23-1191

United States Court of Appeals

for the

Fourth Circuit

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

Plaintiff/Appellant,

– v. –

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

Defendants/Appellees,

JUVENILE LAW CENTER; RISE FOR YOUTH; ELECTRONIC PRIVACY INFORMATION CENTER; NATIONAL POLICE ACCOUNTABILITY PROJECT,

Amici Supporting Appellant.

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

BRIEF OF APPELLEES

ANNE C. LAHREN
RICHARD H. MATTHEWS
ANDREW C. HARDING
PENDER & COWARD, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, Virginia 23462
(757) 490-6293

Counsel for Appellees School Board of the City of Virginia; Beach, Virginia; Reid Baker; Aaron C. Spence; Dan Edwards; Carolyn T. Rye; Kimberly A. Melnyk; Beverly M. Anderson; Sharon R. Felton; Dorothy Holtz; Laura K. Hughes; Victoria; Manning; Trenace B. Riggs; Carolyn D. Weems; Joel McDonald; and Patti T. Jenkins

MARK D. STILES
CHRISTOPHER S. BOYNTON
GERALD L. HARRIS
JOSEPH M. KURT
OFFICE OF THE CITY ATTORNEY
Municipal Center, Building One,
Room 2098
2401 Courthouse Drive
Virginia Beach, Virginia 23456
(757) 385-4531

Counsel for Appellees City of Virginia Beach and Marie Carr

COUNSEL PRESS • VA – (804) 648-3664

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Beverly M. Anderson
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Beverly M. Anderson

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Patti T. Jenkins
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Patti T. Jenkins

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

School Board of the City of Virginia Beach
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: School Board City of Virginia Beach

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Reid Baker
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Reid Baker

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Dan Edwards
(name of party/amicus)

---

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Dan Edwards

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sharon R. Felton
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Sharon R. Felton

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Dottie Holtz
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Dottie Holtz

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Laura K. Hughes
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Laura K. Hughes

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Victoria Manning
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Victoria Manning

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Joel McDonald
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Joel McDonald

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Kimberly A. Melnyk
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Kimberly A. Melnyk

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Trenace B. Riggs
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Trenace B. Riggs

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Carolyn T. Rye
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Carolyn T. Rye

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Aaron Spence
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Aaron Spence

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie L. Carr, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Carolyn D. Weems
(name of party/amicus)

who is an Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 02/23/2023

Counsel for: Carolyn D. Weems

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1191 Caption: O.W. v. Marie Carr, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Marie Carr & City of Virginia Beach
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 2/24/2023

Counsel for: Marie Carr & City of Virginia Beach

Print to PDF for Filing

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

JURISDICTIONAL STATEMENT

Appellant's "Jurisdictional Statement" fails to address the district court opinion granting leave to file an amended complaint within 30 days of the issuance of the Memorandum Opinion on February 14, 2023. As discussed, *infra*, Appellees construe the pursuit of this appeal as a waiver of Appellant's right to seek leave to amend his pleadings in the district court. Otherwise, in its current form, Appellant's Opening Brief may not have properly established appellate jurisdiction pursuant to 28 U.S.C. § 1291. *See Britt v. DeJoy*, 45 F.4th 790, 793 (4th Cir. 2022) (en banc).[1]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellees do not contest the statement of issues Appellants have raised on appeal. However, Appellees deny that any of these issues identified have legal merit or otherwise justify a reversal of the district court.

STATEMENT OF THE CASE

I. Introduction

The District Court's February 14, 2023, Opinion ("District Court Opinion") straightforwardly applied well-established law to the facts of this case.

The essential facts are not in dispute: Appellee Reid Baker ("Baker"), a middle school Assistant Principal, received credible reports that Appellant O.W. was

[1] Notably, the CM/ECF Filing System for the Eastern District of Virginia – Norfolk Division still shows the district court case as "OPEN" in this matter.

disseminating a sexually explicit image of a female peer during school hours; Baker initiated an investigation of his own volition and pulled O.W. out of class; O.W. testified he told Baker the truth about his actions from the start and that he confessed to showing other students the explicit photo in two written statements before he had any interaction with Appellee Marie Carr ("Officer Carr"), who was the school resource officer ("SRO"); Baker seized O.W.'s phone; and based upon O.W.'s written and oral statements, Baker provided the written statement and O.W.'s phone to Officer Carr. These facts fit squarely within the reasonableness standard provided for in *New Jersey v. T.L.O.* and its many progeny cases, and Baker's search and seizure were entirely lawful.

Confronted with a sound District Court Opinion, Appellant's Opening Brief obfuscates the facts and the law. Appellant grossly distorts the factual record throughout his opening brief. For example, the "Statement of the Facts" artfully relates facts out of temporal order to mask the fact that Appellant himself testified he confessed to his wrongdoing before Officer Carr was involved in any way. Appellant's Opening Brief also repeatedly ascribes specific intentions to Appellees' actions, casting these interpretations as facts – even where Appellees' unrebutted deposition testimony refutes such unsupported characterizations. Ultimately, the most devastating facts for O.W.'s claims are those that O.W. alleges in his Second

Amended Complaint and those to which he testified under oath. He must be bound by these facts—even where they do not fit the narrative he now presents on brief.

Moreover, Appellant's Opening Brief repeatedly misapprehends and misstates case law. As just one example, Appellant continues his stubborn insistence that the Court should be guided by *Ferguson v. Charleston*, a "special needs" case that addresses programmatic, suspicionless searches in a hospital setting and which is totally inapposite to the case at bar – where a school official conducted a search with sufficient evidence to satisfy easily the applicable reasonable suspicion standard.

O.W.'s claims are unsupported in fact and law, and this Court should uphold the District Court's grant of summary judgement for Appellees.

II. Statement of Facts

Appellant includes a statement of facts that, as referenced above, has a distorting effect by mischaracterizing certain facts, ignoring other important facts entirely, and rearranging the chronology of events in a manner creating a misleading narrative. The factual record must be presented and reviewed as it is, not as O.W. wishes it to be. *See* Federal Rules of Appellate Procedure 28(e); Local Rule 28(f).

a. *The investigation and prosecution of O.W.'s criminal conduct*

In 2019, O.W. was a 13-year-old student at Kempsville Middle School. JA25. On March 5, 2019, while at school, O.W. showed at least two classmates an explicit

photograph of a 14-year-old female student on his cellular phone, A.F. JA28, JA389. That same day, O.W. also transmitted the photograph electronically to another student, G.C.[2] (or "G.R."). JA28. The photograph was of A.F.'s vagina. JA28; JA387-389. A.F. had sent O.W. the explicit photograph through Snapchat approximately three months prior while both students were at home in the evening. JA378. According to O.W., on March 5, 2019, "everyone was talking about" the photograph and "asking him . . . if A.F. had really sent it to him." JA389.

Later that afternoon, after O.W. had shown the photograph to at least two classmates and sent it to G.C., a teacher reported to Mr. Baker that O.W. had shown other students an explicit image of a female student. JA389. Mr. Baker was the acting Assistant Principal at the time. JA389. Mr. Baker took O.W. out of class, brought him to Kempsville Middle School's printing room, and asked him about an explicit image circulating around campus. JA390. The police officer working at Kempsville Middle School, Officer Carr, was not present during these initial discussions. JA390.

Following the questioning in the printing room, Mr. Baker took O.W. to the lobby of the school guidance office. JA390. At the request of Mr. Baker, O.W. wrote two different incident statements. JA391. Mr. Baker asked O.W. to write a second statement because he believed O.W. was not telling the entire story in the first

[2] Sometimes referred to as G.C. in the pleadings and Joint Appendix.

statement. JA332-333; JA391. O.W. wrote in the second statement: "I showed people the photo and that was my bad." Mr. Baker then took O.W. to a room connected to the guidance office and asked him further questions about his statements. JA333. O.W. testified that he "immediately" told Baker the truth about transmitting the explicit photograph and was truthful in discussing his actions with Baker "the whole time." JA426, JA874, JA1295-1297. At some point, Mr. Baker "confiscated Plaintiff's phone" and "searched the photo gallery of the phone and did not find the photograph." JA30.

During Baker's interview of O.W., the door to the room off the guidance lobby remained open, JA953, and Baker used a "normal," not angry tone of voice during his questioning. JA954. According to O.W., Carr still had not talked to him, as she was in a room with another student being interviewed by Baker. JA589. It was only after Baker and O.W. moved to another room off the guidance lobby that Carr, though she was not officially invited by Baker, JA709, was physically present during the ongoing school disciplinary investigation. JA391.

The Second Amended Complaint alleges that, while Baker was interviewing O.W., Carr "conducted her investigation contemporaneously (and at that point silently) from the corner of the same room." JA29. Importantly, this was the first interaction O.W. had with Officer Carr on March 5, 2019, occurring only *after* O.W. acknowledged he truthfully admitted his wrongdoing to Baker during their initial

discussions and then wrote two confessions regarding his conduct. JA28-30; JA1289-1294.

Baker testified he did not collaborate with Officer Carr as part of his independent investigation or have "specific discussions" with her prior to his questioning of O.W., there was no plan devised about questions to be asked or how the interview should be conducted, and there was no stated purpose of securing an arrest of O.W. as a result of the interview. JA1320-1322. The record contains no evidence to the contrary.

During the interview in the guidance office, although O.W. had previously admitted to showing other students the photograph, he initially denied that he still possessed it. JA455-456. Mr. Baker advised O.W. about the importance of being honest. JA533. O.W. testified that Baker asked him to tell the truth. JA874. Officer Carr did not ask O.W. any questions at this point. JA29; JA389-391. O.W. then admitted that he still possessed the photograph on his phone and that he sent it to another student. JA333-334. After hearing O.W.'s oral confession, Officer Carr left the room and contacted her supervisor to advise him of the situation. JA1001. Officer Carr's supervisor then referred her to contact Shannon Dolida, who instructed Officer Carr to charge O.W. (and G.R./G.C.) and specifically to not charge A.F. JA956, JA1002-1004.

Following this discussion, knowing she had not seen for herself the picture of A.F.'s vagina on O.W's phone—Carr reentered the room with the previously confiscated phone to ask O.W. if he still had the photo because she was "hoping it was something else, and that [she] wouldn't have to charge [the juveniles] with a felony." JA493-494. In response to Officer Carr's single request, O.W. showed Officer Carr the photograph. JA494.

Baker's investigation also included speaking to other students, including G.C. and A.F. JA333, JA932-933, JA1315. Officer Carr was not present during those interviews, but overheard Mr. Baker's questioning of G.C. from just outside the room. JA1252-1253. Based on the information he collected, Mr. Baker referred O.W. for infractions of the Code of Student Conduct. JA1318. O.W.'s mother, Ms. Bass, was contacted around 4:10 p.m. and arrived at the school around 5:00 p.m. JA393. Officer Carr placed O.W. and G.C. under arrest. JA335. Officer Carr informed Ms. Bass that O.W. would be criminally charged and led him out of the school without handcuffing him. JA393. Both O.W. and G.C. spent one night in juvenile detention. JA393.

Following the incident, O.W. was prosecuted for the possession and distribution of child pornography in the Juvenile and Domestic Relations Court. JA335. During the state juvenile proceedings, defense counsel for O.W. filed two suppression motions on the grounds that Mr. Baker's questioning of O.W. in Officer Carr's presence and the request to see the explicit photograph on O.W.'s phone

violated his rights under the Fourth and Fifth Amendments of the U.S. Constitution. JA1380-1411, JA1413-1414. The state court denied those motions. JA1410, JA1411, JA1414. Following trial, the court found the "after consideration of all the evidence presented at trial, this court finds evidence is sufficient for a finding of guilty," but deferred disposition of the matter. JA1414. Following completion of certain terms and conditions, the Juvenile and Domestic Relations Court dismissed the case against O.W. on August 17, 2020. JA1415.

b. *VBCPS Disciplinary Investigations, SROs, and the Memorandum of Understanding between the City and VBCPS.*

The events of March 5, 2019, described herein, reveal independent and distinct school and law enforcement investigations of O.W.'s actions taking place on school grounds and during school hours. This is entirely consistent with a Memorandum of Understanding ("MOU") between the City and VBCPS. JA627-634.

The MOU provides for coordination between these two entities when criminal activity occurs on campus, including specific provisions concerning police questioning and searches and seizures. JA627-634 (Sections VI, VIII of the MOU). Possession of child pornography is both a violation of the Kempsville Middle School Code of Student Conduct, JA620-621 ("possession of offensive materials such as nude photographs, pornographic videos, etc., are prohibited" as are "Serious Violations" involving "criminal acts in violation of local, state, or federal laws"),

and of Virginia Code § 18.2-374.1:1(C). There is no evidence in the record that the disciplinary investigation was done with the intent Plaintiff attributes generally to school officials: to coerce "confessions of criminal conduct" for "criminal evidentiary purposes." *See* Appellant's Opening Brief at p. 5-6. Appellant ascribes to Baker the intention of furthering Carr's criminal investigation but does not cite to a single fact in the record supporting that assertion. Appellant also does not offer any facts whatsoever to support that the policy of the MOU establishes a tacit agreement to deprive O.W. of his constitutional rights.

O.W. was subjected to an independent and distinct school disciplinary investigation that was in no way intended to promote "law enforcement objectives," as O.W. suggests. JA540 ("I was investigating school infractions. For Officer Carr to be in the room, I believe she was gathering information for her own investigation . . . but that's outside my purview. I'm only handling school"); JA524 ("my role as the assistant principal is I'm handling school discipline from the school point of view based off of the Code of Student Conduct. I'm not – I have nothing to do with Officer Carr . . . So I'm just handling school discipline."); JA952 ("I just don't understand the advising part because I'm conducting my own investigation for school purposes. I'm not doing anything for [Carr] – on her behalf."). Notwithstanding O.W.'s characterization of the school incident statements as "confessions" for criminal law enforcement purposes, the evidentiary record makes clear that the incident

statements are intended provide the students with due process by allowing an appropriate [school] disciplinary recommendation to be made. JA1317[3] (emphasis added); JA532; JA950. In fact, as part of his investigation of the March 5, 2019, incident, Baker recalled taking up to ten statements from student-witnesses to ensure Appellant was afforded the Due Process to which he was entitled during a school investigation. JA1315, JA1317.

Ultimately, the disciplinary process concerning O.W. was pursued through the various channels of the school administration and resulted in the penalty of suspension after consideration by the Virginia Beach School Board. JA394-395. Officer Carr had no input regarding the school disciplinary violation investigations (or outcomes) in this matter. JA998.

III. Procedural History

Appellant's recitation of the procedural history of this case is accurate.

---

[3] Q: What was your purpose of obtaining these incident statements in reference to [Appellant's] investigation?

A: Typically, any time someone is named as a witness, I want to make sure I'm getting the complete story so with the incident occurring on the 5th, it was me having more time during the school day with other students to just gather what they might have saw, heard, or seen. And that way I can just make sure that we're going through *due process* and getting all of the information we can to make an accurate, you know, *discipline recommendation for a student*."

SUMMARY OF ARGUMENT

The district court's ruling was correct in granting summary judgment to the Appellees on all counts in the Appellant's Second Amended Complaint. The district court committed no error in its decision and properly applied controlling precedent from *New Jersey v. T.L.O.* to hold that the actions of Appellants were reasonable under the law in a school setting under the facts of this case.

STANDARD OF REVIEW

Appellant correctly states the Standard of Review.

ARGUMENT

A. THE DISTRICT COURT CORRECTLY HELD THAT BAKER'S SEARCH OF O.W.'S CELLULAR PHONE WAS REASONABLE.

Appellant incorrectly argues that *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the seminal case regarding searches in a school environment, does not apply (or should not apply) to this lawsuit. *T.L.O.* and its progeny plainly are the controlling precedents for this case.

The United States Supreme Court's opinion in *T.L.O.* holds that Fourth Amendment protections apply to students in the school setting. However, the Court held that such searches need not be supported by probable cause that a criminal violation had taken place. *Id.* at 341. Rather, "[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id.* The Court promulgated an analysis of reasonableness that is similar to

that provided for under *Terry v. Ohio*, 392 U.S. 1 (1968), and which involves a twofold inquiry: (1) "whether the . . . action was justified at its inception," and (2) "whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (quotations omitted). A search is "'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 342 (emphases added). Finally, a search is permissible in its scope "when the measures adopted are reasonably related to the 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.*

The U.S. Supreme Court rationalized this standard as follows:

> This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

N.J. v. T. L. O., 469 U.S. 325, 342-343.

Application of *T.L.O.* and its progeny, including cases from the Fourth Circuit– such as *Wofford v. Evans*, 390 F.3d 318 (4th Cir. 2004) and *Gallimore v. Henrico County School Board*, 38 F. Supp. 721 (E.D. Va. Aug. 5, 2014) – lead to

this conclusion: Baker's independent school investigation, carried out pursuant to applicable school rules and regulations, was lawful.

Baker's investigation was justified at its inception because his receiving a teacher's report of "inappropriate images being shared about a student" and being "given [O.W.'s] name" in connection therewith provided Baker reasonable suspicion that O.W. had violated the Code of Student conduct; therefore. Baker was justified in questioning and searching O.W. JA595. The record in this case shows that Appellant disrupted the educational environment at Kempsville Middle School during the school day on March 5, 2019. Baker's investigation was focused on ensuring that the school returned to order and on minimizing grave harm to a particular student – A.F.

Baker's search of O.W.'s iPhone, pursuant to the applicable school Bring Your Own Device ("BYOD") policy, was appropriate in scope and directly related to the objective of the investigation and the Code of Student Conduct. Baker's further investigation and related searches were carried out in a manner "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 at 341. Since the alleged violation of the Code of Student Conduct related to a photograph on O.W.'s personal cell phone, it was reasonable for Baker to search the cell phone. It is undisputed that such conduct occurred on school grounds during school hours.

The reasonableness of Baker's search is also supported by reference to additional provisions of the Code of Student Conduct, which Ms. Bass (O.W.'s mother) acknowledges she reviewed. JA1272-1273. When enforcing the Code of Student Conduct, "students and their property (including privately owned electronic devices) may be searched . . . if there is reasonable suspicion that a law or school rule has been or is about to be broken." JA125. The document continues, "School staff may question or interview minor students regarding violations of the Code of Student Conduct and criminal matters without the consent or presence of parents or legal guardians." JA125. There are many provisions of the Code of Student Conduct applicable to Appellant's actions on March 5, 2019. The Code prohibits disruption of the school educational environment, including "[c]onduct, which by its nature is so extreme or offensive that it negatively impacts the school or places the student at risk either educationally, will also constitute a disruption," JA127, and "[p]ossession of offensive materials such as nude photographs or pornographic videos . . . is prohibited." JA127.

The Code of Student Conduct also contains a section entitled "Bring Your Own Device (BYOD)" which states that "[t]he school division reserves the right to examine the privately owned electronic devise and search its contents if there is a reason to believe the school division policies or local, state and/or federal laws have been violated." JA128 (Code of Student Conduct, p.4). Appellant's mother

acknowledged during her deposition that she and her son reviewed the BYOD policy before she signed a Parent Acknowledgment Form for the 2018-19 school year. JA1272-1275; JA552.

There is also no evidence in the record supporting that once Carr finally came into contact with O.W. on March 5, 2019, she directed Baker on how to conduct the investigation. JA953 (Q: "Do you recall [Carr] making any gestures or giving you any sort of nonverbal clues to try and assist you in your questioning of [O.W.]? A: No."). Furthermore, any reference to how Carr told Baker to put the cell phone in 'airplane mode' and power it down was – by O.W.'s own telling – made *after* Baker had seized and searched O.W.'s cell phone and after O.W. admitted to Baker that he possessed, showed, and transmitted the nude photo at school. JA30; JA506.

The lawfulness of Baker's search is also supported by *Piechowicz v. Lancaster Central School District*, a case with remarkably similar facts to the case at bar. In *Piechowicz*, the school principal, having received a report from a student, "called the School resource officer . . . to his office," where they "confronted [a student]" accused of having a nude picture of another student on his cell phone. 2022 U.S. Dist. LEXIS 8935 *9 (W.D.N.Y Jan. 18, 2022). The student admitted to having the photo on his phone, whereupon "[the school principal] and the police officer then examined [the student's] cell phone, deleted the photo, and discovered additional photos of girls…" *Id.* The Southern District of New York applied *T.L.O.'s*

reasonableness standard in finding that the search of the cell phone and seizure of the student were "justified at their inceptions" and reasonable in scope. *Id.* at *55-56. *T.L.O.* should be applied to this case in a similarly straightforward manner.[4]

Despite all this, O.W. continues to his misreliance upon *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), to argue that *T.L.O* does not apply because the circumstances of his case do not meet the criteria to establish a "special needs exception" to warrantless searches. While the U.S. Supreme Court's *Ferguson* opinion cites *T.L.O.* as providing the origin of the term "special needs," the *Ferguson* opinion notably did not include *T.L.O.* in its discussion of "special needs" cases. *See* JA844. O.W., however, nevertheless invokes *Ferguson's* "special needs exception" to deride the partnership agreement between VBCPS and the VBPD as unlawful.

As the District Court's opinion makes clear, the distinction between *Ferguson* and *T.L.O* is obvious. *T.L.O* addressed school searches where reasonable suspicion exists, whereas *Ferguson* addressed nonconsensual suspicionless searches in the

[4] Even were the Court to consider making a sea change in the law, as Appellant and *amici* propose, cases such as *T.L.O.*, *Wofford*, and *Piechowitz* – cited herein – at a bare minimum preclude a finding of liability against Baker on the grounds of qualified immunity, which "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). Plaintiff cites to not a single case that would demonstrate Baker's search and seizure of O.W.'s phone violated a "clearly established" constitutional right.

form of drug screens on pregnant women occurring at the Medical University of South Carolina. Systematic, suspicionless searches involve an altogether different category of constitutional inquiry. The "reasonable suspicion" standard applies in the context of school administrators cooperating with law enforcement officers, and the Fourth Circuit has even applied *T.L.O.'s* holdings to searches and seizures by police officers themselves. *See e.g., Wofford v. Evans*, 390 F.3d 318 (4th Cir. 2004).

Baker had a reasonable and good-faith basis to suspect O.W. had violated the Code of Student Conduct on school grounds during the school day and that evidence of such violations was contained in O.W.'s cell phone. The facts available to Baker on March 5, 2019, clearly afforded him the authority under *T.L.O.* to question O.W. and search his phone—as doing so was closely related to the alleged possession and distribution of a pornographic photo of A.F.'s vagina, in violation of school policy.

Arguments by O.W. regarding the applicability of *T.L.O.* or advocating for an outright change to *T.L.O.* are misplaced. O.W. invites this court to alter its legal analysis to correct alleged systemic wrongs: racial disparities, rogue SROs, discriminatory practices in school discipline, and overly intrusive searches of personal devices. While these considerations may touch on important policy issues subject to ongoing public debate, these are all red herrings in the context of this case. Baker's search and seizure of O.W.'s phone was plainly lawful under existing precedent.

B. THE DISTRICT COURT CORRECTLY HELD THAT O.W.'S CONFESSIONS WERE ENTIRELY VOLUNTARY.

O.W. fully confessed his actions to Baker as part of the disciplinary investigation. O.W. admitted to Baker that he had the photograph on his phone, that he showed it to other students, JA1019-1920, and that he texted it to G.R./G.C, JA956. O.W. testified that when he confessed his actions to Baker he had neither spoken to Carr nor been in her physical presence. JA1027. Further, Baker used a "normal tone", during the March 5, 2019, interviews with O.W., i.e., "not angry". JA954. Further, Baker conducted the interview in a familiar setting with the door open. JA953. O.W.'s own deposition testimony does not accuse Baker of doing anything more than what is alleged in the Complaint: he asked O.W. to "answer his questions truthfully." JA30. The totality of the facts in this case do not evidence, in any way, that O.W.'s will was overborn. His confession was entirely voluntary.

O.W. testified he was being truthful from the start with Baker and he remained truthful when he wrote his statements. JA426, JA874, JA1295-1297. This critical fact undermines his argument on appeal that the suggestion there were likely disciplinary consequences for being untruthful somehow compelled his confession. It had already occurred. There is no error where O.W. was not subjected to a custodial interrogation requiring *Miranda*, his responses were consensual, and there is no evidence he was coerced by Baker (or Carr) in his responses. JA1221 n.20. The testimony of Baker, Officer Carr, and *O.W. himself* all support a finding that the

confession was voluntary under the law. As a result, the district court did not err in its holding.

C. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS DID NOT CONSPIRE TO VIOLATE HIS CONSTITUTIONAL RIGHTS.

O.W. argues that the trial court erred when it stated he had a "weighty burden" and that he must demonstrate "specific circumstantial evidence that each member of the alleged conspiracy shared the same conspiratorial objective." Appellant's Opening Brief. at p. 35. Appellant claims that his burden was "to support the element of concerted conduct with direct evidence" and that "the question for the court to decide was whether the Appellees acted jointly in concert in an *act* that resulted in the constitutional deprivation, not whether they shared the intent to deprive O.W. of his rights." *Id.* at pp. 35-36.

First, and most important, O.W. has failed to allege any underlying violation of his constitutional rights. Therefore, his conspiracy claim fails. Second, instead of providing actual evidence of concerted conduct, *Id.* at p. 36, O.W. merely ascribes certain motives to Appellees' actions without factual support. Essentially, he is stating that the MOU itself evidences an intent to violate the constitutional rights of Virginia Beach students of color and that the City and VBCPS's adherence to the MOU equated to a conspiratorial objective and intent. By this logic, any school administrator's investigation of any student for a violation of the Code of Student

Conduct that is also a violation of criminal law constitutes an action in furtherance of the conspiracy created by the MOU. Clearly, O.W. seeks to remake the law.

O.W. does not offer a single citation to the record to support his conspiracy argument, nor can he elucidate how the MOU's contents were unlawful or how its terms established any sort of agreement to violate his (or others) constitutional rights. Appellant relies on conclusory statements, such as his claim that "the record is teeming with direct evidence of concerted conduct," all the while failing to point to any such evidence in the record. *Id.* at 36. The record is clear. Neither Baker nor Officer Carr testified in a matter that permits an inference that they collaborated for the purpose of securing criminal charges – much less to act in a concerted manner to violate O.W.'s rights. JA953; JA1320-1322, JA1452.

Similarly, O.W. states that "this joint criminal investigative method has been employed by VBCPS and VBPD employees for at least nineteen years," and provides several misleading citations to the record. Most glaring of these misrepresentations is his complete omission of the objection and full response of Sgt. Cortes at page 7 of Appellant's Opening Brief. This block quotation includes Appellant's attorney's question beginning, "So when you say that the Principal has everything the SRO needs – ." JA568. However, Sgt. Cortes never actually uttered those words during his deposition. Appellant's cutting-out the immediate objection of opposing counsel misleads the Court. Making matters worse, the briefing cites his

response to a question about how long these MOU practices has been in place as "I think that is how it's always been" as the end of the quote. Again, this is grossly misleading. The remainder of the response lends important context that *disproves* Appellant's own contentions of conspiratorial motivations. Sgt. Cortes goes on to explain, in his next breath, that

> Usually the principals handle most of the things in the school, okay? And it is not the officer's job to enforce everything in the school, okay? I don't believe in that, you know. And I tell the SROs that it's the principal's school. You are there to assist them, and I will tell them, I don't want you there arresting every kid for every little thing in the school. That is not your job, okay? Your job is to assist at the school. Arrest if you have to arrest, okay? But let the principal and the staff handle the students at the school, okay? Like I said, I didn't want them -- I want them to patrol the halls to be visible, but not -- interact with the children in a positive manner. That's how I told them to be, okay? You are there when they -- you are there when they need you to be there, okay? You're not there to be, you know, patrol officer there in, you know, harassing children. That's not your job, okay? You're there to assist the school and provide security for them.

JA569-570. O.W.'s reliance on spliced quotes regarding the personal experience of a single VBPD Sergeant, Louis Cortes, for his conspiracy claim is plainly misleading and also unavailing. Considered in the full context of his deposition testimony, Sgt. Cortes simply confirms the City and VBCPS have worked independently but collaboratively under the MOU for years.[5] Nothing about his testimony supports a

[5] Sgt. Cortes testified that he expected SRO's to "look at all the facts of the case, okay, make sure that it complied with the MOU. Look at the code, okay, see if it fits the code, okay. And if they were unsure of it, for them to call the duty attorney." Depo p. 27

claim of conspiratorial motive or intent to violate constitutional rights of students across the entire City.

O.W. cannot identify any evidence in support of his conspiracy claim beyond the existence of an agreement to collaborate pursuant to the plain terms of the MOU—which O.W. admits he does not challenge. Without more, his conspiracy claim fails.

D. THE DISTRICT COURT CORRECTLY HELD THAT O.W. DOES NOT ESTABLISH ANY CLAIMS UNDER *MONELL* BY SOLELY POINTING TO THE MOU.

O.W. contends that "the record is sufficient to allow a reasonable jury to infer the Appellees violated O.W.'s rights" with all reasonable inferences in his favor. Appellant's Opening Brief at p. 37. Once again, the failure to establish an underlying constitutional violation defeats this claim. Moreover, just as with the conspiracy claim, O.W.'s use of broad and sweeping conclusory statements without any factual support or, more importantly, citation to the record, does not support a *Monell* claim.

O.W. attempts to meet his burden of proof by pointing to the very existence of the MOU, combined with the unsubstantiated conclusion that "the jury would likely infer that the Appellees are engaging in a practice that flows from the top downward, or considering [Appellant's] proof of the long-standing nature of the policies and customs, unlawful acts that are so persistent and widespread that they constitute standard operating procedures," *Id.* at pp. 37-38. This self-serving

prediction does not support his claims under *Monell*. Without supporting evidence, *a reasonable jury* could not reach such conclusion.

Appellant fails to point to anything in the MOU that was unlawful or explain how the terms of the MOU establish an agreement to deprive him of his constitutional rights. While it is clear that there was an agreement between the City and School Board to coordinate when responding to criminal activity, it is unreasonable to simply infer, without more, that this was an agreement to deprive Plaintiff of his constitutional rights. O.W. must establish a constitutional violation or otherwise identity a policy for which the School Board or the City could be held liable under *Monell*. He has not done so. Therefore, this issue on appeal is also properly denied.

E. THE DISTRICT COURT CORRECTLY HELD THAT THE SCHOOL BOARD DID NOT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS.

O.W. claims that he had a "Liberty Interest and Substantive Entitlement in the Virginia Beach School Board Regulation 5-64.1," which he alleges established "a Duty for the School Board to Protect [Appellant's] Constitutional Rights and a Special Relationship." Appellant's Opening Brief at pp. 37-38. O.W. argues that by keeping him after school on March 5, 2019, they created a "special relationship" because this was "a restraint of liberty outside compulsory school attendance" analogous to "incarceration, institutionalization, or the like." Appellant's Opening

Brief at p. 39. O.W. continues that the search was therefore unlawful when Carr asked him if he still had the photo and requested to see it on his cell phone. *See* Appellant's Opening Brief at p. 39; JA494, Carr Dep., 27:2-7.[6]

O.W. writes, "[i]t is not only unfair, but it is unreasonable to even suggest that a school system may constitutionally engender the trust of its students and parents by holding itself out as a shield of protection standing between students and law enforcement but may abandon this duty as soon as the bell rings." Appellant's Opening Brief at p. 40. This argument entirely misses the point. O.W., a student at Kempsville Middle School, admitted to showing a pornographic photo of an underage classmate to other students during the school day and on school grounds, including texting it to a third underage student. The evidentiary record establishes that O.W. was suspended after a full disciplinary investigation. That he is unhappy with or finds fault in the findings of the investigation, does not mean a due process violation occurred.

---

[6] A: So I asked him – because I already had probable cause and I already had the statements, so I asked him if he still had the photo. He said yes. The phone was already powered off.
I said "Can I see it?"
He said yes, so handed him the phone. He turned it on. He went right to the photo. He showed it to me.
…
And it was a photo of a vagina. I was hoping it was a photo of nothing, but it was the photo of the vagina.

The district court correctly held that (1) attendance in public school does not create a special relationship, (2) attending school is not the equivalent of incarceration, and (3) the existence of a School Board regulation does not alter such conclusions. JA1227. O.W. cites no alternate authority to rebut these findings. O.W. again resorts to general and sweeping arguments that a special duty to O.W. arose when the investigation ran beyond the normal end of the school day, but without any authority to support this contention. *See* JA1226-1227. The trial court was correct in holding that no constitutional violation occurred in this instance.

F. THE DISTRICT COURT CORRECTLY HELD THAT JUVENILE COURT RECORDS ARE PROPER MATERIAL FOR JUDICIAL NOTICE AND, NONETHELESS, APPELLANT'S ADMISSION DEMONSTRATES THAT JUDICIAL NOTICE OF THE JUVENILE COURT RECORDS WAS AT MOST HARMLESS ERROR.

Appellant argues that facts contained in his juvenile records were improperly noticed by the trial court under Rule 201 of the Federal Rules of Evidence ("FRE 201"). *See* Appellant's Opening Brief at p. 41.

First, for purposes of this appeal, judicial notice of facts in O.W. juvenile records is immaterial.[7] O.W. admits these records are not dispositive of any issue on appeal. Appellant's Opening Brief at 18 ("The district court again erred when it

[7] City Defendants argued that the *Rooker-Feldman* doctrine barred the district court from considering this case, thus requiring the Court to consider the judicial records from O.W.'s criminal case. That argument was rejected by the district court. The City Defendants have not assigned cross-error to that issue, though the City Defendants disagree with the district court's analysis.

judicially noticed unauthenticated state court records – only to decide that the records had no impact on the outcome of this case."). Appellant is pursuing what he readily admits is harmless error.

Furthermore, the introduction of these records became necessary because the Second Amended Complaint has the effect of misleading the Court by suggesting Appellant obtained outright dismissal of the criminal charges[8] relating to the pornographic image of his fellow classmate, *e.g., see* JA22-56 at ¶¶ 51, 102, 145, whereas the JDR Court made a finding that the evidence was sufficient for a finding of guilt against him, and then deferred adjudication pending his completion of specified terms. JA1414.

Lastly, as the district court noted, judicial records are the most frequent subject of judicial notice. There is no serious argument that O.W.'s records' accuracy can be disputed. In fact, O.W. does not contend the records are not accurate. Instead, O.W. argues that because the juvenile records are "sealed" records they cannot be readily obtained, and their accuracy cannot be confirmed. This is a non-sequitur. It also ignores the Order of the VB JDR granting all parties in this matter direct access to the records, over O.W.'s objection. JA1419-1423. This Order gives both access

[8] In the first Complaint filed in this action, ECF No. 1, Ms. Bass, mother of Appellant, admitted O.W. was convicted in Juvenile Court. However, that Complaint is not before the Court as it has been superseded by subsequently filed pleadings.

and credibility to these records—which provides the basis for judicial notice of these records.

G. O.W.'S FAILURE TO AMEND HIS PLEADING IS A WAIVER OF HIS APPEAL ON THIS ISSUE, OR ELSE, O.W. INVITES DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION.

O.W. argues that the trial court abused its discretion in denying his motion without prejudice and limiting "the extent to which Appellant may seek leave to amend in the future." Appellant's Opening Brief at p. 42. The trial court denied O.W.'s motion without prejudice and provided 30 days to refile a motion for leave to amend based on the changes he proposed, JA1231[9], the fact that the proposed changes did not state "a plausible claim for relief given the existing record in this case," *see* JA1232, and admonished all parties to "avoid rehashing legal arguments that have already been rejected by the Court," JA1232.

O.W. was provided this opportunity to file a motion for leave to file a third amended complaint and elected not to do so. Instead, he filed a Notice of Appeal.

---

[9] "Specifically, the proposed amended complaint brings a direct claim against Officer Carr for a violation of his Fourth, Fifth, and Fourteenth Amendment rights; a Fourteenth Amendment Equal Protection Clause claim based on race against some of the School Defendants; a separate supervisory liability claim against some of the School Defendants; and a conversion/trover claim against the City of Virginia Beach arising from the seizure of O.W.'s cellular phone. The proposed amended complaint also materially changes certain factual allegations and modifies various existing claims by adding or removing defendants. Finally, the proposed amended complaint removes some claims entirely, specifically the civil conspiracy claim, racially motivated conspiracy claim, state created danger special relationship claim, and the Title IX claim."

By virtue of the Notice of Appeal filed three days after the district court opinion granting summary judgment for the defendants, he has—in effect—affirmatively waived any further amendment of his pleadings. Furthermore, the allotted thirty days to file an amended complaint has long since lapsed. O.W.'s failure to take the opportunity to amend amounts to a waiver of this issue on appeal before this Court. Any argument by Plaintiff that he has not waived his right to seek leave to amend is fatal to his appeal because it invites the conclusion that this appeal must be dismissed for lack of jurisdiction.[10]

H. APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT IS PROPERLY DISMISSED WITH PREJUDICE.

O.W. argues that the trial court erred by denying Appellant's motion for partial summary judgment "with prejudice." In support, he states that the Court had no explicit authority to deny such a motion "with prejudice" in the language of FRCP 56 and that doing so constituted an abuse of discretion. For his argument, O.W. relies

[10] This court may only exercise jurisdiction over final orders, 28 U.S.C. § 1291, and certain interlocutory and collateral orders, 28 U.S.C. § 1292; Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949). "[A]n order that dismisses a complaint with leave to amend is not a final decision because it means that the district court is not finished with the case." *Britt v. DeJoy*, 45 F.4th 790, 793 (4th Cir. 2022) (en banc) (citing *Jung v. K. & D. Min. Co.*, 356 U.S. 335, 336-37 (1958)). If an appellant wishes to proceed with an appeal from an order of this type, he must "waive [his] right to amend the complaint by requesting that the district court take further action to finalize its decision," *Britt*, 45 F.4th at 796 (citing *Jung*, 356 U.S. at 337), and he "must obtain an additional, final decision from the district court finalizing its judgment," *id.* at 797.

upon *Andes v. Vesant Corpo.*, 788 F.2d 1033, 1037 (4th Cir. 1986). *Andes* relates to FRCP 41 ("Dismissal of Actions") and is inapposite to this case. O.W. neither cites to caselaw or the language of FRCP 56 itself to support that a trial court is prohibited from dismissing his motion for partial summary judgment with prejudice.

When a trial court judge grants a defendant's motion for summary judgment on all counts of a plaintiff's Complaint, it must necessarily follow that Appellant's *Motion for Partial Summary Judgment* in this case, JA448, JA451, must be denied for the very reasons summary judgment was granted to the Defendants. *See Perdue v. Sanofi-Aventis U.S.*, 999 F.3d 954, 962, fn. 5 (4th Cir. 2021). As the U.S. Fourth Circuit stated in *Perdue v. Sanofi-Aventis U.S:*

> [W]e reject [Appellant's] argument that the district court failed to separately consider her cross-motion for partial summary judgment. Granting summary judgment to [Appellee], which required construing all facts and factual inferences in [Appellant's] favor, necessarily meant that [Appellant's] cross-motion for partial summary judgment could not prevail. *See Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003).* The district court's opinion said as much. *See Perdue, 2019 U.S. Dist. LEXIS 171097, 2019 WL 4874815, at *16* ("The Court having determined that the Defendant's Motion for Summary Judgment should be granted, for the same reasons the Plaintiff's motion is denied.").

Perdue v. Sanofi-Aventis U.S., 999 F.3d 954, 962, fn. 5 (4th Cir. 2021).

Amicus Curiae Briefs

The *Amicus Curiae* briefs filed in this case advocate for dramatically reshaping the relationship between schools and SROs, "establishing" new rules regarding cell phone searches, and even arguing that police should be effectively

barred from schools as a way to curtail student arrests for violations of the law. These advocacy pieces are of no relevance to the legal issues presented in this case and should be dismissed offhand. Furthermore, they solely advance the interests of law-breaking students without any regard to the impact on their victims including, in the present case, the profound harm O.W. caused to his then-14-year-old fellow classmate through his violation of her trust and privacy in sharing an intimate photograph with their middle school classmates.

CONCLUSION

For the foregoing reasons, O.W.'s appeals should be denied and the judgment below should be affirmed.

Dated: June 28, 2023

Respectfully submitted,

By: /s/ Anne C. Lahren

Anne C. Lahren, Esq. (VSB # 73125)
Richard H. Matthews, Esq. (VSB # 16318)
Andrew C. Harding, Esq. (VSB #96820)
Pender & Coward, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, Virginia 23462
Telephone: (757) 490-6293
Email: alahren@pendercoward.com
Email: rmatthew@pendercoward.com
Counsel for Appellees School Board of the City of Virginia; Beach, Virginia; Reid Baker; Aaron C. Spence; Dan Edwards; Carolyn T. Rye; Kimberly A. Melnyk; Beverly M. Anderson; Sharon R. Felton; Dorothy Holtz; Laura K. Hughes; Victoria; Manning; Trenace B. Riggs; Carolyn D. Weems; Joel McDonald; and Patti T. Jenkins

By: /s/ Joseph M. Kurt
Mark D. Stiles (VSB No. 30683)
City Attorney
Christopher S. Boynton (VSB No. 38501)
Deputy City Attorney
Gerald L. Harris (VSB No. 80446)
Senior City Attorney
Joseph M. Kurt (VSB No. 90854)
Associate City Attorney
Office of the City Attorney
Municipal Center, Building One, Room 2098
2401 Courthouse Drive
Virginia Beach, Virginia 23456
Telephone: (757) 385-4531
Facsimile: (757) 385-5687
Email: mstiles@vbgov.com
Email: cboynton@vbgov.com
Email: glharris@vbgov.com
Email: jkurt@vbgov.com
Counsel for City of Virginia Beach and Marie Carr

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

- This brief contains 7,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because:

- This brief has been prepared in a proportionally spaced, 14-point Times New Roman font using Microsoft Word.

/s/ Anne C. Lahren

Anne C. Lahren, Esq. (VSB # 73125)
Richard H. Matthews, Esq. (VSB # 16318)
Andrew C. Harding, Esq. (VSB #96820)
Pender & Coward, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, Virginia 23462
Telephone: (757) 490-6293
Email: alahren@pendercoward.com
Email: rmatthew@pendercoward.com
Counsel for Appellees School Board of the City of Virginia; Beach, Virginia; Reid Baker; Aaron C. Spence; Dan Edwards; Carolyn T. Rye; Kimberly A. Melnyk; Beverly M. Anderson; Sharon R. Felton; Dorothy Holtz; Laura K. Hughes; Victoria; Manning; Trenace B. Riggs; Carolyn D. Weems; Joel McDonald; and Patti T. Jenkins

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2023, the foregoing was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

/s/ Anne C. Lahren
Anne C. Lahren, Esq. (VSB # 73125)
Richard H. Matthews, Esq. (VSB # 16318)
Andrew C. Harding, Esq. (VSB #96820)
Pender & Coward, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, Virginia 23462
Telephone: (757) 490-6293
Email: alahren@pendercoward.com
Email: rmatthew@pendercoward.com
Counsel for Appellees School Board of the City of Virginia; Beach, Virginia; Reid Baker; Aaron C. Spence; Dan Edwards; Carolyn T. Rye; Kimberly A. Melnyk; Beverly M. Anderson; Sharon R. Felton; Dorothy Holtz; Laura K. Hughes; Victoria; Manning; Trenace B. Riggs; Carolyn D. Weems; Joel McDonald; and Patti T. Jenkins