CASE NO. 18-10231-EE

IN UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD D. JACKSON and LORETTA S. JACKSON, and
E.D.J., a minor child, by and through her parents,
RICHARD D. JACKSON and LORETTA S. JACKSON,

Plaintiffs-Appellants,

vs.

DAVID McCURRY, in his individual and official
capacities, and SANDI D. VELIZ, BO OATES,
JOSH KEMP, and RYAN SMITH, in their individual capacities,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

BRIEF OF PLAINTIFFS-APPELLANTS

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Appeal No. 18-10231
Richard D. Jackson, *et al.* v. David McCurry *et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants, Richard D. Jackson and Loretta S. Jackson, and E.D.J., a minor child, by and through her parents, Richard D. Jackson and Loretta S. Jackson, by counsel and pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-1, 26.1-2(b) and 28-1(b), respectfully submits a complete list of all persons and entities known to have an interest in the outcome of this appeal:

1. Association of County Commissioners of Georgia - Interlock Risk Management Agency (Insurer for Defendant-Appellee Ryan Smith)
2. Cason, David S. (attorney)
3. Chattahoochee County School District
4. Coleman, Franklin T. (attorney)
5. E.B.J., Plaintiff-Appellant
6. Georgia School Boards Association Risk Management Fund (Insurer for Defendant-Appellees McCurry, Veliz, Oates and Kemp)
7. Hooks, Hayden D. (attorney)
8. Jackson, Loretta S., Plaintiff-Appellant
9. Jackson, Richard D., Plaintiff-Appellant

Appeal No. 18-10231-EE
Richard D. Jackson, *et al.* v. David McCurry *et al.*

10. Kemp, Josh, Defendant-Appellee

11. Land, Clay D., District Court Judge

12. McCurry, David, Defendant-Appellee

13. Oates, Bo, Defendant-Appellee

14. Perry & Walters, LLP (Attorneys)

15. Smith, Ryan, Defendant-Appellee

16. Togut, Torin D. (attorney)

17. Veliz, Sandi D., Defendant-Appellee

18. Waymire, Jason C. (attorney)

19. Williams, Morris & Waymire, LLC (attorneys)

20. Williams, Terry E. (attorney)

This 5th day of March, 2018

BY: /s/ Torin D. /Togut
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants, respectfully request this Court grant oral argument for this appeal. The Court's decisional process would be enhanced and clarified by oral presentation of two issues of first impression. The first issue is whether the search of E.D.J.'s cell phone was conducted in accordance with the United States Supreme Court's decision in New Jersey v. T.L.O. , 469 U.S. 325 (1985). There is also a question whether school administrators must consider a heightened privacy interest when searching a student's cell phone in view of Riley v. California, __U.S.__, 134 S.Ct. 2473 (2014). The second issue is whether Superintendent McCurry's use of his unbridled discretion to prohibit Richard D. Jackson from speaking to the school board about the search of E.D.J.'s cell phone because he threatened to sue the school system constituted a prior restraint on his free speech and was based on his viewpoint.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

Plaintiffs-Appellants Richard D. Jackson and Loretta S. Jackson, and E.D.J., a minor child, by and through her parents, Richard D. Jackson, filed a civil rights action pursuant to 42 U.S.C. § 1983 alleging that Defendants-Appellees David McCurry, Sandi D. Veliz, Bo Oates, Josh Kemp, and Ryan Smith violated their rights under the First and Fourth Amendments to the United States Constitution and under pendent state court claims. The district court had subject-matter jurisdiction of this action under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). The district court granted summary judgment for Defendants-Appellees on all issues and claims which provides this Court with appellate jurisdiction under 28 U.S.C. § 1291.

The district court entered an order granting summary judgment to all Defendants-Appellees on December 22, 2017. Plaintiffs-Appellants filed a notice of appeal within thirty (30) days on January 19, 2018 under Fed. R. App. P. 4(a)(1). This appeal is from a final order that disposed of all of the parties' claims and defenses.

STATEMENT OF ISSUES

1.Whether the district court erred in ruling Bo Oates ' search E.D.J.'s cell phone was justified at its inception due to reasonable suspicion that the search would reveal a violation of the rules of the school under New Jersey v. T.L.O.?

2. Whether the district court erred in ruling Bo Oates' search of E.D.J.'s cell phone was permissible in its scope and not excessively intrusive in light of the age and sex of E.D.J. and the nature of the infraction under New Jersey v. T.L.O. ?

3.Whether the district court erred in ruling a school official was entitled qualified immunity for searching E.D.J.'s cell phone in light of New Jersey v. T.L.O. and Riley v. California?

4. Whether the district court erred in ruling Superintendent McCurry was entitled to qualified immunity for prohibiting Richard D. Jackson from exercising his First Amendment right to speak to the school board after he threatened to sue the board?

5. Whether the district court erred in ruling Superintendent David McCurry was entitled to qualified immunity for prohibiting Richard D. Jackson from exercising his First Amendment right to communicate with teachers, coaches and students off school property?

6. Whether the district court erred in ruling that Smith's seizure of R. Jackson was justified at its inception, and whether the seizure was reasonably related in its scope

to the circumstances which justified the interference under the Fourth Amendment?

7. Whether the district court erred in granting qualified immunity to Smith, Veliz, and Kemp on the basis they had a reasonable suspicion to seize R. Jackson because he allegedly committed criminal trespass under Georgia law?

STATEMENT OF CASE

Course of Proceeding and Disposition in the District Court Below

Plaintiffs-Appellants brought a civil rights action under 42 U.S.C. § 1983 against Defendants-Appellees for violation of their rights under the First and Fourth Amendments to the United States Constitution and Georgia state-law claims for monetary relief.[1] (Doc 1- Pgs. 1-36). The Defendants-Appellees filed answers to the complaint and raised several affirmative defenses, including qualified immunity and and official immunity. (Doc 12 - Pgs 1-26 & Doc 13 - Pgs 1-25). After the parties completed discovery, Defendants-Appellees filed motions and briefs in support of summary judgment, and statements of material facts and conclusions of law in support of summary judgment on all claims. (Doc 17 - Pgs 1-17 - attachments #1 & #2; Doc 19 - Pgs 1-20 - attachments #1 & 2). Plaintiffs-Appellants filed responses, briefs, and statements of material facts in opposition to the motions for summary judgment. (Doc 29 - Pgs 1-24 - attachment #1 & 2; Doc 33 - Pgs 1-24 attachments #1 & #2). The Defendants-Appellees filed reply briefs in support of their motions for summary judgment. (Doc 35 - Pgs 1-13; Doc 36 - Pgs 1-11).

[1] Plaintiffs are not appealing the district court's entry of summary judgment in favor of the Defendants on the Georgia state-law claims.

On December 22, 2018, the district court entered an order and judgment granting summary judgment on all claims to Defendants-Appellees. (Doc 39 - Pgs 1-35; 40-1). On January 20, 2018, Plaintiffs-Appellants filed a notice of appeal from the district court's order granting summary judgment. (Doc 41 - Pgs 1-4).

STATEMENT OF FACTS

Jackson Family Background

In July 2011, Richard D. Jackson (hereinafter "R. Jackson"), his wife Loretta Jackson (hereinafter "L. Jackson"), and their daughter E.D.J. moved from a military base at Anchorage, Alaska to the Army base at Ft. Benning, Georgia. (Doc 21 - Pgs 10:13-14, 23-25, 1:1-5; 14:4-5; Doc 22 - Pgs 11:1-4; 12:18-25; 13:1-4). R. Jackson, who is fifteen year army veteran, served on armed combat tours in Panama, Iraq, Oman, Somalia, and Afghanistan. (Doc 21 - Pgs 13:1-5; 96:2-17). He is classified as Sergeant First Class and an ASE Master Certified Technician with the Path Finder School at Ft. Benning, Georgia. (Doc 21 - Pgs 13:8-24; 14:1-6). Upon moving to Ft. Benning, Georgia, E.D.J. enrolled in the Chattahoochee County School System (CCSS). (Doc. 25 at P-Ex. 8). The CCSS serves about 800 students, including students of military families living at Ft. Benning, Georgia. (Doc 24 - Pgs 4:19-25;16:5-15). The majority of students attending Chattahoochee County Middle/High School (CCMHS) are military dependents. (Doc 24 - Pg 16:13-16).

CCSS 2016-17 School Year

For the 2016-17 school year, E.D.J. was enrolled as a 12th grade senior at CCMHS. (Doc 21 - Pg. 18:14-19; Doc 23 - Pgs 11:6-12; Doc 25 - P-Ex. 8). At the beginning of the school year, E.D.J. experienced problems with M.G., who was a senior female student she had known since her freshman year. (Doc 23 - Pg 15:1-10). E.D.J. believed the problem arose because other students made false statements that she was saying bad things about M.G. (Doc 23 - Pg 16:8-11). In August 2017, M.G. threatened to beat up E.D.J. if she continued talking bad about her. (Doc 23 - Pgs 16:13-16; 17-1-10; 20:19-25). Thereafter, E.D.J. learned from a friend that M.G. believed she was texting bad things about her. (Doc 23 - Pg 18:7-10). M.G. continued to torment E.D.J. At the school. (Doc 23 - Pg 21:5-20). E.D.J. texted her mother because she did not feel comfortable attending volleyball practice that day because something might happen in the locker room with M.G. (Doc. 23 - Pg 21:5-20).

L. Jackson suggested to E.D.J. that she should contact an adult at school about M.G.'s threats to her. (Doc 23 - Pg 19:17-25). When E.D.J. went back to school, she talked to Ryan Smith, a CCSS Security Resource Officer (SRO), and wrote a statement for him. (Doc 23 - Pg 20:1-6; 20:12-24 & D-1; Doc 28 - Pg 14:1-20). Smith also told E.D.J. that he would talk to Principal Sandi Veliz, Assistant Principal Bo Oates, and Administrative Assistant Josh Kemp about threats made by M.G.

(Doc 23 - Pg 20:16-17; Doc 25 - Pgs 13:25, 14:1-4; Doc 27 - Pg13:5-13; Doc 26 - Pg 16:8-10). E.D.J. also told volley ball coach Kimberly Jackson regarding her problem with M.G. (Doc 23 - Pgs 20:7-8; 22:7-12).

Kemp's Investigation of Text Messages

Kemp talked to E.D.J. about her problem with M.G. and decided to conduct an investigation. (Doc 26 - Pgs 22:6-25; 23:9-18; Doc 25 at Ex. 5). Kemp contacted M.G. and other students that knew E.D.J. (Doc 25 at P-Ex. 6; Doc 26 - Pg 25:1-9). Kemp also spoke to a student nicknamed "Bear", who described the situation between E.D.J. and M.G. as "drama." (Doc 26 - Pg 26:15-25). Kemp stated he was not sure what was happening, but there were text messages between students "Nephatali a/k/a "Bear", E.D.J., Arianna, and M.G." (Doc 26 - Pgs 19:14-25; 25:1-25; 26:1-25; 27:21-25; 28:1-10; 29:18-25; 40:4-11). M.G. allegedly told Kemp that E.D.J. was running her mouth and making fun of her for not making the volleyball team. (Doc 26 - Pg 25:10-14). Kemp and Oates stated this type of rivalry or drama between female students is common in high school. (Doc 26 - Pgs 25-22; 26-13-14; 28:22-25; 29:2-4; Doc 27 - Pgs 29:18-25; 30:1-2).

Oates' Search of E.D. J.'s Cell Phone in Kemp's Office

On August 16, 2016, Kemp called over the intercom for E.D.J to come to his office regarding the situation between her and M.G. (Doc 23 - Pg 23:11-15; Doc 26 -

Pg 30:4-18; Doc 27 - Pg 17:11-20). Oates just happened to be in Kemp's office at this time; there was no plan for him to be there. (Doc 26 - Pg 31:2-17). Kemp asked E.D.J. about M.G. and the drama between them. (Doc 26 - Pg 33:2-18). E.D.J. denied sending any text messages about M.G. to other students. (Doc 26 - Pg 33:21-22). Based on what Oates learned from Kemp, he requested E.D.J to give him her cell phone and unlock it. (Doc 23 - Pgs 33:25; 34-2-3; Doc 26 - Pg 33-4-6). Kemp was surprised with this request as he had no idea Oates planned to ask for E.D.J.'s cell phone. (Doc 26 - Pg 26:4-5). At this time, Oates was familiar with the school system's protocol to search a student's personal belongings such as a cell phone. (Doc 24 - Pg 17:2-18, P-Ex. 6 at Pg 52). Oates relied entirely on what Kemp told him as reasonable suspicion to search E.D.J.'s cell phone prior to executing the search. (Doc 37 - Pg 26:16-22). Oates knew what reasonable suspicion meant as he had taken law classes that discussed the Supreme Court's standard in New Jersey v. T.L.O. for searching a student's property. (Doc 24 - Pgs 19:7-25; 20:2-19; 21:2-7; Doc 27 - Pg 23:9-14). Oates knew that confidential and private information is usually kept on cell phones. (Doc 27 - Pg 30:16-22).

Kemp did not provide Oates with any information that E.D.J. committed any violation of any school rule when he searched her cell phone. (Doc 27 - Pg 29:18-22). Rather Kemp told Oates that it was more like "just drama" that was going on between

two students. (Doc 27 - Pg 29:18-22). Oates admitted the text messaging among students was "cell phone drama," and it was like going down a lot of rabbit holes. (Doc 27 - Pg 30:2-12). Kemp said, "[I]f there is some type of information on the phone that can clear up a case. . . it's not out of the ordinary to ask to see it." (Doc 26 - Pg 34:13-16). Oates added it was fairly typical for them to solve rumors "through social media and things like that" by searching a student's cell phone. (Doc 26 - Pg 27:8-13).

Oates looked at the text messages on E.D.J's cell phone without her permission. (Doc 27 - Pg 35:3-5; Doc 34 at ¶2). While reviewing the text messages, Oates specifically asked E.D.J. about persons listed as her friends and related nicknames or emojis. (Doc 23 - Pg 26:10-24; Doc 26 - Pg 37:2-4). Oates said he wanted to look at Neftali's message first to make sure E.D.J. was not sending text messages about M.G. (Doc 27 - Pgs 26:10-25; 27:1-24). But after Oates scrolled through Nefatali's messages, he further went through E.D.J's personal and private text messages. (Doc 27 - Pg 28:3-10). Oates and Kemp asked E.D.J. about personal messages regarding an ex-boyfriend and best friend. (Doc 23 - Pgs 28:3-10; 31:2-25). They went through E.D.J.'s messages with her mother, sister, and grandmother. (Doc 23 - Pgs 28:9-10; 29:1-8). They specifically asked E.D.J. why she texted her best friend about M.G.'s threats. (Doc 23 - Pg 29:12-19). They asked E.D.J.'s about

private messages to her mother. (Doc 23 - Pgs 29:24-25; 30:1-11; 18-25). E.D.J. felt violated and embarrassed when Oates and Kemp were going through her personal and confidential text messages. (Doc 23 - Pgs 77:18-25; 78:6-15). She felt her privacy was invaded. (Doc 23 - Pg 78:2-4). E.D.J. said the search of her messages "was beyond what they were looking for. " (Doc 23 - Pg 77:21-24).

Oates told Kemp he did not see that E.D.J. had done anything wrong and gave the cell phone back to her. (Doc 27 - Pgs 21:20-25; 22:1-2). E.D.J. was not disciplined for any violation of the student code of conduct. (Doc 27 - Pg 28:3-10). Kemp admitted only E.D.J.'s cell phone was searched and not those of other students. (Doc 26 - Pg 41:3-7; Doc 27 - Pgs 27:14-25; 28:1). Later that day, E.D.J. called her father about Oates' search of her cell phone. (Doc 23 - Pg 45:7-12). R. Jackson then called Veliz. (Doc 21 - Pg 37:16-22). He was upset Oates searched E.D.J.'s cell phone and believed he violated her Fourth Amendment rights. (Doc 25 - Pgs 38:22-25; 39:2-5 & P-Ex. 1).

R. Jackson's Meeting with Volleyball Coaches on August 19, 2016

On or about August 19, 2016, R. Jackson met volleyball coaches Raynesha Harris and Kimberly Jackson in the gym at the high school. (Doc 21 - Pg 22:11-12). R. Jackson wanted to speak to the coaches about his daughter's safety at school. (Doc 21 - Pgs 27:25; 28:1-6). He also asked the coaches what they knew about the

search of E.D.J.'s cell phone. (Doc 21- Pg 32:12-18). He told Kimberly Jackson the school system had violated E.D.J.'s rights and he might sue. (Doc 21 - Pgs 32:20-25; 33-1). He also told the coaches that Oates had intimidated E.D.J. and violated her constitutional rights. (Doc 21 - Pgs 33:11-25; 34:18-23; Doc 21 - Pgs 8:22-25; 39:1-4; 40:11-18). He denied making any threats or acting aggressively toward the volleyball coaches. (Doc 21 - Pgs 28:7-10; 96:23-25; 97:1-18). He denied telling the coaches that he would show Oates what intimidation meant. (Doc 21 - Pg 33:15-19). Oates said R. Jackson called him and threatened to have his job and sue him. (Doc 27 - Pg 33:5-25). But Oates stated R. Jackson did not physically threaten him in any manner. (Doc 27 - Pg 34:7-14).

R. Jackson's Meeting with Superintendent McCurry on August 22, 2016

On or about August 22, 2016, R. Jackson went to the school to speak to Veliz, but he was met at the door by David McCurry, Superintendent of CCSS. (Doc 21 - Pg 24:23-25; Doc 24 - Pg 14:7-11; 52:22-25; 53:2-12). McCurry surmised that R. Jackson came to the school to speak to Oates, but he would not allow it. (Doc 24 - Pg 53:13-24). McCurry said the school board attorney instructed him not to communicate with R. Jackson, because he had threatened legal action against the system. (Doc 24 - Pgs 53:24-25; 54:2-13).

McCurry Prohibited R. Jackson from Speaking to School Board

R. Jackson wanted to speak to the school board because Oates had searched his daughter's cell phone and violated her rights. (Doc 21 - Pg 47:12-13). Consequently, R. Jackson contacted McCurry so that he could speak to the school board.[2] (Doc 21 - Pg 47:19-22). McCurry told R. Jackson the he could not attend or speak at board meetings about this matter. (Doc 21 - Pg 47:14-18). McCurry denied R. Jackson's request to speak to the board because he had threatened litigation. (Doc 21 - Pgs 47:23-25; 48:5-10; Doc 24 - Pgs 54:24-25; 55:3-5).

Superintendent McCurry's Letter of August 26, 2016 to R. Jackson

On August 26, 2016, McCurry sent a letter to R. Jackson because he threatened legal action against the school system. (Doc 24 - Pgs 42:11-19; 54:4-25; P-Ex.3). The letter prohibited R. Jackson from making any unauthorized appearances at his daughter's school or at any extracurricular activity except at her volleyball games. (Doc 24 - Pgs 55:21-25; 56:22-25; 57:2-19). The letter prohibited R. Jackson from attempting to contact or talk with teachers, coaches and students. (Doc 24 - Pg 57:20-25). McCurry later admitted the letter should have stated R. Jackson had

[2] According to the system's policy, any citizen complaint that could not be resolved by the administration had to be submitted to the Superintendent and then request a topic that they wanted to speak to the board. (Doc 24 - Pg 7:2-19 & P-Ex. 6 at Pg 3).

permission to communicate with teachers, coaches and students outside of school. (Doc 24 - Pgs 58:10-25; 59:2-8).

Events at Senior Night on October 4, 2016

On October 4, 2017, R. Jackson and his wife attended senior night at the high school to watch E.D.J. participate in volleyball games. (Doc 21 - Pg 23:2-8; Doc 22 - Pg 34:18-24; Doc 23 - Pgs 52:20-23; 53:15-22). R. Jackson and his wife complied with McCurry's letter dated August 24, 2016 and sat in the designated parent's area on the third row of the bleacher seats. (Doc 21 - Pg 51:14-19; Doc 22 - Pg 4:19-24). During the evening's volleyball games, Smith, who had been sitting next to Kemp for about thirty minutes, told Kemp he did not think R. Jackson was supposed to be at the games. (Doc 26 - Pgs 51:13-25; 52:25).

Kemp decided to call Veliz and inform her R. Jackson was at the games, and whether he should ask him to leave? (Doc 26 - Pg 52:21-25; Doc 25 - Pgs 57-25; 58:1-5). Veliz told Kemp that things had been pretty quiet and she did not want to unnecessarily remove R. Jackson and make a scene. (Doc 25 - Pgs 58:9-15; 59:6-7). Kemp mentioned he believed R. Jackson had threatened the school's coaches and there was a ban letter. (Doc 26 - Pg 54:6-18). Veliz then called McCurry who left the decision to remove R. Jackson from the school to her. (Doc 24 - Pgs 63:4-12, 24-25, 64:2-3; Doc 25 - Pgs 58:20-22; 59:18-22, 25). When McCurry made this decision,

he failed to consider the letter dated August 26, 2016, permitting R. Jackson to attend E.D.J.'s volley ball games. (Doc 24 - Pg 64:9-16). After R. Jackson's removal, Veliz called McCurry back and he remembered the letter that allowed R. Jackson to attend the volleyball games. McCurry ultimately a mistake was made in relation to R. Jackson's removal from school. (Doc 24 - Pgs 64:12-13; 65:16-20).

Veliz next removed R. Jackson due to allegations he upset the volley ball coaches and in response to the ban letter. (Doc 25 - Pgs 59:9-11; 60:14-20). Veliz did not ask Kemp for Smith to be involved in removing R. Jackson from the school. (Doc 25 - Pg 68:16-22). Veliz said the procedure for removing R. Jackson involved walking or following him off the premises. (Doc 25 - Pg 68:3-8). Veliz specifically told Kemp not to do anything with R. Jackson until senior night activity was over and not to make a scene (Doc 25 - Pgs 67:21-25; 68:9-15). Nevertheless, Kemp and Smith did not wait until the end of senior night to remove R. Jackson. During intermission before the next volley ball game, Smith walked up to R. Jackson and pointed at him in the bleachers to come to him. (Doc 21- Pgs 54:8-21; 70:1-6; Doc 22 - Pg 35:12-19; 36-2-7). R. Jackson fully cooperated with his command. (Doc 21 - Pg 55:16-25; Doc. 26 - Pg 58:15-24; Doc 28 - Pgs 34:8-17; 42:21-25). Smith then grabbed R. Jackson's right arm with a hard, strong grip, and almost immediately placed his hand on his pistol. (Doc 21 - Pgs 54:23-25; 56:12-17; 70:14-23; 72:4-7;

Doc 22 - Pg 37:5-10). R. Jackson objected to Deputy Smith touching him. (Doc 21 - Pg 71:15-25). Smith assumed a threatening pose toward R. Jackson. (Doc 21 - Pg. 92:8-12). R. Jackson asked Smith to remove his hand from his pistol, which he ignored. (Doc 21 - Pgs 55:7-16; 56:8-9). Smith told R. Jackson to leave the school. (Doc 21 - Pg 75:23-25).

R. Jackson, Smith, and Kemp walked to the concession area where they had a discussion. (Doc 21 - Pgs 72:8-25; 73:1-25.). R. Jackson told Smith there was a letter from the Superintendent allowing his attendance at his daughter's volleyball games. (Doc 21 - Pg 73:19-21). Smith said he did not care because Kemp did not want him at the school. (Doc 21 - Pgs 73:6-25; 74:1). When they were outside of the school, Smith released R. Jackson's arm. (Doc 21 - Pgs 74:2-3; 104:3-5). Later that evening, Veliz requested Kemp to retrieve McCurry's letter to R. Jackson from her office. (Doc 24 - Pg 65:19-25). After Kemp retrieved and read the letter to Veliz, she realized R. Jackson could attend volleyball games and she made a mistake. (Doc 24 - Pgs 65:19-25; 66:1-9).

STANDARD OF REVIEW

This Court reviews *de novo* the district court's disposition of a summary judgment motion based on qualified immunity, resolving all issues of material fact and reasonable inferences in light most favorable to Plaintiffs-Appellants, and then whether Defendants-Appellees are entitled to qualified immunity under that version of the facts. Tolan v. Cotton, ___U.S.___, 134 S.Ct. 1861, 1866 (2014); Wate v. Kubler, 839 F. 3d 1012, 1018 (11th Cir. 2016); Jackson v. Humphrey, 776 F. 3d 1232, 1238 (11th Cir. 2015). This Court must resolve factual disputes in favor of Plaintiffs-Appellants and decide whether Defendants-Appellees are entitled to qualified immunity under plaintiffs' version of the facts. Dukes v. Deaton, 852 F. 3d 1035, 1042 (11th Cir. 2017); Montero v. Nandlal, 597 Fed. Appx. 1021, 1024 (11th Cir. 2014).

Summary judgment is appropriate where the pleadings, discovery materials on file, and any affidavits demonstrate that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Hammett v. Paulding Cty., Ga., 875 F. 3d 1036, 1048 (11th Cir. 2017).

SUMMARY OF ARGUMENT

On August 16, 2016, Kemp, an administrative assistant, investigated cell phone text messages between high school students. Kemp learned E.D.J, a high school senior, may have been sending teasing text messages to another student. On August 24, 2017, Kemp summoned E.D.J. to his office. She denied sending such messages to her friends. Nonetheless, AP Oates, who was in Kemp's office, decided to search E.D.J.'s cell phone without her permission. Oates scrolled through her private and confidential messages involving fellow students, her boyfriend, ex-boyfriend, best friend, mother, and grandmother. Oates found no incriminating messages and gave back her cell phone. Oates' search of her cell phone violated the Fourth Amendment as it was unreasonable at its inception, and there were no reasonable grounds for suspecting the search would reveal E.D.J. violated the law or school rules. Oates' search of E.D.J.'s cell phone was impermissible in its scope and excessively intrusive in light of her age and sex. Because the search of E.D.J.'s cell phone violated clearly established law under New Jersey v. T.L.O. and Riley v. California, the district court erred in finding Oates was entitled to qualified immunity.

When R. Jackson learned Oates' searched his daughter's cell phone without her permission, he questioned E.D.J.'s volleyball coaches and called school officials. Due to Jackson's alleged instigation of a commotion at the school, Superintendent

McCurry wrote a ban letter banning R. Jackson from school grounds except for limited purposes such as attending E.D.J.'s volley ball games. McCurry prohibited Jackson from contacting coaches, students and teachers at school and outside of school. He also exercised unbridled discretion under school rules, prohibiting R. Jackson to speak at a board meetings regarding the search of E.D.J.'s cell phone because he allegedly threatened to sue the school system. The district court erred in granting qualified immunity to McCurry, because he exercised viewpoint and content-based discrimination that violated clearly established law under the First Amendment.

On October 4, 2017, R. Jackson and his wife watched E.D.J. play volleyball games on senior night. During the games, Smith told Kemp that R. Jackson should not be allowed to be on school property. Kemp called Veliz for direction whether to remove Jackson from school. Veliz told Kemp to remove R. Jackson from school but she did not look at the ban letter. She also told Kemp not to remove R Jackson until senior night activities had ended. Kemp and Smith did not wait. Smith removed R. Jackson from school property by grabbing his arm and threatening him by placing his hand on his pistol. Veliz, Kemp and Smith unlawfully seized R. Jackson in violation of the Fourth Amendment and they are not entitled to qualified immunity.

ARGUMENT AND CITATIONS OF AUTHORITY

I. ANALYSIS TO DETERMINE WHETHER McCURRY, VELIZ, OATS, KEMP AND SMITH ARE SHIELDED BY QUALIFIED IMMUNITY.

To be entitled to qualified immunity, a defendant must first establish he was acting within his discretion at the time of the challenged occurrence.[3] Jones v. Fransen 843 F. 3d 843, 851 (11th Cir. 2017). Once this is proven, the burden shifts to the plaintiff to establish that qualified immunity is not appropriate in accordance with a two-part inquiry. Roberts v. Spielman, 643 F. 3d 899, 904 (11th Cir. 2011). First, the Court must determine whether defendant's conduct toward plaintiff violated his constitutional rights. Id. To reach this decision, it must be based on "the plaintiff's version of the facts." Brand v. Casal, 877 F. 3d 1253, 1261 (11th Cir. 2017), citing Lee v. Ferraro, 284 F. 3d 1188, 1194 (11th Cir. 2002)(emphasis in original). The first prong also requires that district courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. Tolan, 134 S.Ct. at 1866; Palm Peach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F. 3d 1245, 1258 (11th Cir. 2015). Second, the Court asks whether the violation of plaintiff's rights was "clearly established" at the time of the alleged misconduct. Tolan, at 1866; Hope v. Pelzer,

[3] There is no dispute that Defendants-Appellees in this action were acting within the scope of their discretionary functions at the time of the challenged occurrences. (Doc 39 - Pg 12).

536 U.S. 730, 739 (2002). This two prong inquiry can be conducted in whatever order is deemed appropriate to the case. Grider v. City of Auburn, 618 F. 3d 1240, 1254 (11th Cir. 2010).

There are generally three ways to determine whether a governmental actor violated clearly established law. Gaines v. Wardynski, 871 F. 3d 1203, 1208 (11th Cir. 2017). First, the facts of the case should be viewed in light most favorable to a plaintiff, and then determine if there was "fair warning" to the actor that his conduct at issue violated a constitutional right. Jones, 857 F. 3d at 851. A constitutional right is clearly established if its contours are sufficiently clear that a reasonable government official would understand what he is doing violates that right. Saucier v. Katz, 533 U.S. 194, 201 (2001). Clearly established law is binding precedent decided by the Supreme Court, Eleventh Circuit, and to the highest state court (Supreme Court of Georgia). Barnes v. Zaccari, 669 F. 3d 1295, 1307 (11th Cir. 2012).

Second, there may be a general constitutional rule that is already identified in decisional law or applies with obvious clarity to the specific conduct in question, even though "the very action in question has [not] been previously held unlawful." Hope, 536 U.S. at 741, quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987). A plaintiff is not required to demonstrate that a case directly on point exists, but

existing precedent must have placed the statutory or constitutional question beyond debate. Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011). In other words, a plaintiff must show "[t]he reasoning though not the holding of the prior cases . . . send[s] the same message to reasonable [governmental actors] in novel factual situations." Mercado v. City of Orlando, 407 F. 3d 1152, 1159 (11th Cir. 2005)(citation and internal quotation marks omitted). Third, a plaintiff can demonstrate that a governmental actor's conduct may so obviously violate the constitution that prior case law is unnecessary. Loftus v. Clark-Moore, 690 F. 3d 1200, 1205 (11th Cir. 2012). This is a narrow category that encompasses those situations where a governmental actor's conduct so obviously lies at the very core of the constitution provision which prohibits that the unlawfulness of the conduct was readily apparent to the actor notwithstanding the lack of case law. Id. In all cases, "clearly established law" should not be defined "at a high level of generality" and must be "particularized to the facts of the case." White v. Pauly, ___U.S.___, 137 S.Ct. 548, 552 (2017).[4]

II. T.L.O. AND THE FOURTH AMENDMENT PROTECTS STUDENTS FROM UNWARRANTED SEARCHES BY SCHOOL OFFICIALS.

The Fourth Amendment invokes protection for students from unconstitutional

[4] See Ziglar v. B. Abbasi, __U.S.__, 137 S.Ct. 1843, 1871-1872 (2017)(J. Thomas, C., in a concurring opinion, questioned whether qualified immunity jurisprudence should be reconsidered).

searches by school officials. Veronica Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995); New Jersey v. T.L.O, 469 U.S. 325, 334 (1984). There must be reasonable suspicion for school officials to determine the legality of a school administrator's search of a student. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 370 (2009)(reasonable suspicion can be described as a moderate chance of finding evidence of wrongdoing); D.H. v. Clayton Cnty. Sch. Dist., 830 F. 3d 1306, 1313 (11th Cir. 2016)(school officials must have reasonable grounds for suspecting a student is guilty of a violation of school rules). T.L.O. established a two-prong inquiry to determine the legality of a school official's search of a student. First, the court must find whether the action [search] was justified at its inception; and second, "whether the search actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." Id., 469 U.S. at 341-342. "Such a search will be permissible in its scope when the measures adopted are reasonably related to objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Id., 469 U.S. at 342.

A. Oates' Search Of E.D.J.'S Cell Phone Was Not Justified At Its Inception.

Viewing the facts and reasonable inferences in light most favorable to E.D.J., Oates' search of her cell phone was unjustified its inception. The underlying reason for Oates' search of E.D.J.'s cell phone was to clear up the "drama" between E.D.J.

and M.G. (Doc 26 - Pgs 25-22; 26-13-14; 28:22-25; 29:2-4; Doc 27 - Pgs 29:18-25; 30:1-2). Before calling E.D.J. into Kemp's office, neither one of them had articulated any reasonable suspicion that E.D.J. may have violated any law or school rule. Oates gave an after-the-fact justification for the search of E.D.J.'s cell phone - he surmised she could have been involved in "harassment." (Doc 27 - Pg 29:2-10). However, the school system's policy on harassment is inapplicable here as it addresses "any act of harassment of students by other students and employees based on race, color, national origin, sex, or disability" while at school (Doc 24 - Pg 17:2-18, P-Ex. 6 at Pgs 50-51). There is no evidence Kemp or Oates ever suspected E.D.J. of harassing M.G. because of her race, color, national origin, sex, or disability. Rather, the evidence reflects E.D.J. may have been teasing M.G. for not making the volley ball team. Such an allegation is not a violation of any school rule.

The district court reasoned Kemp received a tip from two students that E.D.J. was making fun about M.G. by sending text messages to other students. (Doc 39 - Page 16). Kemp received one tip from M.G. She allegedly told Kemp that E.D.J. was running her mouth and making fun of her for not making the volley ball team. (Doc 26 - Pg 25:10-14). M.G. may have made this allegation based on a rumor from what she heard from other students. This is consistent with Kemp's opinion there were text messages among students that constituted "drama." (Doc 26 - Pgs 19:14-

25, 25:1-25; 26:1-25, 27:21-25; 28:1-10; 29:18-25; 40:4-11). The other tip came from "Bear", who only confirmed there was "drama" between E.D.J. and M.G. (Doc 26 - Pg 26:15-25). The tips Kemp received lacked any corroboration and did not constitute reasonable suspicion to suspect E.D.J. violated any school rule. See e.g., Phaneuf v. Fraikin, 448 F.3d 591, 597-598 (2nd Cir. 2006)(school administrator did not properly investigate tip from any student or otherwise corroborate and substantiate it). Cf. C.B. v. ex rel. Bredding v. Driscoll, 82 F. 3d 383, 388(11th Cir. 1996)(tip provided reasonable suspicion to search student for drugs). M.G.'s and Bear's tips did not trigger reasonable suspicion that E.D.J. violated a school rule.

Furthermore, the district court erroneously determined E.D.J.'s alleged conduct could constitute harassment. (Doc 39 - Pg. 16). The district court's citation to the school system's handbook concerning "harassment" is in error. (Doc 24 - P-Ex. 6 at Pg 65). The system's rule on harassment is reflected in a different section of the student handbook. (Doc 24 - P-Ex. 6 at Pgs 50-51). The district court's citation to the rule on harassment is actually taken, in part, from a school policy definition of bullying. (Doc 24 - Ex. 6 at Pg 58). E.D.J. was never suspected of bullying M.G, and Oates had no basis to form a reasonable suspicion that E.D.J. had committed any violation of a school rule. T.L.O., 469 U.S. at 242(there must be reasonable grounds for suspecting the search will turn up evidence the student has or is violating either

the a law or a rule of the school) . The search of E.D.J.'s cell phone could not have shown she had violated a school rule because no harassment or bullying of M.G. was ever suspected. Oates' search of E.D.J.'s cell phone was not justified at its inception and violated the Fourth Amendment. Cf. G.C. v. Owensboro Pub. Sch., 711 F. 3d 623, 633 (6th Cir. 2013)(Court held there was no reasonable suspicion to search a student's cell phone for drug activity at its inception).

B. Oates' Search of E.D.J. 's Cell Phone Was Not Reasonably Related In Its Scope, And Was Excessively Intrusive In Light Of The Age And Sex Of The Student And The Nature Of The Infraction.

Oates had no reasonable suspicion to search E.D.J.'s cell phone solely to investigate "cell phone drama" occurring among high school students. (Doc 26 - Pgs 27:8-13;30:2-12; Doc 27 - Pg 30:2-12). Kemp did not search the other students' cell phones prior to searching E.D.J.'s (Doc 26 - Pg 41:3-7; Doc 27 - Pgs 27:14-25; 28:1). The school system had no policy that prohibited students from texting each other at school. (Doc 26 - Pg 28:11-14). The scope of Oates' search of E.D.J's cell phone was not reasonably related to a violation of a school rule, and his search of confidential and private text messages contained in E.D.J.'s cell phone was highly intrusive in light of her sex and age, especially when there was no school infraction. The intrusiveness of Oates's search of private text messages militates against his unsubstantiated reason for the search in the first place. The district's court erred in

ruling the scope of Oates' search of confidential and private text messages on E.D.J.'s cell phone did not violate the holding of T.L.O. and Riley v. California, __U.S.__, 134 S.Ct. 2473 (2014). (Doc 39 - Pgs 17-19).

The initial purpose of Oates' search of E.D.J.'s cell phone was to review Neftali's (or Bear's) text messages. (Doc 25 - Pg 26:10-17). Oates ventured far beyond the initial purpose of the search as he searched through E.D.J.'s private and personal cell phone text messages, while asking questions about these messages. (Doc 25 - Pg 28-3:28; 29:3-8; 30:12-25; 31:4-12; 78:8-15; Doc 34 - Pg 1 at ¶ 2). Oates searched through E.D.J.'s personal text messages of her boyfriend, ex-boyfriend, best friend, mother and grandmother, which greatly upset and embarrassed E.D.J. (Doc 23 - Pgs 77:18-25; 78:6-15). The district court, however, reasoned Oates had a valid reason to expand the search of E.D.J.'s cell phone to family and friends. [5] (Doc 39 - Pg 17). The district court found some of the recipients of the E.D.J.'s text messages were identified with an "emjois" instead of their names. (Doc 39 - Pg 17). The district court surmised E.D.J. could have disguised some of her contacts so that the

[5] The district court relied on the Ninth Circuit's decision United States v. Adjani, 452 F. 3d 1140, 1148-1150 (9th Cir. 2006), in part, to justify Oates' review of personal text messages in E.D.J.'s cell phone. Adjani is inopposite to this case because it involved a defendant's challenge to suppress incriminating emails from a computer obtained from a search warrant which allegedly lacked the specificity requirement for this warrant.

text messages could actually have been her's and other students' instead of her family and close friends. (Doc 39- Pg 17). This is purely speculation as there is no evidence whatsoever Oates thought E.D.J. was concealing the true identify of individuals she had allegedly texted or that she had concealed such identities to Oates. (Doc 23 - Pg 26:10-24; Doc 26 - Pg 37:2-4). The district court cannot draw unfavorable inferences against E.D.J. on a motion for summary judgment. Tolan, 134 S. Ct. at 1867-1868.

For teenagers, cell phones and texting messages are an integral part of their lives at home and at school.[6] E.D.J. was a seventeen (17) year old female at the time of the search. (Doc 25 - Pg 9:3-5; 40:1-10; Doc 25 - Pg 35:1-23 P-Ex. 8 at Pg 2). The search of her cell phone triggered heightened privacy interests. See Riley v. California, ___U.S.___, 134 S.Ct. 2488-2489 (2014)(cell phones implicate significant privacy concerns of individuals). In Riley, Chief Justice J. Roberts wrote "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'privacies of life'" Id. at 2494-2495, citing Boyd v. United States, 116 U.S. 616, 630 (1886). As a female

[6] As of 2013, 78% of teenagers had a cell phone, and 47% of those teenagers had cell phone which was considered a smartphone. A 2010 study on cell phone use at school showed 77% of teenage students reported they brought their cell phones to school each day. Of the teens that brought cell phones to school, 65% said they texted during class. See Ross Hoogstraten, *Implications on the Constitutionality of Student Cell Phone Searches Following Riley v. California*, 24 WM. & MARY BILL OF RTS. 879, 888 (March, 2016).

17-year old, it was mortifying to E.D.J. for Oates to search her private text messages with her boyfriend, ex-boyfriend, and best friend. (Doc 23 - Pgs 77:18-25; 78:2-15). E.D.J. disagrees with the district court's position that her sex was irrelevant to the search of her cell phone. (Doc. 39 - Pg 17). E.D.J. disagrees with the position that her A female student in twelfth grade is more likely than her male counterpart to be embarrassed when a male administrator demands she reveal private information contained on her cell phone.[7] The infraction allegedly committed by E.D.J. - which was sending text messages to her friends making fun of M.G. - did not warrant the excessively intrusive search of E.D.J.'s confidential and private text messages.

The district court rejected E.D.J.'s claim related to the Supreme Court's decision in Riley v. California as to privacy interests concerning the search of a student's call phone. (Doc 39 - Pgs 18-19). The district court opined Riley did not suggest the decision would apply to searches of student's cell phones or that T.L.O. should be overruled. (Doc 39 - Pg 19). Yet since Riley there is growing consensus in the legal community that privacy interests should be heightened when a school

[7] Wikipedia, Gender differences in social network service use available at https://en.wikipedia.org/wiki/Gender_differences_in_social_network_service_use (last visited March 2, 2018)(research, in part, shows that women are more protective of their personal information and more likely to have privacy profiles).

official searches a student's cell phone. Ross Hoogstraten, supra, 24 WM. & MARY BILL OF RTS., at 911 ([w]arrantless searches of a cell phone are unreasonable almost in every context because of the reasonable expectation of privacy a student has in the data on her cell phone. . . ."); Bernard James, *T.L.O. and Cell Phones: Student Privacy and Smart Devices After Riley v. California*, 101 IOWA L. REV. 343, 365 (Nov., 2015)(The more rigorous standards of T.L.O. apply to educators' decisions to confiscate and search the contents of students' cell phones incident to school discipline); Joanna Tudor, *Legal Implications of Using Digital Technology in Public Schools: Effects on Privacy*, 44 J.L.& EDUC. 287, 334-335 (Summer, 2015)(Riley requires that information on a cell phone is entitled to more protection than other items commonly found on students).[8] E.D.J. had a subjective expectation of privacy in her cell phone and society should be prepared to recognize that expectation as objectively reasonable. T.L.O., 469 U.S. at 337-338(search of child's closed purse or other bag on her person is a severe violation of subjective expectation of privacy); United States v. Jones, 184 Fed. Appx. 943, 947 (11th Cir. 2006)(whether society is willing to recognize an individual's expectation of privacy as legitimate is reviewed

[8] See also, Marc C. McAllister, *Rethinking Student Cell Phone Searches*, 121 PENN ST. L. REV. 309, 344-45 (Fall, 2016); Deanne Marie Mulhall, *Students' Fourth Amendment Rights Pertaining to Cell Phone Use in Light of G.C. Owensboro Public Schools*, 43 J. L. & EDUC. 279 (Spring, 2014).

de novo). For these reasons, E.D.J. had a expectation of privacy in her cell phone that should be protected under the Fourth Amendment.

C. Oates Is Not Shielded By Qualified Immunity For Searching E.D.J.'s Cell Phone.

The law was clearly established on August 16, 2016 to give Oates fair warning his search of E.D.J.'s cell phone and review of her private text messages was unjustified at its inception and unrelated to the search. T.L.O., 469 U.S. at 341-342. Viewing the facts most favorable to E.D.J., Oates had fair warning of the constitutional prohibitions contained in the T.L.O. decision because of his training on this subject matter. (Doc 24 - Pgs 19:7-25; T-20:2-19; 21:2-7; Doc. 27 - Pg 23:9-14). Oates had fair warning of the school policy on searches of student's property which mirrored, in part, the language of T.L.O. (Doc 24 - Pg 17:2-18, P-Ex. 6 at Pg 52). Oates had fair warning that privacy interests were at stake in searching a student's cell phones. (Doc 27 - Pg 30:16-22). Yet Oates searched E.D.J.'s cell regardless of her not violating school rules and simply because he wanted to clear up some "cell phone drama" among students. (Doc 24 - Pg 17:2-18, P-Ex. 6 at Pgs 50-51).

T.L.O. established guidelines sufficiently clear that Oates would have understood the search of E.D.J.'s cell phone at its inception was without reasonable suspicion and the scope of the search was excessively and in violation of the Fourth

Amendment T.L.O. recognized that students carry on their persons nondisruptive "yet highly personal items such as photographs, letters, diaries." (Doc. 39 - Pgs 18-19); T.L.O., 469 U.S. at 339. The Court's decision in T.L.O. should be interpreted to cover any highly personal items of a student, including but not limited to, cell phones, ipads, lap top computers, and other electronic devices. Cell phones are highly personal items that contain confidential information. See Riley, 134 S.Ct. at 2494-2495. Thus T.L.O. provided fair warning to Oates that his search of E.D.J.'s cell phone violated clearly established constitutional law. See e.g., G.C. v. Owensboro Pub. Sch., 711 F. at 632-633 (school officials failed to demonstrate search of student's cell phone was justified at its inception under T.L.O.); Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 641 (E.D. Pa. 2006) (court relied upon the T.L.O. decision to find school officials' were not entitled to qualified immunity for search of student's property). Cf. J.W. v. DeSoto Sch. Dist., 2010 U.S. Dist. LEXIS 116328 at *12-13 (N.D. Miss. Nov. 1, 2010) (court held search of student's cell phone was not clearly established law under T.L.O.).

Applying the obvious clarity test, T.L.O. provides a general constitutional rule identified in decisional case law that Oates' specific conduct violated the Fourth Amendment even though his conduct in question has not been previously held unlawful. Gaines, 871 F. 3d at 1209. Any objective reasonable school official would

have known searching a student's cell phone without reasonable suspicion at its inception and without justification scroll through her private text messages regarding the student's family members, best friend, boyfriend, and ex-boyfriend would violate the Fourth Amendment. Gallimore v. Henrico Sch. Bd., 38 F. Supp. 2d 721, 726(E.D. Va. 2014)(no reasonable school administrator could believe searching through a cell phone would result in finding marijuana). For these reasons, Oates is not shielded by qualified immunity for violating E.D.J.'s rights under the Fourth Amendment.

II. McCURRY DEPRIVED R. JACKSON OF HIS RIGHT TO FREE SPEECH AND ASSOCIATION BY PROHIBITING HIM FROM SPEAKING TO THE SCHOOL BOARD AND STUDENTS, TEACHERS, AND COACHES OUTSIDE OF SCHOOL.

McCurry's letter of August16, 2016, in pertinent part, prohibited R. Jackson from communicating with teachers, coaches and students at school and outside of school. (Doc 24 - Pgs 54:14-25 & P-Ex. 3 at Pg 2; 55:1-12; 58:8-2). McCurry also denied R. Jackson the right to speak to the local school board because he threatened to sue the school system for violation of E.D.J. 's constitutional rights. (Doc 21 - Pg 47:5:24; Doc 24 - Pgs 42: 11-19 & P-Ex. 1; 45:23-25; 46:1-11 47:22-24; 54:4-25;55:1-5; 58:8-25). There are two separate constitutional issues posed by McCurry's prohibition against R. Jackson speaking to the school board and to teachers, coaches and students outside of school. First, McCurry's prohibition against R. Jackson attending and speaking to the school board was a prior restraint on his speech. The

restraint on R. Jackson's speaking to the school board was also based on his viewpoint in a limited public forum. Second, McCurry's letter to R. Jackson was overbroad and chilled his right of speech and association with teachers, coaches and students outside of the school system.

A. McCurry's Prohibition Against R. Jackson Speaking To The School Board Because He Threatened to Sue The School System Violated His Rights Under First Amendment.

The government violates the First Amendment when it denies access to a speaker solely to suppress his point of view he espouses.[9] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985). When government targets particular views taken by speakers on a subject, it is likely to violate the First Amendment. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828-830 (1995); R.A. V. v. St. Paul, 505 U.S. 377, 391 (1992). Nonetheless, permissible content-based restrictions by government on speech may vary depending if the property is a public forum, designated public forum, or nonpublic forum. Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37, 45-46 (1983); Bloedom v. Grube, 631 F. 3d 1218, 1231 (11th Cir. 2011).

R. Jackson accepts the district's court's reasoning that a school board is a

[9] The First Amendment protects the rights of freedom of speech and the right of expressive association. U.S. Const. amend 1.

limited public forum under the circumstances of this action. (Doc 39- Pgs. 26-27). A limited public forum is a forum for a certain groups of speakers and for the discussion of certain topics. Crowder v. Housing Auth. of Atlanta, 990 F. 3d 586, 591 (11th Cir. 1993). See e.g. City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167, 175 (1976)(teachers have the right to speak to school board meeting on subjects relating to the operation of the school district). The school district can regulate speech by content-neutral conditions through restrictions on time, place, and manner, which must be narrowly tailored to serve a significant governmental interest. Perry, 460 U.S. at 45-46. "A restriction which vests unlimited discretion in a governmental actor, however, opens the way to arbitrary suppression of particular points of view. When such restriction is based on the content or subject matter of the speech, then it is impermissible." Crowder, 990 F. 2d at 591, quoting Heffron v. International Soc'y for Krishna Consciousness, Inc., 457 U.S. 640, 648 (1981)

R. Jackson's desired to speak to the board concerning Oates' search of E.D.J.'s cell phone was directly related to the operation of the school system and its policies. (Doc 21 - Pg 47:5-24; Doc 24 - Pg 17:2-18, P-Ex. 6 at Pg 52). The CCSS vested McCurry with unbridled discretion to determine whether R. Jackson could speak to the school board on this subject. (Doc 24 - Pg 17:2-18, P-Ex. 6 at Pg 3). But

McCurry's absolute prohibition against R. Jackson from speaking to the board went too far - it constituted a prior restraint on his speech. McCurry's edict that authorized suppression of R. Jackson's speech in advance of its expression was constitutionally impermissible. Ward v. Rock Against Racism, 491 U.S. 781, 795 n. 5 (1989). See Café Erotica of Fla. v. St. Johns County, 360 F. 3d 1274, 1282 (11th Cir. 2004), quoting United States v. Frandsen, 212 F. 3d 1231, 1236-37 (11th Cir. 2000)(prior restraint on speech occurs "when the government can deny access to a forum for expression before the expression occurs."). Although a prior restraint on free speech is not unconstitutional per se, McCurry bears a heavy burden to sustain its constitutionality. Southwestern Promotions, Ltd v. Conrad, 420 U.S. 546, 558 (1975). McCurry failed to justify this heavy burden on his motion for summary judgment. (Doc 19 - Pgs 12-14).

McCurry's restriction on R. Jackson's speech to the school board was not content-neutral; it was directly related to his viewpoint that Oates' violated E.D.J.'s constitutional rights. Although the school board is a limited public forum, McCurry cannot censor R. Jackson's speech that was based on his viewpoint. See Barrett v. Walker Cty. Sch. Dist., 872 F. 3d 1209, 1225 & n. 10 (11th Cir. 2017) ("Viewpoint discrimination is . . .. an egregious form of content discrimination."); Solantic, LLC v. City of Neptune Beach, 410 F. 3d 1250, 1259 (11th Cir. 2005)(laws which by their

terms distinguish favored speech over unfavored speech on the basis of ideas or viewpoint expression are content-based). The district court reasoned McCurry did not target the content of his speech but rather he restricted his speech based on his membership in a certain class of litigants who had or threatened to sue the school. (Doc 39 - Pg 28). There is no evidence, however, McCurry or the school board had a policy, practice or custom of excluding any citizens from speaking at a board meetings that threatened to sue the CCSS. (Doc 19 - Pgs 12-14). The district court impermissibly created a class of speakers who threatened litigation that was not based on viewpoint.

R. Jackson's complaint that Oates' search of E.D.J.'s cell phone was unconstitutional and his threat of litigation are intertwined. McCurry barred R. Jackson from speaking to the school board because of his viewpoint on the search of his E.D.J.'s cell phone. (Doc 21 - Pg 47:1-1-18). R. Jackson's threat to sue the school was an after-the-fact justification for McCurry to deny him a forum to express his views to the school board on Oates' search of E.D.J.'s cell phone. For example, McCurry's letter of August 26, 2016 omitted any mention that R. Jackson was barred from speaking to the school board because he threatened litigation against the school. (Doc 24- Pgs 42:11-19; 54:4-25; P-Ex.3). McCurry informed R. Jackson that he would receive the letter because of his alleged behavior toward the volleyball coaches

and his threat of litigation. (Doc 21 - Pgs 25:4-12; 26:1-25; 27:1-23).

CCSS's policy that permits citizens to speak to the board upon approval by the Superintendent is content-neutral; yet it still must meet a legitimate governmental interest. Burk v. Augusta-Richmond County, 365 F. 3d 1247, 1251 (11th Cir. 2004). There is no legitimate government interest to prohibit a citizen from speaking to a school board solely because he has threatened litigation. A school board could invite its attorney to attend the board meeting to protects its interests. McCurry, in addition, could have narrowly restricted R. Jackson from speaking before the board on matters that did not concern Oates' search of E.D.J.'s cell phone. McCurry could have limited the time allotted for R. Jackson to speak to the board. But McCurry did not consider any of these options.

The district court further reasoned R. Jackson had other avenues to voice his grievance about the search of E.D.J.'s cell phone other than to the school board. (Doc 39 - Pg 29). However, McCurry's letter barred R. Jackson from any contact with school officials. (Doc 24- Pgs 42:11-19; 54:4-25; 58:2-18 & P-Ex.3). Because R. Jackson was barred from any communication with any school staff except for McCurry or the school board's lawyer, why would this be an viable option for him to voice his grievance? (Doc 24 - Pg 54:4-12; Doc 39 - Pg 29). R. Jackson did not have any other avenues to voice his grievances to the school system except to petition

the school board for redress of his grievance. R. Jackson, who is in active military service to this county to protect our constitutional rights, sought to exercise his right to freedom of speech by speaking to the school board about the search of his daughter's cell phone. Freedom of speech is one of our country's most cherish rights for which "our military has fought to defend throughout this nation's history and all over the world. " Searcey v. Crim, 681 F. Supp. 821, 826 (N.D. Ga. 1988). McCurry's prohibition against R. Jackson speaking to the school board about Oates' search of E.D.J.'s cell violated the First Amendment.

B. McCurry's Prohibition Against R. Jackson Speaking To Teachers, Coaches And Students Outside Of School The School Violated The First Amendment.

The First Amendment includes the right to associate for the purpose of engaging in activities protected by the First Amendment such as speech and to petition for the redress of grievances. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984); Moore v. Tolbert, 490 Fed. Appx. 200, 203 (11th Cir. 2012). McCurry's letter prohibited R. Jackson from attempting to contact any teacher, coach or student inside and outside of the school. (Doc 24 - Pgs 57:21-25; 58:2-18; Doc 24 at P-Ex.3). The part of McCurry's letter that prohibited R. Jackson from contacting teachers, coaches and students outside of school is problematic. McCurry admitted this was a mistake or oversight. (Doc 24 - Pgs 58:14-25; 59:2-8). McCurry's letter chilled Jackson's right to speak to military families of students who attended the high

school, and from expressing his grievances to the school board. (Doc 21 - Pg 47:12-24; 76:12-25; 77:1-25; 78:1-5). McCurry's restriction on R. Jackson's speech and association with teachers, coaches and students outside of school is presumptively invalid unless it is necessary to serve a compelling state interest. R.A.V. 505 U.S. at 382. There was no compelling government interest to bar R. Jackson from contacting school staff and students outside of school. McCurry's letter violated R. Jackson's right to freedom of speech and association under the First Amendment. Virginia v. Hicks, 539 U.S. 113, 118-120 (2003); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

C. McCurry Is Not Shielded By Qualified Immunity For Prohibiting R. Jackson From Speaking To The School Board.

The law is clearly established that one of the most egregious types of First Amendment violations is viewpoint-based discrimination. Hollomon v. Harland, 370 F. 3d. 1252, 1270 (11th 2004). The First Amendment protects individuals against abridgement of their rights of free speech at schools. Id. at 1279-1280. When McCurry prohibited R. Jackson from speaking to the school board, the application of view-point discrimination was clearly established law in public schools. Id. at 1282. The principle of prior restraint on free speech was also clearly established to limited public fora such as schools. Barrett, 872 F. 3d at 1225.

Although there is no a binding Eleventh Circuit precedent on "all fours" that

matches the facts of this case, general constitutional rules are perfectly capable of providing clear and fair warning to government officials even where the very action in question has not previously been held unlawful. Harris v Coweta County, Ga., 433 F. 3d 807, 820 (11th Cir. 2005)(en banc); Cook v. Gwinnett County Sch. Dist., 414 F. 3d 1313, 1320 (11th Cir. 2005). McCurry had clear and fair warning the exercise of his unbridled discretion to prohibit R. Jackson from speaking to the school board on a matter of constitutional importance could be a prior restraint on his right to free speech. United States v. Frandsen, 212 F. 3d at 1236-37 (11th Cir. 2000). McCurry also clear and fair warning that barring R. Jackson's viewpoint at a school board meeting about the unlawfulness of the search of E.D.J.'s cell phone violated the First Amendment. R.A.V,, 505 U.S. at 388. Therefore, the district court erred in ruling McCurry was entitled to qualified immunity.[10] (Doc 39 - Pg 29).

D. McCurry Is Not Shielded By Qualified Immunity For Prohibiting R. Jackson From Speaking To Teachers, Coaches and Students Outside of School.

McCurry stated his letter to R. Jackson dated August 26, 2016 was perhaps overbroad, and should not have prohibited him from contacting teachers, coaches, and students outside of school. (Doc 24 - Pgs 54:4-25;55:1-5; 58:8-25:1-8) R. Jackson

[10] The district court denied R. Jackson's request for declaratory relief. (Doc 39 - Pgs. 25-26 n.7). R. Jackson has standing to assert this claim because he sought monetary relief against McCurry for violation of his First Amendment rights. (Doc 1 - Pgs 21-22 at ¶¶ 62-68; Pg 32). Cf. Esteves v. SunTrust Banks, Inc., 615 Fed. Appx. 632, 635 (11th Cir. 2015). See, 28 U.S.C. §§ 2201 et seq.

testified that after he received McCurry's letter he stopped communicating with teachers, students, and coaches and stopped attending any volley balls involving his daughter. (Doc 21 - Pgs 50:1-7; 97:22-25; 98:1-13). McCurry's letter had a chilling effect on McCurry's right to freedom of speech and association both inside and outside of school. McCurry had no compelling governmental interest to prohibit R. Jackson from speaking and associating with teachers, coaches and students outside of school. In re Grand Jury Proceeding., 842 F. 2d 1229, 1232 (11th Cir. 1988); Wilson v. Taylor, 733 F. 2d 1539, 1543-1544 (11th Cir. 1984). McCurry's regulation of R. Jackson's speech and association outside of school sweeps too broadly. Broadrick v. Oklahoma, 413 U.S. at 615; FF Cosmetics FL, Inc. v . City of Miami Beach, 866 F. 3d 1290, 1302 (11th Cir. 2017). McCurry had fair warning his letter to R. Jackson violated clearly established law under the First Amendment. Jones v. Fransen, 857 F. 3d at 851.

The district court, relying on Yates v. Cobb Cty. Sch. Dist., 687 F. 3d 866, 867 (11th Cir. 2017), nevertheless reasoned R. Jackson's First Amendment damage claim against McCurry is barred by qualified immunity because there is no case addressing the extent to which school officials could limit a parent's speech to other school officials and students. (Doc 39 - Pgs 24-25). But Yates applies to the parent's conduct at school. Id. In contrast, R. Jackson 's letter barred McCurry from speaking

to school officials and students while *outside* of school. McCurry's letter stated no compelling governmental interest prohibit R. Jackson from speaking and associating with school staff and students *outside* of school. Moreover, at the summary judgment stage, the district court cannot consider McCurry's subjective version of the facts why he prohibited R. Jackson from speaking to school personnel and students outside of school, but rather must reconstruct the event in light most favorable to Plaintiff. Fils v. City of Aventura, 647 F. 3d 1272, 1287-1288 (11th Cir. 2011). McCurry should not be shielded by qualified immunity.

III. THE SEIZURE OF R. JACKSON WHILE HE ATTENDED E.D.J. PLAYING IN VOLLEY BALL GAMES VIOLATED THE FOURTH AMENDMENT.

A. R. Jackson Established He Was Seized Under the Fourth Amendment.[11]

R. Jackson's Fourth Amendment claim alleges Veliz, Kemp, and Smith unconstitutionally "seized" him without a warrant or probable cause, and against his will while his daughter was playing in volley ball games on senior night.[12] (Doc. 1 - Pgs 12-14 & 18-20; Doc 29 - Pgs 11-13, Doc 33 - Pgs 11-12). A person is seized

[11] The Fourth Amendment provides, in relevant part, that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

[12] The district court on a motion for summary judgment assumed without deciding that R. Jackson's detention constituted a seizure under the Fourth Amendment. (Doc 39 - Pg 20 n. 7).

when "by means of physical force or who of authority," government action terminates or restrains his freedom of movement, " Brendlin v. California, 551 U.S. 249, 254-255 (2007), quoting Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968), *through means intentionally applied*." Brower County of Inyo, 489 U.S. 593, 597 (1989)(emphasis in original). If there is evidence of a seizure, this Court should consider whether the actions of Veliz, Kemp, and Smith were objectively reasonable under the circumstances. Brigham City v. Stuart, 547 U.S. 398, 404 (2006).

B. Smith's Seizure Of R. Jackson Was Not Objectively Reasonable Under The Circumstances.

The district court ruled R. Jackson's seizure was justified at its inception and not objectively reasonable under the circumstances.[13] (Doc 39 - Pg. 21). The district court also ruled Smith had reasonable suspicion R. Jackson was criminally trespassing under O.C.G.A. § 16-7-21(b)(2).[14] (Doc 39- Pgs 20-21). The district court's analysis is flawed because Veliz, Kemp, and Smith had no objective reason

[13] The district court relied on Patterson v. State, 559 S.E. 2d 472, 475 (2002) to support its decision Smith had probable cause to seizure R. Jackson. But in Patterson the accused told the officer he had been warned off the property; an employee of the property told the officer the accused was not to return to the property; and the accused had been given a trespass warning. These facts are distinguishable from R. Jackson's situation.

[14] A person commits criminal trespass when he knowingly and without authority enters upon the land or premises of another . . . after receiving, prior to such entry, notice from the owner . . . authorized representative of the owner or rightful occupant that such entry is forbidden.

under the circumstances that R. Jackson was committing criminal trespass by watching E.D.J. play in volleyball games at CCMHS. The reasonableness of R.Jackson's seizure by Veliz, Kemp, and Smith should judged by the application of a balancing analysis for searches or seizures conducted in an extraordinary manner. Atwater v. City of Lago Vista, 532 U.S. 318, 322 (2001); Whren v. United States, 517 U.S. 806, 818 (1996). There are several genuine issues of material issues of fact that support R. Jackson's claim of violation of his rights under the Fourth Amendment.

First, Veliz did not voice any concern that R. Jackson was criminally trespassing on school property. Veliz testified the ultimate decider to remove R. Jackson from the school was her thinking about those two volley ball coaches and how they felt. (Doc 25 - Pg 59:9-11 60:11-20). Veliz expressed ambivalence about removing R. Jackson from school that evening. (Doc 25 - Pg 60:4-10).

Second, R. Jackson had the authority to enter the school for the purpose of watching E.D.J. play in volley ball games on senior night. Although McCurry allegedly told Smith not to allow R. Jackson back on the premises if he saw him, he did not intend to completely ban R. Jackson from school property. (Doc 28 - Pg 29: 17-25). McCurry's letter shows he allowed R. Jackson on school property under limited circumstances such as picking up and dropping off E.D.J. and attending her volleyball games. (Doc 24- Pgs 54: 14-23 & P-Ex. 3). McCurry testified that if R.

Jackson showed up during the school day and inappropriately confronted the volley ball coaches, for example, then he would have had him escorted off campus by law enforcement. (Doc 24 - Pgs 59:15-25; 60:2-10).

Third, Smith made the decision to remove R. Jackson from the school based solely on what Veliz told Kemp.[15] (Doc 21 - Pgs 34:25; 35:1-22). Smith did not articulate any other reason to remove R. Jackson from the school. An officer must be able to articulate more than "an inchoate and unparticularized suspicion or "hunch" of criminal activity. Illinois v. Wardlow, 528 U.S. 119, 123-124 (2000). An officer must be able to articulate a *particularized* and *objective* basis for suspecting an individual was engaged in a legal wrongdoing that constitutionally permitted an investigatory stop. Aponte, 662 Fed. Appx. at 784. There must be criminal activity afoot. Terry v. Ohio, 392 U.S. at 19-20. Smith did not articulate at any time that R. Jackson was engaging in a criminal activity while he watched the volleyball games. Smith had no probable cause to seizure R. Jackson. Cf. Nixon v. State, 347 S.E. 2d 592, 594 (1986)(there was no evidence that would justify a person of reasonable

[15] Smith watched a video of R. Jackson meeting with the two volley ball coaches. (Doc 28 - Pg 50:8-18). There is no evidence, however, Smith considered this video or what McCurry told him that R. Jackson was not permitted on campus to remove him from the school . (Doc 38 - Pg 20). Yet it was Veliz that made the decision to remove R. Jackson from the school because of what happened to the volley coaches and the ban letter. (Doc 25 - Pg 59:9-11; 60:11-20).

caution to believe an offense had or was being committed by accused).

Last, when Smith was removing R. Jackson from the school, Veliz had a copy of the "ban letter", yet she did not review it before asking Kemp to remove R. Jackson from the school. Kemp and Smith ignored R. Jackson's plea that he had a letter from McCurry that authorized him to attend the volley ball games. (Doc 21 - Pgs 73:19-24; 102:20-22). Kemp and Smith could have called Veliz or McCurry to confirm that R. Jackson could attend the volley ball games. McCurry testified "I did not remind her [Veliz] that the letter said he [R. Jackson] could be at volleyball games." (Doc 24 - Pg. 64:9-16). It was only *after* R. Jackson was removed from the school that Kemp called Veliz a second time. During this telephone call, Kemp told Veliz that R. Jackson informed him that he could attend the volley ball games. (Doc 25 - Pg 65: 19-22). Consequently, Veliz asked Kemp to retrieve the "ban letter" from her office. (Doc 25 - Pg 65:23-25). Kemp read the entire letter to Veliz and Veliz then admitted R. Jackson had permission to attend senior night activity and watch the volley ball games. (Doc 25 - Pgs 65:23-25; 66:2-9). Veliz also called McCurry within a matter of minutes after R. Jackson was removed from school. (Doc 24 - Pg 65: 3-5, 16-20; 55:4-25). Veliz asked McCurry again if R. Jackson could attend the volleyball games. This time McCurry said yes. (Doc 24 - Pg 65:16-20). McCurry admitted there was a "[t]otal breakdown in communication." (Doc 24 - Pg 66:18-25).

Veliz, Kemp, and Smith made no attempt conduct a reasonable investigation whether R. Jackson had permission to attend the volley ball games until after he was removed from the school. They ignored certain facts within their knowledge. Veliz, for example, had a copy of the "ban letter" in her office but prior to R. Jackson's removal from school, she did not ask Kemp to read it. There were no exigent circumstance to immediately remove Jackson from the school. To the contrary, Veliz asked Kemp not to remove R. Jackson until after senior night activities had ended. (Doc 25 - Pgs 67:21-25; 68:9-15). Nevertheless, Kemp did not wait as he and Smith took steps to remove R. Jackson from school before senior night activities ended. (Doc 23 - Pgs 70:17-25; 71:1-16). They had a duty to objectively investigate and consider all information available to them *at the time* before taking steps to remove R. Jackson from the school. Kingsland v. City of Miami, 382 F. 3d 1220, 1228-1231 (11th Cir. 2004)(Court held there were material issues of fact whether defendant manufactured probable cause, failed to conduct a reasonable investigation, and ignored certain facts within their knowledge).

C. Smith's Use of Force Against R. Jackson Was Excessive and Unreasonable

The district court ruled Smith's use of force in initiating and conducting the seizure of R. Jackson was arguably reasonable. (Doc 39 - Pg 21). The district court, citing Zivojinovich v. Barner, 525 F. 3d 1059, 1072 (11th Cir. 2008), concluded

Smith used *de minimis* force to initially effectuate R. Jackson's seizure and his continuing use of force was necessary to investigate.[16] (Doc 39 - Pg 22). But the facts in Barner are distinguishable because the officer had probable cause to arrest the accused for unlawfully resisting arrest. Id. Ultimately, there was no investigation and Smith did not have any grounds to arrest R. Jackson for criminal trespass. If Smith did not have the right to arrest R. Jackson, then he did not have any right to use any degree of force in seizing him. Walters v. Freeman, 572 Fed. Appx. 723, 729 (11th Cir. 2014); Reese v. Herbert, 527 F. 3d 1253, 1272 (11th Cir. 2008). In light of the totality of circumstances, R. Jackson was forcibly escorted out of the school by Smith and Kemp without legal justification. Doc 21- Pgs 54:8-25; 55: 7-16; 56:7-17; 70:1-6; 72:4-7;92:8-12; Doc 22 - Pg 36-2-7; 37:5-10). Evans v. Stephens, 407 F. 3d 1272, 1281-1282 (11th Cir. 2005).

D. Veliz, Kemp, and Smith Are Not Shielded by Qualified Immunity For Seizing R. Jackson and Removing Him From the School .

Veliz, Kemp, and Smith are not entitled to qualified immunity because there

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[16] The district justified Smith's use of force because R. Jackson allegedly argued with him and did not comply with his command to leave the school. (Doc 39 - Pg. 23). There is conflicting testimony that R. Jackson cooperated with Smith's commands and did not physically or verbally resist leaving the school. (Doc 21- Pgs 54:8-21; 55:16-14; 70:1-6; 88-19-25; Doc 22 - Pg 36-2-7; Doc 26 - Pg. 58:15-24; Doc 28 - Pgs 34:8-17; 42:21-25). Where there is a conflict in testimony, this Court should accept R. Jackson's version of the facts on a motion for summary judgment. Tolan, 134 S.Ct. at 1867-1868.

was clearly established law that government officials must be objectively reasonable under the circumstances in seizing R. Jackson. Brigham City, 547 U.S. at 404; Courson v. McMillian, 939 F. 3d 1479, 1487 (11th Cir. 1991); Brown v. State, 750 S.E. 2d 148, 154 (2013). In view of the totality of the circumstances, the actions of Veliz, Kemp and Smith were not objectively reasonable in that: (1) there was no objective basis to suspect R. Jackson was criminally trespassing on school property; (2) there was no exigent or imminent reason for Smith to have seized R. Jackson; (3) Veliz, Kemp and Smith did not properly investigate whether McCurry's letter permitted R. Jackson to watch E.D.J. play in volley ball games; and (4) Smith used excessive force to remove R. Jackson from the school. All of these stated reasons show Jackson was unreasonably seized at the school.

Smith had no probable cause to seize Jackson on senior night at the school. United States v. Dunn, 345 F. 3d 1285, 1288-1289(11th Cir. 2003)(minimally intrusive seizures are permissible by an officer when he has reasonable suspicion criminal activity is afoot). Smith seizure of R. Jackson was highly intrusive. It is clearly established an officer's unprovoked force against a non-hostile and non-violent suspect who has disobeyed instructions violates the Fourth Amendment. See Mighty v. Miami-Dade Cnty., 659 Fed. Appx. 969, 973 (11th Cir. 2016), citing Fils v. City of Aventura, 647 F. 3d 1272, 1289 (11th Cir. 2011). Smith's use of

unprovoked force against R. Jackson, who cooperated with Smith's command, violated clearly established law. The offense of criminal trespass that R. Jackson was allegedly committed is of a relative minor nature. R. Jackson posed no physical danger to himself or others. He did not resist Smith's command. To balance Smith's use of force, this Court should consider the severity of crime at issue, whether R. Jackson posed an immediate threat to the safety of Smith or others, and whether he resisted arrest. Vineyand v. Wilson, 311 F. 3d 1340, 1347 (11th Cir. 2002). Here, a reasonable officer would have known the use of force in a degrading manner against R. Jackson was so obviously unlawful as to violate the Fourth Amendment. May v. City of Nahunta, 841 F. 3d 1173 (11th Cir. 2016), op. withdrawn by and substituted op. at May v. City of Nahunta, 846 F. 3d 1320, 1332 (11th Cir. 2017); Evans v. Stephens, 407 F. 3d 1272, 1281 (11th Cir. 2005). Smith also was not authorized to use any physical force against R. Jackson, as he was not conducting an arrest. Reese, 527 F. 3d at 1272. Accordingly, the district court erred in ruling Veliz, Kemp, and Smith were shielded by qualified immunity. (Doc 39 - Pgs 20-24).

CONCLUSION

Plaintiffs-Appellants respectfully request this Court reverse the district court's grant of summary judgment to Defendants-Appellees McCurry, Veliz, Oates, Kemp, and Smith on the ground of qualified immunity, and remand this case for further proceedings.

This 5th day of March, 2018.

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This day of 5th day of March, 2018.

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Jackson et al v. McCurry et al.
Case No. 10231-EE

CERTIFICATE OF SERVICE

This is to certify that I have this day electronically filed the foregoing Brief of Plaintiffs- Appellants using the Court's Electronic Case Files (ECF) system which will automatically send email notification of such filing to the following attorneys of record:

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