teacher relationship." *Id.* at 340. The decision was not meant to be used by law enforcement as an end-run around the Fourth Amendment. When law enforcement becomes involved in a student search, the search morphs from a school matter to a criminal matter and typical Fourth Amendment protections

apply. *See Ferguson v. City of Charleston*, 532 U.S. 67, 88 (2001) (hospital administrator's search does not qualify for the special needs exception because they coordinated with law enforcement).

The Supreme Court has repeatedly reaffirmed the narrowness of the *T.L.O.* decision. In *Safford Unified School District v. Redding*, it characterized *T.L.O.* as "h[o]ld[ing] that for searches *by school officials* a careful balancing of governmental and private interests" requires a showing less than probable cause, and therefore applying "a standard of reasonable suspicion to determine the legality of a *school administrator's* search of a student." 557 U.S. 364 (2009); *see also Ferguson*, 532 U.S. at 79 n.15 (noting that "[i]n *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.'") (emphasis added).

This case clearly demonstrates a search outside the "swift and informal disciplinary procedures" that justify the special needs exception in schools because of school policy to involve law enforcement in investigations of students, which inevitably gives law enforcement access to evidence for use in criminal prosecutions. *T.L.O.*, 469 U.S. at 340. Virginia Beach City Public Schools policy *requires* administrators to notify law enforcement partners of all suspected student criminal activity. *See* Memorandum of Understanding, *O.W. v. School Board of the*

City of Virginia Beach et al., No. 2:21-cv-448 (E.D. Va. 2023), ECF No. 109 ¶ 60 ("All criminal activity that comes to the attention of the Principal or School staff shall be reported immediately to the SRO when on duty."). In this case, Assistant Principal Baker retrieved Officer Carr, warning of potential criminality before Mr. Baker even detained O.W, *see* JA701, 986 (Dep. Tr. of Marie Carr, at 17:8-11), or knew whether O.W. had violated a school rule, *see* Dep. Tr. of Reid Baker, at 16:4-12. Mr. Baker searched O.W.'s smartphone in the officer's presence after the two had interrogated O.W., and Mr. Baker followed the officer's orders concerning how to handle the phone once evidence was found. JA1027 (Dep. Tr. Of O.W., at 47:10–22); JA492.

These facts, among others highlighted by Plaintiff, establish that *T.L.O.* is inapplicable. This search was not merely an administrator's attempt to gather evidence for a school disciplinary matter: it was the result of a partnership between school administrators and law enforcement to generate evidence to prosecute students such as O.W. Standard Fourth Amendment principles apply: this was a warrantless law enforcement search that is presumptively unreasonable under the Fourth Amendment. As the Court in *Riley* proclaimed, if VBCPS involves police officers in student searches, they must "get a warrant." *Riley*, 573 U.S. at 403.

II. UNDER *RILEY V. CALIFORNIA*, WARRANTLESS CELL PHONE SEARCHES BY SCHOOL OFFICIALS CAN ONLY BE JUSTIFIED—IF AT ALL —WHEN LIMITED TO SCHOOL PURPOSES.

Riley v. California, 573 U.S. 373 (2014), requires the court to examine whether the rationale underlying the warrant requirement exception in *T.L.O.* justifies warrantless cell phone searches. The justification for the student search exception in *T.L.O.* was maintaining school discipline so that students can learn. Because of the heightened privacy interests teens in particular have in the contents of their cell phone, warrantless phone searches are justified only insofar as they are necessary for and limited to informing school disciplinary matters. To the extent that a search goes beyond those purposes—such as gathering evidence for or sharing evidence with law enforcement—a warrant is needed.

A. *Riley v. California* requires assessing whether and to what extent the school administrator exception to the warrant requirement in *T.L.O.* is justified for cell phone searches.

Under *Riley*, courts are not to mechanically apply warrant requirement exceptions to cell phone searches. Courts must instead assess whether the exception is reasonable given the balance of interests at stake: the privacy interests of the person whose phone is searched on the one hand, and the government's interest in conducting a warrantless search on the other. Because of the significant privacy interests people have in the contents of their cell phones, if a warrantless

search is not necessary to serve the interests identified with the exception, the government must get a warrant.

In *Riley*, the Court declined to automatically extend the search-incident-to-arrest exception to searches of smartphones' digital data. *Riley*, 573 U.S. at 386. Instead, the Court analyzed whether the logic justifying the exception applied to cell phone searches by weighing "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Riley*, 573 U.S. at 385.

In *Riley*, the search-incident-to-arrest exception did not apply to cell phone searches for two related reasons. First, the individual's privacy interest is higher when cell phones are involved. The Court found that cell phones are different in "both a quantitative and a qualitative sense from other objects." *Id*. Their storage capacity, functionality, and unavoidable role as an essential tool for modern life "fundamentally alters the privacy interests at stake." Alan Butler, *Get a Warrant: The Supreme Court's New Course for Digital Privacy Rights After Riley v. California*, 10 Duke J. Const. L. & Pub. Pol'y 83, 90 (2014). Second, the government's interest was lower when cell phones are involved. The interests underlying the exception—ensuring officer safety, preventing escape, and safeguarding evidence—are not present, or present to a lower degree, in the

context of cell phones. *Riley*, 573 U.S. at 387–89. The Court explained that this analysis should precede any decision to exempt a search from the warrant requirement when digital devices are involved. *Id.* at 385.

This Court and others have recognized that smartphones change the calculus for the application of traditional warrant exceptions. For example, this Court recognized that digital devices must receive heightened protections during border searches. *See United States v. Aigbekaen*, 943 F.3d 713, 720, 722–23 (4th Cir. 2019); *United States v. Kolsuz*, 890 F.3d 133, 144–46 (4th Cir. 2018). In those cases, while acknowledging that the government's interest is at its "zenith" at the border, this Court nonetheless found that any border search of a digital device was presumptively "non-routine," requiring individualized suspicion and a demonstrated nexus to the border-search exception's traditional justifications in order to be found constitutional. *See Aigbekaen*, 943 F.3d at 720–21; *Kolsuz*, 890 F.3d at 143. In *Carpenter v. United States*, the Supreme Court recognized that the third-party exception did not apply to the historical records of people's locations revealed by their cell phones because the privacy interest in those records was too high to justify the exception. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018). Other courts have also recognized the need for enhanced protection for digital devices that precludes automatic application of a recognized warrant exception. *See, e.g.*, *United States v. Cano*, 934 F.3d 1002, 1016–19 (9th Cir.

2019) (ruling that border officials may conduct warrantless searches of cell phones "only to determine whether the phone contains contraband," such as explicit images of child sexual abuse, while searches for evidence relating to a crime require a warrant); *United States v. Smith*, No 22-cr-352 (JSR), 2023 WL 335837, at *8–9 (S.D.N.Y. May 11, 2023) (requiring a warrant to search a digital device at the border).

B. Teens have an especially strong privacy interest in the contents of their cell phone.

Riley established that the general public has a significant privacy interest in the contents of their cell phones. *Riley*, 573 U.S. at 393–99. As the *Riley* Court noted, "a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." *Id.* at 396–97.

Teenagers' phones arguably contain even more sensitive information than adults' phones. Cell phones are "a pervasive and insistent part of daily life," *id.* at 385, especially for teenagers whose phones often capture and store records of their entire social and private lives. Because of the way teens use cell phones—and particularly, their tendency to send each other explicit images of themselves that

are criminalized in many states—teens have an especially strong privacy interest in the contents of their phones.

Teens are dependent on their cell phones. About 95 percent of teens report having or using a smartphone, up from 73 percent at the time *Riley* was decided. *See* Emily A. Vogels, Risa Gelles-Watnick & Navid Massarat, Pew Research Center, *Teens, Social Media and Technology 2022* (2022).[2] Forty-six percent of teens report using the internet "almost constantly" throughout the day—presumably on a cell phone that goes with them everywhere. *Id.* Today's teenagers live their lives in large part on their cell phones. As one academic, danah boyd, put it:

> What the drive-in was to teens in the 1950s and the mall in the 1980s, Facebook, texting, Twitter, instant messaging, and other social media are to teens now. Teens flock to them knowing they can socialize with friends and become better acquainted with classmates and peers they don't know as well. They embrace social media for roughly the same reasons earlier generations of teens attended sock hops, congregated in parking lots, colonized people's front stoops, or tied up the phone lines for hours on end. Teens want to gossip, flirt, complain, compare notes, share passions, emote, and joke around. They want to be able to talk among themselves—even if that means going online.

danah boyd*, It's Complicated: The Social Lives of Networked Teens* 20 (2015). The COVID-19 pandemic only exacerbated the extent to which teens rely on their

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[2] https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/.

cell phones. *See* Colleen McClain, Emily A. Vogels, Andrew Perrin, Stella Sechopoulos & Lee Rainie, Pew Research Center, The Internet and the Pandemic (Sept. 1, 2021) (explaining that 72% of surveyed parents reported their children were spending more time on screens compared with before the outbreak).[3] Smartphones, especially for teens, hold "the privacies of life" for which strong constitutional protection is necessary. *Riley*, 573 U.S. at 403 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

Teenagers' privacy interests in their cell phones are especially heightened because of the outsized possibility that their phones contain information that can be used to prosecute them. A substantial portion of teenagers today send or receive sexually explicit text messages and photos. This behavior is collectively called "sexting." The best meta-analyses report that 14-20 percent of adolescents have sent a sext, up to 35 percent have received one, and up to 15 percent have forwarded a sext without consent. Camille Mori *et al.*, *Are Youth Sexting Rates Still on the Rise? A Meta-Analytic Update*, 70 J. Adolescent Health 531, 531-39 (2021);[4] Christina Molla-Esperanza, Josep-Maria Losilla & Emelina Lopez-

[3] https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/.
[4] https://pubmed.ncbi.nlm.nih.gov/34916123/.

Gonzalez, *Prevalence of Sending, Receiving and Forwarding Sexts Among Youths: A Three-Level Meta-Analysis*, 15 PLoS One (2020).[5]

Sexting then is a common behavior for teens, and one where school discipline and adult guidance are necessary—not criminal prosecution. *See* Victor Strasburger, Harry Zimmerman & Jeff Temple, *Teenagers, Sexting, and the Law*, 143 Pediatrics 1, 3 (2019) (arguing that consensual teen sexting is "not known to be initially harmful to either party" and is not likely to be remedied by police but "rather is a health and education issue that is better addressed at home, in schools, and in primary care.").[6] Indeed, prosecuting teens for child pornography is contrary to the legislative intent behind child pornography laws. Robert Mummert, *Sexting and the Law: How Lack of Reform in California Puts Teenagers in Jeopardy of Prosecution Under Child Pornography Laws Enacted to Protect Them*, 38 W. St. U. L. Rev. 71 (2010). It thus does not serve the interests of the teens or the school community to involve police in investigating incidents of students exchanging intimate images.

Black teens in particular need privacy protections for their cell phones because schools already disproportionately discipline Black children for a broad

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[5] https://pubmed.ncbi.nlm.nih.gov/33284862/.
[6] https://publications.aap.org/pediatrics/article/143/5/e20183183/37112/Teenagers-Sexting-and-the-Law?autologincheck=redirected.

spectrum of sexual behaviors. Black girls are far more likely than white girls to be punished for dress code violations and inappropriate cell phone use in schools. Edward W. Morris & Brea L. Perry, *Girls Behaving Badly? Race, Gender, and Subjective Evaluation in the Discipline of African American Girls*, 90 Sociology of Education 127, 138 (2017).[7] And both Black girls and boys are disproportionately likely to receive in-school discipline for inappropriate sexual behavior. *Id*. at 139. Adding cell phones to the equation magnifies the potential for disparate treatment in schools to result in excessive surveillance and unnecessary arrests of Black teens.

C. Warrantless cell phone searches by school officials under *T.L.O.* can only be justified if strictly limited to school disciplinary, not criminal prosecution, purposes.

Having established that the privacy interests at stake in searching a teenager's cell phone without a warrant are especially high, *Riley* requires the court to examine "the degree to which [a warrantless search] is needed for the promotion of legitimate governmental interests." *Riley*, 573 U.S. at 385. Here, the court must look to the interests underlying the *T.L.O.* exception and determine to what extent warrantless cell phone searches are needed to advance this interest.

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7 https://www.beyondthegap.org/uploads/4/7/0/9/4709551/girls_behaving_badly.pdf

To justify a search conducted without a warrant, the government must establish that the circumstances in which the search occurred match the justification for why a warrant was not required. This is apparent throughout the Supreme Court's Fourth Amendment cases, especially when digital devices are concerned. For example, police cannot search cell phones incident to arrest—even those within an arrestee's immediate control—because such searches are not necessary to protect officers' safety or prevent destruction of evidence. *Riley*, 573 U.S. at 387–89. This Court has recognized that the warrantless search of a traveler's digital devices at the border do not fall under the border search exception when the government offers no reasonable basis to suspect that the defendant's crimes have had a transnational component. *Aigbekaen*, 943 F.3d at 721. The Court explained that "neither the Supreme Court nor this court has ever authorized a warrantless border search unrelated to the sovereign interests underpinning the exception." *Id.* at 720–21; *see also United States v. Cano*, 934 F.3d 1002, 1016 (9th Cir. 2019) (holding that "border searches are limited in scope to searches for contraband and do not encompass searches for evidence of past or future border-related crimes").

The justification for the student search exception in *T.L.O.* was to allow for the "swift and informal disciplinary procedures needed in the schools." *T.L.O.*, 469 U.S. at 340. This means that, to the extent school officials are allowed to search

cell phones without a warrant pursuant to the student search exception of *T.L.O.*, the searches must be limited to informing school disciplinary proceedings—not criminal prosecutions. Law enforcement officials are not necessary to investigate school disciplinary issues and their presence makes it impossible to limit a cell phone search to the justification underlying the exception in *T.L.O*. This is why the Court explicitly declared that the lower standard for student searches only applies to searches "carried out by school authorities acting *alone*." *Id.* at 341 n.7 (emphasis added).

Ensuring that the reason to conduct warrantless searches of student cell phones matches the student search exception's justifications is especially important because students lack other privacy protections while in school. Students are legally required to be present in school, and administrators have the authority to conduct searches based on behavior that is not otherwise criminal. School discipline investigations are often initiated based on non-criminal behavior: students not listening to teachers, wandering the hallways during class time, and other violations of school rules that do not rise to the level of criminal conduct. In practice, school administrators have ample opportunities to search students most private possessions, phones, backpacks, and computers. This may be necessary and desirable for maintaining a safe and educational school environment, but it cannot mean that students are subjected to nearly unlimited police scrutiny.

D. Law enforcement involvement in school disciplinary matters does not promote—and, in fact, often negatively impacts—school learning environments.

Having law enforcement present during the warrantless search of a student's cell phone is not only unnecessary to "maintain[] an environment in which learning can take place," *T.L.O.*, 469 U.S. at 340, it can work *against* this interest. Evidence shows that the presence of law enforcement has no impact on a school's ability to maintain order and discipline; in fact, it makes students feel less safe and transforms schools into common sites for the unnecessary arrest and prosecution of students, particularly Black students.

More than forty years of evidence on the presence of dedicated police officers assigned to schools (school resource officers or SROs) shows that police do not reduce rates of misbehavior or violence in schools. Chelsea Connery, *The Prevalence and the Price of Police in Schools*, U. Conn. Neag Sch. Ed. (Oct. 27, 2020);[8] Emily Tanner-Smith *et al.*, *Adding Security, but Subtracting Safety? Exploring Schools' Use of Multiple Visible Security Measures*, 43 Am. J. Crim. Just. 102 (2017). Today about 58 percent of schools have an SRO on campus at least one day a week. *See* Connery, *supra*. A significant 2011 study found that

[8] https://education.uconn.edu/2020/10/27/the-prevalence-and-the-price-of-police-in-schools/.

when schools start an SRO program, they do not report lower rates of violent, non-violent, or property crime. Chongmin Na & Denise Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, Justice Quarterly 1 (2011).[9] The same study found that students are more likely to be criminally charged for both violent and non-violent behavior when there is a police officer at school. *Id*. at 19. There is also no evidence that officers in schools make mass shootings less likely. *Id*.*; see also* Connery, *supra*.

The weight of the literature demonstrates that police in schools do not have a positive effect on school safety, but that SROs increase frequency and the severity of school discipline, including expulsions. Benjamin Fisher & Emily Hennessy, *School Resource Officers and Exclusionary Discipline in U.S. High Schools: A Systematic Review and Meta-analysis*, 1 Adolescent Res. Rev. 217, 217 (2016).[10] A meta-analysis of dozens of studies found that schools with SROs report roughly 20 percent more suspensions and expulsions than schools without police. *Id*. at 229. The impact of school discipline falls heaviest on Black children. Suspending or expelling a child increases the likelihood that child will be convicted of a crime when they grow up and decreases the likelihood the child will go to college or find

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[9] https://ccjs.umd.edu/sites/ccjs.umd.edu/files/pubs/COMPLIANT3%20-%20Police%20Officers%20in%20Schools.pdf.
[10] https://link.springer.com/content/pdf/10.1007/s40894-015-0006-8.pdf.

a well-paying job. Miles Davison *et al.*, *School Discipline and Racial Disparities in Early Adulthood*, 51 Ed. Researcher 173 (Apr. 2022).[11] School discipline accounts for up to 30 percent of the difference in good outcomes for Black versus white children. *Id*.

Having a police officer around also dramatically increases how often students are arrested. In schools with dedicated officers, students are arrested nearly three times more, with the difference primarily due to arrests for forms of disorderly conduct. Education and Civil Rights Alliance, Police in Schools: a Background Paper 3 (2022).[12] Another study found that officers in schools have the most substantial impact on referrals of low-level offenses, doubling the arrest rates for fistfights, petty theft, and threats made without a weapon. Jason Nance, *Students, Police, and the School-To-Prison Pipeline*, 93 Wash. U. L. Rev. 919, 967 (2016). The presence of police is also a determining factor in high arrest rates for particularly young students. In 2018 alone more than 3,500 children under the age of 10 were arrested, with most arrests happening in schools. Bill Hutchison, *More Than 30,000 Children Under Age 10 Have Been Arrested in the US Since 2013:*

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[11] https://journals.sagepub.com/doi/epub/10.3102/0013189X211061732.
[12] https://youthlaw.org/resources/police-schools-background-paper.

FBI, ABC News (Oct. 1, 2019).[13] Very young Black girls are disproportionately targeted for both searches and aggressive arrests by SROs. Erica Green, Mark Walker & Eliza Shapiro, *A Battle for the Souls of Black Girls*, N.Y. Times (Oct. 1, 2020) (reporting disproportionate discipline and arrest rates for Black girls, and highlighting cases of 6-12 year old girls being handcuffed in school).[14] Because students, including very young students, are regularly arrested in school, schools are an environment where strong Fourth Amendment protections are increasingly necessary.

The presence of police in schools also conclusively makes students feel less safe. Across the board, the presence of security measures like metal detectors and police officers tends to make students more stressed and report feeling equally or less safe at school. Nat. Assn. of School Psychologists, School Security Measures and Their Impact on Students 2 (2018).[15] That fear impacts the school learning environment as well, especially for Black and brown students. *Id*. Stress from regular police contact along with increased rates of suspension and expulsion when

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[13] https://abcnews.go.com/US/30000-children-age-10-arrested-us-2013-fbi/story?id=65798787.
[14] https://www.nytimes.com/2020/10/01/us/politics/black-girls-school-discipline.html.
[15] PDF available for download at: https://www.nasponline.org/Documents/Research and Policy/Research Center/School_Security_Measures_Impact.pdf.

officers are involved lead to worse learning outcomes for students, with a disproportionate impact on Black and Brown students. *See* Connery, *supra.*

The presence of police in schools has a demonstrated disproportionate impact on Black children in particular, increasing rates of in-school discipline, arrest, and leading to overall worse life outcomes. Across the board, Black children are far more likely than white children to experience suspensions (~3x more), expulsions (~2.5x), referrals to law-enforcement (~3x), and in-school arrests (~3.5). Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions Are Associated with County-Level Rates of Racial Bias*, 116 PNAS 8255, 8256 (Apr. 2, 2019).[16] The magnitude of that disparity has increased dramatically in the last half century. Between 1972 and 2013, out-of-school suspension rates for white students dropped from 6 percent to 3.4 percent of students, while Black students saw increased rates from 11.8 percent to 15 percent of students being suspended. Emily Peterson, *Racial Inequality in Public School Discipline for Black Students in the United States*, BYU (Sept. 2021).[17] The presence of SROs is one of the most significant factors driving diverging outcomes for Black and white students. *Id*.; Amanda Merkwae, *Schooling the Police: Race,*

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[16] https://www.pnas.org/doi/10.1073/pnas.1808307116.
[17] https://ballardbrief.byu.edu/issue-briefs/racial-inequality-in-public-school-discipline-for-black-students-in-the-united-states.

Disability, and the Conduct of School Resource Officers, 21 Mich. J. Race & L. 147, 168–71 (2015).[18]

Once Black children reach the criminal justice system, they receive substantially harsher penalties, magnifying the harm caused by increased arrest rates. Black kids in the criminal justice system today are up to 18 times more likely to be charged as adults than white children. Eileen Poe-Yamagata & Michael A. Jones, National Council on Crime and Delinquency, And Justice for Some 27–30 (2000);[19] Kenneth J. Cooper, *Despite Law on Racial Disparities, Black Teens Are Overly Tried as Adults*, NPR (Mar. 12, 2019) (finding disproportionate charging practices treating Black teens as adults in St. Louis, MO, and that disparate treatment increased from 2000 to 2011);[20] Dwayne Fatheree, *Criminal Injustice: States Unfairly Prosecute Children as Adults*, Southern Poverty Law Center (Jan. 21, 2022) (finding substantial racial disparities in prosecution of children as adults in Florida).[21] Children charged as adults receive longer sentences, go to adult prison, are more likely to reoffend when released, and are more likely to commit

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[18] https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1053&context=mjrl
[19] Available online at: https://files.eric.ed.gov/fulltext/ED442882.pdf.
[20] https://news.stlpublicradio.org/government-politics-issues/2019-03-12/despite-law-on-racial-disparities-black-teens-are-overly-tried-as-adults.
[21] https://www.splcenter.org/news/2022/01/21/criminal-injustice-states-unfairly-prosecute-children-adults.

suicide. Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?*, ABA (Oct. 3, 2016).[22]

The prevalence of teen sexting and ubiquity of teens using phones has the potential to greatly exacerbate some of the worst disparate treatment of Black teens. At least 23 states use child pornography laws to prosecute teenagers. Victor Strasburger, Harry Zimmerman & Jeff Temple, *Teenagers, Sexting, and the Law*, 143 Pediatrics 1, 1 (2019).[23] Sexting creates indelible digital evidence of technically serious crimes, possession of CSAM, exploitation of minors etc. The end result of allowing officers unfettered access to students' phones is increasing criminalization of students, with the impact falling most heavily on Black children.

As this court balances the interests of law enforcement in warrantless phone searches with the privacy interests of children in the contents of their cell phones, it should weigh heavily the negative impacts of student-police interactions. Enforcing a warrant requirement will not prevent officers from addressing serious crimes in schools, but it will restrain unchecked fishing expeditions and limit disparate impacts by reducing officers' discretion to perform searches for minor

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[22] https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/.

[23] https://publications.aap.org/pediatrics/article/143/5/e20183183/37112/Teenagers-Sexting-and-the-Law?.

offenses. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Mahanoy Area School District v. B.L. by and through Levy*, 594 U.S. ___, 141 S.Ct. 2038, 2049 n.1 (2021) (Alito, J., concurring) (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)). The same is true of their reasonable expectation of privacy. *T.L.O.*, 469 at 337–38. The Court has emphasized that "[s]choolchildren have legitimate expectations of privacy. They may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items by bringing them onto school grounds." *Id.* at 339.

Applying the cell phone privacy balancing test from *Riley* and the limited warrant exception for school searches from *T.L.O.* results in a clear rule: school administrators may only search student phones for disciplinary purposes, and even then in limited circumstances. Any search of a cell phone for law enforcement purposes, whether conducted by police officers or school administrators, requires a warrant or genuine exigency. Students have the highest expectation of privacy in the contents of their cellphones: electronic devices, often password-locked and encrypted, that contain encyclopedic records of the most intimate details of their lives. *Riley*, 573 U.S. at 394–95. School administrators meanwhile have limited if any legitimate interest in straying beyond traditional roles as educators to help law

enforcement officers shortcut the normal investigative process. When schools stray beyond that role, the weight of the evidence demonstrates that student safety, well-being, and the effectiveness of the educational environment all suffer. Warrantless searches of student phones for law enforcement purposes are unreasonable.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to reverse the district court's grant of summary judgment in favor of Defendants.

Date: June 20, 2024

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CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(4) because this brief contains 5491 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

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Signature: *<u>/s/ Megan Iorio</u>* **Date:** June 20, 2024

CERTIFICATE OF SERVICE

I certify that on May 18, 2023, this brief was e-filed through the CM/ECF System of the U.S. Court of Appeals for the Fourth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: June 20, 2024

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