No. 21-12424

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

T.R., a minor, by and through her mother, Porsha Brock,
Plaintiff-Appellant,

v.

The Lamar County Board of Education, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Alabama, Case No. 6:19-cv-01101-LSC

BRIEF OF PLAINTIFF-APPELLANT

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
ASHOK CHANDRAN
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

LEROY MAXWELL JR.
AUSTIN RUSSELL
MAXWELL & TILLMAN LAW FIRM
2326 2nd Ave N.
Birmingham, AL 35203
(205) 216-3304

CHRISTOPHER KEMMITT
GEORGINA C. YEOMANS
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, D.C. 20005
(202) 682-1300

Counsel for Plaintiff-Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the NAACP Legal Defense and Educational Fund, Inc. and Maxwell Tillman Law Firm state that they have no parent corporations, nor have they issued shares or debt securities to the public. The organizations are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock. I hereby certify that the following is a complete list of interested persons:

1. Boardman, Carr, Petelos, Watkins, and Ogle P.C., *Attorneys for Defendants/Appellees*
2. Boardman, Mark S., *Attorney for Defendants/Appellees*
3. Brock, Porsha, *Plaintiff/Appellant*
4. Chandran, Ashok, *Attorney for Plaintiff/Appellant*
5. Coogler, L. Scott, *District Court Judge*
6. Dean, Kathy, *Defendant/Appellee*
7. Herron, Vance, *Defendant*
8. Ifill, Sherrilyn A., *Attorney for Plaintiff/Appellant*
9. Kemmitt, Christopher, *Attorney for Plaintiff/Appellant*
10. Lamar County Board of Education, *Defendant*

11. Maxwell Jr., Leroy, *Attorney for Plaintiff/Appellant*

12. Maxwell & Tillman Law Firm, *Attorneys for Plaintiff/Appellant*

13. NAACP Legal Defense and Educational Fund, Inc., *Attorneys for Plaintiff/Appellant*

14. Nelson, Janai S., *Attorney for Plaintiff/Appellant*

15. T.R., *Plaintiff/Appellant*

16. Russell, Austin, *Attorney for Plaintiff/Appellant*

17. Spital, Samuel, *Attorney for Plaintiff/Appellant*

18. Stamps, Lisa, *Defendant/Appellee*

19. Watkins, Katherine, *Attorney for Defendants/Appellees*

20. Yeomans, Georgina C., *Attorney for Plaintiff/Appellant*

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant respectfully requests that the Court hear oral argument in this case. The case implicates important questions regarding the protection of federal Constitutional rights as well as state causes of action and warrants oral argument to ensure their full and fair resolution.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C1

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF JURISDICTION 4

STATEMENT OF ISSUES PRESENTED 4

STATEMENT OF THE CASE 6

I. Factual Background 6

II. Procedural History 11

STANDARD OF REVIEW 12

SUMMARY OF THE ARGUMENT 13

ARGUMENT 16

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS QUALIFIED IMMUNITY ON T.R.'S FOURTH AMENDMENT CLAIM. 16

A. Defendants Violated T.R.'s Fourth Amendment Rights Each Time They Forced Her to Remove Her Clothing, Lift Her Breasts, and Bend Over. 17

1. The District Court erred by failing to separately analyze the two strip searches T.R. endured. 17

2. Neither search was justified at its inception. 20

a. The first search was premised entirely on an inadequate, general suspicion. 20

b. Because the first strip search conclusively determined that T.R. did not possess drugs, the second search had no justification. 24

3. The scope of each search was impermissible. 27

B. The District Court Improperly Granted Defendants Qualified Immunity.....30

1. Because Defendants acted outside the scope of their discretionary authority, they are not entitled to qualified immunity. 31

2. Defendants are not entitled to qualified immunity for the first strip search because the right they violated was clearly established. 34

3. Any reasonable school official would know that strip-searching a student without any basis to suspect contraband violates the Fourth Amendment. 41

a. It has been clear for decades that a fruitless strip search of a student eliminates any basis to conduct a subsequent strip search. 41

b. The unconstitutionality of the second strip search should have been obvious even absent specific precedent. 43

II. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S STATE LAW CLAIMS. .44

A. Defendants Are Not Entitled to State-Agent Immunity. 45

B. The Record Supports T.R.'s Claim for Outrage. 47

CONCLUSION 50

CERTIFICATE OF COMPLIANCE 51

TABLE OF AUTHORITIES

Cases **Page(s)**

Bonner v. City of Prichard,
661 F.2d 1206 (11th Cir. 1981) (en banc) 18

Brent v. Ashley,
247 F.3d 1294 (11th Cir. 2001) 24, 41, 46

Burton v. Tampa Hous. Auth.,
271 F.3d 1274 (11th Cir. 2001) 15

Clark v. City of Atlanta,
544 F. App'x 848 (11th Cir. 2013) 24

Coolidge v. New Hampshire,
403 U.S. 443 (1971).....18

D.H. by Dawson v. Clayton Cnty. Sch. Dist.,
830 F.3d 1306 (11th Cir. 2016) .....*passim*

Davis v. White,
No. 7:17-cv-01533-LSC, 2020 WL 4732073 (N.D. Ala. Aug. 14,
2020) (Coogler, J.) 48

Denson v. United States,
574 F.3d 1318 (11th Cir. 2009) (Carnes, J., concurring) 25

District of Columbia v. Wesby,
138 S. Ct. 577 (2018).....16

Doe v. Renfrow,
631 F.2d 91 (7th Cir. 1980) 48

Est. of Cummings v. Davenport,
906 F.3d 934 (11th Cir. 2018) 32

Evans v. Stephens,
351 F.3d 485 (11th Cir. 2003), *rev'd on other grounds en banc*,
407 F.3d 1272 (11th Cir. 2005) 24

Evans v. Stephens,
407 F.3d 1272 (11th Cir. 2005) 25, 42, 43

Hodges v. Stanley,
712 F.2d 34 (2d Cir. 1983) 26

Holloman ex rel. Holloman v. Harland,
370 F.3d 1252 (11th Cir. 2004) 14, 16, 31, 32

Hope v. Pelzer,
536 U.S. 730 (2002).....43

Jenkins by Hall v. Talladega City Bd. of Educ.,
115 F.3d 821 (11th Cir. 1997) 41

Jones v. Fransen,
857 F.3d 843 (11th Cir. 2017) 34

Ex parte Kennedy,
992 So. 2d 1276 (Ala. 2008).....45

Lenz v. Winburn,
51 F.3d 1540 (11th Cir. 1995) 32

Littell v. Houston Indep. Sch. Dist.,
894 F.3d 616 (5th Cir. 2018) 48

Little v. Robinson,
72 So. 3d 1168 (Ala. 2011).....47

Ex parte Lumbermen's Underwriting All.,
662 So. 2d 1133 (Ala. 1995).....48

N.G. v. Connecticut,
382 F.3d 225 (2d Cir. 2004) 18

New Jersey v. T.L.O.,
469 U.S. 325 (1985).....18, 19, 20

Safford Unified Sch. Dist. No. 1 v. Redding,
557 U.S. 364 (2009).....*passim*

Taylor v. Riojas,
141 S. Ct. 52 (2020) (per curiam) 43, 44

Terry v. Ohio,
392 U.S. 1 (1968) 17

United States v. Franklin,
323 F.3d 1298 (11th Cir. 2003) 24

United States v. Piatt,
576 F.2d 659 (5th Cir. 1978) 17, 18

United States v. Puglisi,
723 F.2d 779 (11th Cir. 1984) 46

United States v. Ross,
964 F.3d 1034 (11th Cir. 2020) (en banc) 18

Vinyard v. Wilson,
311 F.3d 1340 (11th Cir. 2002) 33

Wilson v. Univ. of Ala. Health Servs. Found., P.C.,
266 So. 3d 674 (Ala. 2017) 47

Statutes

28 U.S.C. § 1291 4

28 U.S.C. § 1331 4

28 U.S.C. § 1367 4

42 U.S.C. § 1983 4

INTRODUCTION

Fourteen-year-old T.R. was nearing the end of her school day at Sulligent High School on August 28, 2017, when she was removed from agriculture class, taken to another part of campus, and forced—*twice*—by Defendants Dr. Lisa Stamps and Kathy Dean to strip naked, bend over, and lift her breasts in front of a window open to public corridors. T.R. was subjected to this search to dispel a generalized suspicion held by the principal and counselor of her school that she might have drugs somewhere on her person, which she did not. Humiliated and traumatized by this experience, T.R. has grown depressed and anxious, and regularly experiences flashbacks to these strip searches.

T.R., through her mother Porsha Brock, sued Defendants Dean and Stamps for the violation of her Fourth Amendment rights, intentional infliction of emotional distress, and invasion of privacy. The District Court granted summary judgment to Defendants. In so doing, it misapplied the summary judgment standard, the rules regarding qualified immunity, clearly established Fourth Amendment law, and Alabama state law. Although the District Court nominally acknowledged that the record, viewed most favorably to T.R., shows Defendants conducted two separate strip searches at two separate times, the District Court failed to analyze the facts known to Defendants at the moment of each strip search, as precedent from this Court and the Supreme Court plainly requires. This led the District Court to hold

that the first strip search was justified based on a universe of facts that included information Defendants were not aware of until *after* that search took place, and to ignore the information Defendants learned from the first search when analyzing the constitutionality of the second search.

Properly analyzed, the record establishes that Defendants first strip-searched[1] T.R. based solely on an odor of marijuana in the agriculture classroom and their discovery of drug paraphernalia in T.R.'s backpack. But these two facts did not give rise to a specific suspicion that T.R. had drugs hidden inside her underwear, which clear Supreme Court precedent requires before a school official may conduct a strip search of a student. Furthermore, once the first strip search revealed no drugs anywhere on T.R.'s body, any suspicion that she possessed drugs was eliminated. T.R. remained in Defendants' custody, under the watch of school officials, for the entire period between the two searches, and thus had no opportunity to hide any drugs in her underwear. Nonetheless, Defendants subjected her to another strip search before she was allowed to leave, based solely on a school "protocol" that they claimed required them to "double check" her body but that is nowhere in the record.

[1] For purposes of this brief, the term "strip search" refers to searches that include searching inside a person's underwear. *See, e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009) (discussing scenario in which student's bra and underpants were searched); *D.H. by Dawson v. Clayton Cnty. Sch. Dist.*, 830 F.3d 1306, 1311 (11th Cir. 2016) (discussing search requiring student to remove his outer clothing and underwear).

That strip search lacked *any* justification, and thus violated clear Fourth Amendment law.

Compounding these errors, the District Court ignored that Lamar County Board of Education ("LCBE") policy explicitly forbade Defendants from conducting a strip search without the express permission of the superintendent—permission they did not receive. Consequently, Defendants acted outside of their discretionary authority and were categorically ineligible for the protections of either qualified immunity on T.R.'s Fourth Amendment claim or state-agent immunity for T.R.'s invasion of privacy claim.

Finally, the District Court took an unduly narrow view of the tort of outrage under Alabama law, treating three examples provided by the Alabama Supreme Court as an exhaustive list of situations where the tort may lie. But taken in the light most favorable to T.R., the record here establishes precisely the sort of extreme and outrageous conduct that should be submitted to a jury: Defendants subjected a fourteen-year-old girl to a public strip search *twice*, forcing her to contort her body and lift her breasts, with no justification whatsoever, and in clear violation of their own policy.

The District Court's grant of summary judgment should be reversed, and this case remanded for trial.

STATEMENT OF JURISDICTION

The District Court properly exercised jurisdiction over Plaintiff's federal claim pursuant to 28 U.S.C. § 1331, as that claim arises under 42 U.S.C. § 1983 and the Fourth Amendment to the United States Constitution. The District Court also properly exercised supplemental jurisdiction over Plaintiff's state law claims for invasion of privacy and intentional infliction of emotional distress pursuant to 28 U.S.C. § 1367, as all claims hinge on the same set of facts such that they form part of the same case or controversy.

The District Court entered summary judgment in favor of Defendants on all claims in an opinion and order dated June 22, 2021. That order constituted a final order over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291. Plaintiff timely filed a notice of appeal as to her federal Fourth Amendment claim and her state law intentional infliction of emotional distress claim on July 19, 2021, properly invoking this Court's jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in refusing to separately consider the basis for each of the two strip searches of Plaintiff?

2. Did the District Court err in holding that a reasonable school official could believe that, as of August 28, 2017, the Constitution permitted them to strip-search a teenage girl and force her to lift her breasts and bend in front of an open window

where the search was based on a generalized suspicion that the student possessed drugs, rather than any specific suspicion that drugs were hidden inside her clothing, and where the search could have been accomplished through less intrusive means?

3. Would a reasonable school official believe that, as of August 28, 2017, the Constitution permitted them to ignore the results of a strip search revealing no drugs or contraband of any kind on a teenage student's body and force the student to once again completely disrobe, lift her breasts, and bend over?

4. Did the District Court err in determining that Defendants were entitled to qualified immunity for twice strip-searching T.R. where qualified immunity can be granted solely to officials who act within the scope of their discretionary authority; LCBE policy states that only the superintendent may give approval for a strip search; and the Defendants neither sought nor received permission from the Superintendent to conduct the two strip searches at issue here?

5. Did the District Court err in holding that Defendants were entitled to state-agent immunity for Plaintiff's invasion of privacy claim, despite the fact that such immunity is only available to state actors who act within the bounds of their authority, and Defendants ignored express restrictions on their ability to conduct strip searches when they forced T.R. to disrobe without seeking or receiving permission from the Superintendent?

6. Did the District Court err in holding that it was not "extreme and outrageous" for Defendants to make a fourteen-year-old child remove all her clothing, lift her breasts, and bend over with arms raised in front of an uncovered window despite knowing that she had no contraband hidden inside her clothing, in light of Alabama precedent sustaining claims for outrage premised on less egregious conduct?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On August 27, 2017, T.R., a fourteen-year-old eighth grade special education student at Sulligent High School in Lamar County, Alabama, spent the night at a friend's house before going to school the next morning. Doc 43-1 - Pg 34; Doc 46-6 - Pg 1. She had with her two plastic bags containing prescription medication that she was supposed to take at night and then in the morning. Doc. 43-1 - Pg 35–36. While at her friend's house on the evening of August 27, T.R. and her friend smoked marijuana. *Id*. at 38.

The next day, T.R. went to school. She had forgotten to take her prescription medications both at night and in the morning, so she had those pills in her backpack. *Id*. at 37. T.R. also had with her AZO and Niacin, two over-the-counter supplements. And she had marijuana debris (stems and seeds), rolling papers, and two lighters—

but no actual marijuana—left over in her backpack from smoking the night before. *Id*. at 38.

Toward the end of the school day, when T.R. was in agriculture class, her teacher Joseph Fowler detected the smell of marijuana. Doc 43-8 - Pg 2. T.R. smelled it as well. Doc 43-1 - Pg 38–39, 42–43. The smell was so strong that T.R. sprayed some cologne to try to counteract it. *Id*. at 43. T.R. did not light a marijuana cigarette in class and has no knowledge of who did. *Id*. at 42, 45.

Mr. Fowler called the school's principal, Dr. Lisa Stamps, and its assistant principal, Matthew Byars, to investigate the marijuana smell. *Id.* at 45–46; Doc 43-6 - Pg 2; Doc 43-3 - Pg 2; Doc 43-8 - Pg 2. Dr. Stamps and Mr. Byars took every student's backpack from the agriculture classroom into a smaller room in the agriculture building and searched the students' backpacks for marijuana. Doc 43-1 - Pg 45–46. After finding the medicine, supplements, marijuana debris, rolling papers, and lighters in T.R.'s backpack, Dr. Stamps and Mr. Byars called T.R.'s mother, called law enforcement, and took T.R. to see the school counselor, Kathy Dean, in her office in the main school building. *Id.* at 46; Doc 43-6 - Pg 2; Doc 43-3 - Pg 2–3. Dr. Stamps, Mr. Byars, and Mr. Fowler did not conduct any search of the agriculture classroom before taking T.R. to Ms. Dean's office. Had they done so, the record suggests they would have found a marijuana cigarette about half the size of a pen in plain view under a table. Doc 43-6 - Pg 3–4, 8; Doc 43-8 - Pg 2.

Before they got to Ms. Dean's office, Mr. Byars told Dr. Stamps to "ensure that T.R. did not have any marijuana hidden on her because the remnants of the joint that were smoked in the Ag classroom had not yet been found." Doc 43-6 - Pg 2. Once in Ms. Dean's office, Dr. Stamps told T.R. to remove all her clothes, including her undergarments, in front of Dr. Stamps and Ms. Dean, to make sure T.R. did not have marijuana hidden on her person. The LCBE Policy Manual requires "specific approval of the Superintendent" before school administrators may conduct any search more thorough than a private pat-down or "search of personal items and clothing." Doc 46-5 - Pg 5. Neither Dr. Stamps nor Ms. Dean requested the Superintendent's approval before conducting a strip search. *See* Doc 43-5 - Pg 2; Doc 46-5 - Pg 5. Nor did Dr. Stamps or Ms. Dean attempt a pocket search or a pat-down prior to ordering T.R. to strip naked.

Once T.R. was completely naked, Dr. Stamps told her to lift her breasts, then bend over with her arms raised over her head for inspection. Doc 43-2 - Pg 85; Doc 43-1 - Pg 127–128. The search revealed nothing; T.R. had no drugs inside her clothing or anywhere on her body. Dr. Stamps then allowed T.R. to put her undergarments and a pair of boxer shorts back on. Doc 43-1 - Pg 126–128. For the entire duration of this strip search, the window in Ms. Dean's office—which looked out into a public corridor by the school cafeteria—was uncovered, meaning that T.R. was potentially visible to others in the school throughout the search. *Id.* at 130–131.

After this first strip search, the school nurse, B.J. Moore, came to speak with T.R. According to Dr. Stamps, while Nurse Moore and T.R. were speaking, Dr. Stamps spoke with two students who told her that they had seen T.R. light a marijuana cigarette in class and then spray perfume to mask the scent. Doc 43-3 - Pg 3.[2] At some point thereafter, T.R.'s mother, Porsha Brock, and T.R.'s older sister, Alexus Real ("Alexus"), came into Ms. Dean's office. Doc 43-1 - Pg 128; Doc 43-2 - Pg 45–46, 68; Doc 46-1 - Pg 1; Doc 43-7 - Pg 2; Doc 43-3 - Pg 3; Doc 43-4 - Pg 3. At that time, T.R. remained mostly unclothed from the first strip search, sitting in only her undergarments and boxer shorts.

While in Ms. Dean's office, T.R. denied lighting a marijuana cigarette in agriculture class. Doc 43-1 - Pg 42. She did, however, admit that she had smoked marijuana the night before, that she had first smoked marijuana at age 11, and that she had once used her snack money to buy marijuana approximately two weeks earlier. *Id.* at 50–51, 56–57; Doc 43-2 - Pg 46–51; Doc 43-3 - Pg 3–4; Doc 46-6.

Following this conversation, Dr. Stamps, Ms. Dean, T.R., Ms. Brock, and Alexus called T.R.'s therapist, Penny Mitchell, to discuss a possible rehabilitation

[2] Dr. Stamps's declaration does not make clear when exactly this conversation took place, but appears to place it after Nurse Moore entered Ms. Dean's office and before Ms. Brock and Alexus arrived, meaning it happened after the first strip search, but before the second. *See* Doc 43-3 - Pg 3 (discussing calling Nurse Moore into Ms. Dean's office, then learning "two students wished to speak with" her, then discussing Ms. Brock's and Alexus's arrival to the school).

plan for T.R. Doc 43-2 - Pg 53–58; Doc 43-4 - Pg 3. Dr. Stamps then explained to T.R., Ms. Brock, and Alexus that T.R. was subject to either alternative school or expulsion based on the items found in her backpack that day. Doc 43-2 - Pg 60–61; Doc 43-3 - Pg 4.

At the end of this meeting, before allowing T.R. and her family to leave Ms. Dean's office, Dr. Stamps once again told T.R. to take all her clothes off to make sure that T.R. did not have any drugs on her person, claiming that it was "protocol." Doc 43-1 - Pg 128–129; Doc 43-2 - Pg 63–66; Doc 46-1 - Pg 1–2. Alexus objected to the second search, asking why it needed to be done after the first search revealed nothing. Doc 46-1 - Pg 1; Doc 43-2 - Pg 64. Dr. Stamps and Ms. Dean provided no explanation, and simply "insisted it be done again." Doc 46-1 - Pg 2. T.R. undressed until she was completely naked. Doc 43-1 - Pg 129–130. After T.R. had already started to remove her clothes, T.R.'s sister Alexus took a board and covered the window in Ms. Dean's office to prevent others in the school from watching T.R. disrobe. *Id.* at 131; Doc 43-2 - Pg 82–85. Dr. Stamps again asked T.R. to lift her breasts, then bend over with her arms raised. Doc 43-2 - Pg 85. Once again, this search revealed no contraband anywhere on T.R.'s person. Finally, T.R., Ms. Brock, and Alexus were permitted to leave. *Id.* at 71–72; Doc 43-1 - Pg 132.

The next morning, as Mr. Fowler was sweeping his classroom, he found a partially burned marijuana cigarette roughly half the length of a pen on the floor of his classroom. Doc 43-6 - Pg 3–4, 8; Doc 43-8 - Pg 2.

T.R. was expelled after this incident and never returned to school. Doc 43-1 - Pg 134, 10. She has suffered depression, panic attacks, and flashbacks regarding the strip searches. *Id*. at 109; Doc 43-2 - Pg 89–91.

II. PROCEDURAL HISTORY

T.R. commenced the instant action on July 15, 2019, alleging that Defendants' conduct violated the Fourth Amendment and constituted an invasion of privacy and intentional infliction of emotional distress under Alabama law.[3] On September 28, 2020, Defendants moved for summary judgment on all three claims, which the District Court granted on June 22, 2021. In its decision, the District Court determined that Defendants were entitled to qualified immunity on T.R.'s Fourth Amendment claim; Defendants were entitled to state-agent immunity on Plaintiff's invasion of privacy claim; and Defendants' conduct was not one of the three enumerated classes of cases in which Alabama has recognized the tort of intentional infliction of emotional distress.

[3] T.R. initially brought certain additional claims and named additional parties as defendants; those claims and parties are not before this Court.

In its opinion, the District Court set forth a factual narrative that was materially different from the facts set forth above. First, the District Court described the first strip search as taking place after T.R. spoke with Nurse Moore about her prior drug use and about the pills that were found in her backpack, *see* Doc 65 - Pg 3, despite evidence in the record suggesting that it took place *before* T.R. spoke with Nurse Moore. Second, the District Court reasoned that Defendants had individualized suspicion linking T.R. to "the missing marijuana" based on two student reports that T.R. was smoking marijuana in class, *id*. at 12 n.3, despite the reasonable inference drawn from Dr. Stamps's declaration that the student reports came *after* the initial strip search. *See* Doc 43-3 - Pg 2–3. Finally, the District Court did not reference the fact that T.R. remained in the Defendants' custody for the entire period between the first strip search and the second, leaving T.R. no opportunity to obtain and hide drugs after the first search conclusively determined she had no contraband.

STANDARD OF REVIEW

This Court reviews the District Court's grant of summary judgment *de novo*, viewing the evidence and drawing all reasonable inferences in the light most favorable to the non-movant. *See Burton v. Tampa Hous. Auth.*, 271 F.3d 1274, 1276–77 (11th Cir. 2001).

SUMMARY OF THE ARGUMENT

The District Court's grant of summary judgment to Defendants was error for several reasons.

First, Defendants violated the Fourth Amendment in conducting both searches, as neither search was justified at its inception or reasonable in scope. A strip search that involves the removal of underwear cannot be justified at its inception based solely on a general suspicion—no matter how well-founded—that a student is in possession of drugs. Rather, such an intrusive search is permissible only if officials identify specific evidence that drugs are hidden inside the student's underwear. No such evidence existed at the moment officials decided to strip-search T.R. the first time. Thus, Defendants' decision to make T.R. remove all her clothing, bend over, and lift her breasts in front of an uncovered window violated the Fourth Amendment.

Furthermore, there is no justification for the Defendants' second strip search. The District Court was required to analyze each individual search separately, paying due attention to the facts uncovered during the first search. Here, Defendants' first strip search conclusively demonstrated that T.R. had no drugs inside her clothing—eliminating any justification for the second strip search. The District Court ignored this fact, and thus failed to properly apply this Court's clear directives.

Defendants' strip searches of T.R. were also unconstitutionally excessive in scope. In the context of a strip search, officials cannot "escalate a strip search of a student by forcing [her] to remove [her] underwear"—much less remove her underwear, raise her breasts, and bend over—when the search could be conducted by less intrusive means like pulling her waistband or bra away from her body. *D.H. by Dawson*, 830 F.3d at 1312, 1318 n.8. Viewing the facts in the light most favorable to T.R., Defendants were "no more likely to find marijuana on [T.R.] by performing a fully nude strip search of [T.R.] in front of [an open window]" and then forcing her to lift her breasts and bend over "than [they] would have had [they] employed substantially less invasive means." *Id.* at 1317.

Second, the District Court erroneously held that Defendants were entitled to qualified immunity by ignoring the antecedent question of whether Defendants were acting within the scope of their authority and by misinterpreting controlling precedent from the Supreme Court and this Court. Qualified immunity protects government officials from suit "only when exercising powers that legitimately form a part of their jobs." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1266–67 (11th Cir. 2004). LCBE's written policy states that school officials may not conduct a strip search without the "specific approval of the Superintendent." Doc 43 - Pg 25. And it is undisputed that neither Defendant sought—let alone received—

the superintendent's approval to conduct a strip search. Because Defendants acted outside of their discretionary authority, qualified immunity is unavailable to them.

Additionally, Defendants ignored decades of precedent by first strip-searching T.R. without any specific basis to believe they would find drugs inside her underwear, and then ignoring the results of that search to force her to strip naked once more before allowing her to leave. Defendants also ignored clearly established case law holding that school officials cannot force a student to strip entirely naked where, as here, the search could be accomplished through less intrusive means. Each of these misapplications of qualified immunity independently warrants reversal.

Third, the District Court's analysis of state-agent immunity ignored that Defendants acted beyond the express bounds on their authority to conduct strip searches set by official LCBE policy. Under these circumstances, no state-agent immunity is available.

Fourth, and finally, the District Court took an inappropriately narrow view of what may constitute intentional infliction of emotional distress under Alabama law. Defendants' conduct here shocks the conscience and should be permitted to go to a jury.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS QUALIFIED IMMUNITY ON T.R.'S FOURTH AMENDMENT CLAIM.

Defendants are not entitled to qualified immunity when they have "violated a federal statutory or constitutional right" that was "clearly established" at the time of the violation. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Moreover, qualified immunity is available only when officials are accused of a rights-violation that occurred while they were "exercising powers that legitimately form a part of their jobs." *Holloman ex rel. Holloman*, 370 F.3d at 1266–67. Officials do not enjoy the doctrine's protections when they act outside their authority.

Defendants violated T.R.'s Fourth Amendment rights each time they strip-searched her. At no point did Defendants learn of or obtain any evidence suggesting that T.R. had drugs hidden inside her clothing or underwear, leaving only their inchoate and general suspicion that she possessed drugs. This was squarely insufficient under settled Supreme Court precedent. Nor did Defendants attempt less intrusive methods of checking T.R. for drugs, such as conducting a pat-down of her clothing or having T.R. stretch and shake the elastic of her bra and underwear, before forcing her to strip naked, lift her breasts, and bend over in front of an uncovered window.

Moreover, Defendants are not entitled to qualified immunity for two independent reasons. First, the District Court ignored undisputed evidence that Defendants disregarded express LCBE policy by strip-searching T.R. without seeking or receiving permission from the superintendent. Because Defendants were not acting within their authority in strip-searching T.R., qualified immunity cannot shield their conduct regardless of whether the law was clearly established. Second, even if Defendants acted within the scope of their authority, both searches violated clearly established law. It has long been clear that strip searches for contraband may only be justified where officials have a specific basis to believe that the contraband is stored inside a student's underwear, and where less intrusive searches are either ineffective or infeasible.

A. Defendants Violated T.R.'s Fourth Amendment Rights Each Time They Forced Her to Remove Her Clothing, Lift Her Breasts, and Bend Over.

1. The District Court erred by failing to separately analyze the two strip searches T.R. endured.

The District Court first erred when it failed to separately analyze the two strip searches to determine whether each search was supported by the requisite level of suspicion. Despite recognizing that the summary judgment record set forth two distinct strip searches, Doc 65 - Pg 4, 12, 20, the District Court did not analyze each search individually to determine whether *each* search was reasonable. That error of law infected the District Court's entire analysis.

The Fourth Amendment requires that any search be justified at its inception. *See Terry v. Ohio*, 392 U.S. 1, 19–20 (1968). When "two separate searches [are] conducted[,] each search must have an independent justification." *United States v. Piatt*, 576 F.2d 659, 660 (5th Cir. 1978)[4]; *accord Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) ("[A]ny intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity."); *N.G. v. Connecticut*, 382 F.3d 225, 233–34 (2d Cir. 2004) (separately analyzing justification for two strip searches of juvenile detainees between which detainees were under continuous supervision). That is the case even when multiple searches occur within the context of one encounter between a state actor and a private individual. *See Piatt*, 576 F.2d at 660–61 (treating two entries into defendant's automobile in the course of one arrest as two separate searches); *see also United States v. Ross*, 964 F.3d 1034, 1040 (11th Cir. 2020) (en banc) (considering "in turn" the constitutionality of two separate searches of defendant's motel room, conducted within two hours of each other).

The Supreme Court applied this fundamental Fourth Amendment requirement in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In that case, the respondent T.L.O. was found smoking cigarettes in her high school bathroom. The school's Assistant

[4] Fifth Circuit precedent predating September 30, 1981, is binding in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Vice Principal demanded to see T.L.O.'s purse and, upon opening it, saw a pack of cigarettes which he then removed. When he removed the cigarettes, he saw cigarette rolling papers, which he associated with marijuana use. He then "proceeded to search the purse thoroughly," finding a small amount of marijuana, drug paraphernalia, and other items suggesting T.L.O. was selling marijuana. *Id*. at 328.

The Supreme Court characterized this sequence of events as "two separate searches," the first being the search for cigarettes and the second being the search for marijuana. *Id*. at 343–44. Each search required separate justification under the Fourth Amendment, and because the justification for the second search arose when the Assistant Vice Principle saw cigarette rolling papers during the first search, if the first search lacked reasonableness, then the second search was also unreasonable. *Id*.

Here, the summary judgment record establishes that school officials conducted two separate strip searches of T.R. *See supra* at 9–10. The District Court was thus obligated to separately consider the reasonableness of each search at its inception. The District Court declined to do so, instead disposing of T.R.'s Fourth Amendment claim in part by concluding that Defendants had individualized suspicion to search T.R. the first time. Doc 65 - Pg 12 ("The defendants here had individualized suspicion linking T.R. to the missing marijuana, at least for the first search."). The District Court then stated, in a footnote, that it did not need to answer

the question whether the "defendants lacked reasonable, individualized suspicion for the second search." *Id*. at 12 n.3. The District Court cited no authority in support of this assertion, and there is no basis in law or reason for its failure to assess whether the second search was reasonable.

That failure had a material impact on the outcome of the case. By conflating the two searches into one analysis, the District Court misidentified the universe of facts known to Defendants before each search and failed to draw inferences in T.R.'s favor, as it was required to do. Specifically, the District Court erroneously relied on the reports Dr. Stamps received from two student-witnesses in finding reasonable suspicion for the first strip search despite the fact that, in the light most favorable to T.R., those reports were received *after* the first strip search occurred. *See* Doc 65 - Pg 3; *see also supra* at 9. Similarly, the District Court failed to acknowledge that the first search revealed no drugs, and that T.R. remained in Defendants' custody between the two searches; as discussed further *infra*, Section I(A)(2)(b)), those facts vitiated any suspicion that could have justified the second strip search.

2. Neither search was justified at its inception.

a. <u>The first search was premised entirely on an inadequate, general suspicion.</u>

In the school context, "[d]etermining the reasonableness of any search" requires one to first "consider 'whether the . . . action was justified at its inception.'" *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 20). Because "a strip search is a

'categorically distinct' type of search, [it] require[es] distinct elements of justification . . ." *D.H. by Dawson*, 830 F.3d at 1314 (quoting *Safford*, 557 U.S. at 374).[5] Consequently, school officials may not conduct a strip search unless they hold "'a reasonable suspicion . . . of resort to underwear for hiding evidence'" of contraband.'" *Id*. (quoting *Safford*, 557 U.S. at 377). And their suspicion must be justified by "'suspected facts.'" *Id*. (quoting *Safford*, 557 U.S. at 376). "'[G]eneral background possibilities fall short.'" *Id.* Such "suspected facts" must include evidence that would provide school officials reason to believe that they would find contraband in a student's underwear—not merely reason to suspect that the student might possess contraband generally.

Examples of such evidence include (1) evidence of a general practice among students at the particular school of hiding contraband in their underwear; (2) a specific report from a witness that the student had hidden contraband in her underwear; or (3) finding contraband hidden in the underwear of someone collaborating with the student. *Safford*, 557 U.S. at 376, 378. Thus, this Court has found a strip search of a student was justified at its inception where officials had discovered "well-hidden marijuana on three students" that same day; one of those other students told school officials that the student also had marijuana; and school

[5] The School District acknowledges that strip searches are uniquely invasive by requiring express permission from the Superintendent before they can be performed. *See* Doc 46-5 - Pg 5.

officials understood that marijuana had been discovered in the underpants of multiple students that day. *D.H. by Dawson*, 830 F.3d at 1316. "[V]iewed together," these facts went "beyond the 'general background possibilities' proscribed by the Supreme Court,' and provided school officials with the requisite "'reasonable suspicion . . . of resort to underwear for hiding evidence of wrongdoing.'" *Id.* at 1316, 1317 (quoting *Safford*, 557 U.S. at 376, 377).

No such suspicion existed here. At the time that Defendants decided to strip-search T.R., they knew only the following facts: 1) someone had smoked a marijuana cigarette in T.R.'s class; 2) T.R.'s backpack contained marijuana seeds and stems and rolling papers; and 3) T.R. denied that she had smoked marijuana.[6] At most, these facts created precisely the kind of "background possibilit[y]" that is wholly insufficient to conduct a strip search.

The Supreme Court's decision in *Safford Unified School District No. 1* is instructive. There, school officials strip-searched April Redding, a middle-school student, after learning that certain students were bringing pills and weapons to campus and that one student had gotten sick from taking the pills; discovering a

[6] The District Court's decision states that two students told Dr. Stamps that they had seen T.R. smoke a marijuana cigarette in class before the strip search, and the District Court relied on that fact in its analysis. *See* Doc 65 – Pg 12 n.3. The summary judgment record does not support this assertion, however. Dr. Stamps heard these rumors *after* the first strip search. *See supra* at 9.

binder owned by Ms. Redding and possessed by Ms. Redding's friend that contained weapons and prescription-strength ibuprofen and naproxen; and receiving a report that Ms. Redding "was giving these pills to fellow students." *Safford*, 557 U.S. at 368-73. The Supreme Court held that this evidence supported a search of Ms. Redding's backpack and outer clothing but provided only a "general background possibilit[y]" of finding contraband in her underwear, rendering the decision to strip search her a violation of the Fourth Amendment. *Id.* at 374, 376, 379.

Given the paucity of information at hand here, Defendants had even less basis to suspect T.R. was hiding drugs in her underwear than the officials in *Safford*. At the time of the first strip search, nobody had told Defendants that T.R. smoked marijuana in class or that she had hidden marijuana on her person. And Defendants had done nothing to eliminate the many other potential locations of the marijuana cigarette. They had not conducted even a cursory search of the classroom to see whether someone had discarded the marijuana cigarette on the floor (they had), or in a trash can. Defendants had not questioned or searched the person of any of the other students in class. And common sense indicates that a student would be unlikely to hide a marijuana cigarette that was burning mere moments earlier inside her underwear pressed against her skin. As the Supreme Court held in *Safford*, that absence of evidence that T.R. had hidden contraband in her underwear meant that

Defendants lacked reasonable suspicion to support "the categorically extreme intrusiveness of a search down to [her] body." *Id.* at 376.

b. Because the first strip search conclusively determined that T.R. did not possess drugs, the second search had no justification.

Even if Defendants had been justified in stripping T.R. fully naked the first time—which they were not—their decision to subject T.R. to a *second* strip search without a scintilla of evidence that T.R. had obtained drugs after the first search violated the Fourth Amendment.

It is well-settled that "[t]o determine whether reasonable suspicion exists, [this Court] look[s] to see whether the facts available to the officer *at the moment of . . . the search* warrant a man of reasonable caution in the belief that the action taken was appropriate." *United States v. Franklin*, 323 F.3d 1298, 1301 (11th Cir. 2003) (emphasis added) (internal quotation marks omitted); *accord Clark v. City of Atlanta*, 544 F. App'x 848, 853 (11th Cir. 2013) (applying rule in civil case). This temporal focus requires officials to take into account new information that develops over the course of an encounter with an individual; "as a search progresses . . . an agent must reevaluate whether reasonable suspicion to justify the next level of intrusion exists in light of the information gained during the encounter." *Brent v. Ashley*, 247 F.3d 1294, 1300 (11th Cir. 2001). Put another way, "increasingly thorough searches that fail to reveal contraband or incriminating evidence tend to

dispel reasonable suspicions, not heighten them." *Evans v. Stephens*, 351 F.3d 485, 491–92 (11th Cir. 2003), *rev'd on other grounds en banc*, 407 F.3d 1272 (11th Cir. 2005).

Importantly, the en banc court in *Evans* reached the same conclusion on this issue: that fruitless initial searches undermine—and can completely vitiate—reasonable suspicion to conduct a strip search. *See Evans v. Stephens*, 407 F.3d 1272, 1280 (11th Cir. 2005) ("Furthermore, Plaintiffs testified that Stephens had checked their pockets and twice patted down each of them before he strip-searched them in the jail. These searches also revealed nothing. This lack of revealed evidence undermines the reasonableness of Officer Stephens's belief that Plaintiffs possessed drugs."). The en banc court then went on to reverse the panel's grant of qualified immunity to the officers, explaining that any reasonable officer would know that this conduct violates the Fourth Amendment. *Id.* at 1283.

Rather than engaging with this clear precedent, the District Court stated in a footnote that whether reasonable suspicion existed for the second search was "a question this Court needn't answer." Doc 65 - Pg 12 n.3. This was error.

Viewed in the light most favorable to T.R., the first search revealed that T.R. had no drugs inside her clothing or underwear, nor did she have any drugs taped under her breasts or between her legs. "The earlier search[] revealed no drugs, and . . . removed any suspicion that [T.R.] was carrying drugs in the specific area or cavity

of the body where no drugs were found." *Denson v. United States*, 574 F.3d 1318, 1352 (11th Cir. 2009) (Carnes, J., concurring). Moreover, T.R. remained in the custody of school officials, in her underwear, for the entire time between the two searches, *see* Doc 46 - Pg 15, and thus could not have hidden any new drugs inside her clothing after the first search. The only inference to be drawn from these two facts—and certainly the one that must be made at this stage—is that Defendants knew T.R. could not have obtained any contraband between the first search and the second search. Indeed, Defendants did not suggest otherwise; their only justification for the second search was a purported protocol.[7] Doc 43-1 - Pg 120; Doc 43-2 - Pg 66.

Simply put, Defendants had no basis to believe that T.R. had drugs anywhere on her person after they forced her to strip completely naked the first time and found nothing. *See Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) ("The second search took place shortly after the first, and Hodges had been under continuous escort. Under these circumstances it seems clear that there was no possibility that Hodges could have obtained and concealed contraband. Thus the second search appears to

[7] Defendant Stamps did state that, after the first strip search, she received two students' reports that T.R. was the student who lit a marijuana cigarette in the agriculture class. But even if true, this fact was irrelevant given the conclusive findings of the first strip search: that T.R. did not have any drugs inside her clothing.

have been unnecessary."). Defendants' decision to strip-search her anyway violated T.R.'s Fourth Amendment rights.

3. The scope of each search was impermissible.

For the reasons set forth above, Defendants lacked adequate justification for either strip search of T.R. But even if Defendants had been initially justified in searching T.R., the scope of each search would still violate the Fourth Amendment.

The Fourth Amendment requires more than simply an adequate justification at the inception of a search. "Even where a student strip search is justified at its inception, the Fourth Amendment still requires the execution of the search to be reasonable in scope." *D.H. by Dawson*, 830 F.3d at 1317. That means that "the 'measures adopted' must be '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.* (quoting *T.L.O.*, 469 U.S. at 342). Thus, even if school officials have a basis to believe a student has drugs inside her clothing, they cannot "escalate a strip search of a student by forcing [her] to remove [her] underwear"—much less remove her underwear, raise her breasts, and bend over—when the search could be conducted by less intrusive means like asking her to pull her waistband or bra away from her body. *See D.H. by Dawson*, 830 F.3d at 1312, 1318 n.8.

D.H. by Dawson is controlling and establishes the unlawfulness of Defendants' conduct. There, as here, school officials strip-searched a student to

determine whether he had marijuana hidden in his underwear. Officials ordered the student to fully remove his clothing in a room with other students who could "potentially" see him naked. 830 F.3d at 1315. Although this Court determined that officials had the requisite suspicion to strip-search D.H., it found that the "measures adopted" to perform that search were unconstitutionally intrusive. *See id.* at 1317. As this Court explained, the "decision to have D.H. fully remove all of his underclothing in front of D.H.'s peers bore no rational relationship to the purpose of the search itself. That is, [the official] was no more likely to find marijuana on D.H. by performing a fully nude strip search of D.H. in front of his peers than he would have had he employed substantially less invasive means." *Id.* For example, the school official "could have simply required D.H. to pull the waistband of his underpants away from his body rather than fully remove his underpants." *Id.* This Court also observed that the official could have taken steps to ensure that other students would not see D.H. naked, such as conducting the search in a nearby bathroom or removing other students from the classroom. *Id.* By choosing to conduct the strip search in the manner that he did, the school official "unnecessarily subjected D.H. to a significantly higher level of intrusion" and "rendered the search excessive in scope and, therefore, unconstitutional." *Id.* at 1317, 1318.

Defendants' strip searches of T.R. were even more excessive than the unconstitutional strip search in *D.H. by Dawson*. As in *D.H. by Dawson*, Defendants

chose to conduct the searches in a location where T.R.'s schoolmates could potentially see her naked—an office with an unobstructed window that looked out on a public corridor near the cafeteria.[8] Like *D.H. by Dawson*, the Defendants required T.R. to remove all of her clothing. But unlike *D.H. by Dawson*, Defendants did not stop there. After T.R. was already fully naked, Defendants ordered her to lift up her breasts and then raise her arms over her head and bend over so that they could inspect her. *See infra* at 42.

Viewing the facts in the light most favorable to T.R., Defendants were "no more likely to find marijuana on [T.R.] by performing a fully nude strip search of [T.R.] in front of [an open window]" and then forcing her to lift her breasts and bend over "than [they] would have had [they] employed substantially less invasive means." *D.H. by Dawson*, 830 F.3d at 1317. Defendants "could have simply required [T.R.] to pull the waistband of [her] under[wear and bra] away from [her] body rather than fully remove [them]," *id.*, and then lift her breasts and bend over with her arms raised over her head. Furthermore, *D.H. by Dawson* made clear that a fully nude strip search would essentially *never* be constitutional under these facts: "we can think of no circumstance where it would be permissible for a school administrator

[8] That T.R. did not observe any students watching the strip search is of no moment; the uncovered office window made T.R. "potentially" visible to anyone in the public corridor, just as in *D.H. by Dawson*. There too, there was no evidence that the student was actually seen by his peers; the potential for exposure was sufficient.

to escalate a strip search of a student by forcing [her] to remove [her] underwear when—as here—due to the design of the underwear, an exhaustive search could be performed through 'flanking,'" *i.e.*, pulling the waistband away from the student's body. *See id.* at 1318 n.8. Thus, Defendants' actions each time they strip-searched her violated T.R.'s Fourth Amendment rights.

B. The District Court Improperly Granted Defendants Qualified Immunity.

Qualified immunity protects government officials from liability only when the officials perform duties within the scope and authority of their job. Because LCBE policy bars school officials from conducting strip searches without receiving the express approval of the superintendent, and because Defendants neither sought nor received such approval, Defendants acted beyond the scope of their authority in conducting the strip searches and are not entitled to qualified immunity.

Even if Defendants had adequately invoked the defense, however, they would still not be entitled to qualified immunity because Defendants violated clearly established precedent in strip-searching T.R. twice, first on a generalized suspicion of drug possession, and then on no suspicion at all. They further violated clearly established precedent by forcing T.R. to strip fully naked, lift her breasts, and bend over in front of an open window when a less intrusive search could have accomplished the same goal.

1. Because Defendants acted outside the scope of their discretionary authority, they are not entitled to qualified immunity.

Qualified immunity protects government officials from suit "only when exercising powers that legitimately form a part of their jobs." *Holloman ex rel. Holloman*, 370 F.3d at 1266–67. In order to prove that challenged conduct "legitimately form[s] a part of their jobs," Defendants must show that they were "(a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within [their] power to utilize." *Id.* at 1265, 1267. Thus, Defendants bore the burden of showing *both* that strip-searching T.R. involved a job-related goal *and* that it was within their power to do so without approval from the superintendent. Defendants fell short of this burden because strip-searching T.R. without the Superintendent's authorization was outside their power.

This Court has consistently refused to grant qualified immunity to officials who have pursued legitimate job-related goals through means that fell outside their authority. For instance, this Court has denied qualified immunity to a teacher that pursued "the legitimate job-related function of fostering her students' character education" by means of classroom prayer because prayer "is not within the range of tools among which teachers are empowered to select in furtherance of their pedagogical duties." *Id.* at 1283. Similarly, it has held that a guardian ad litem is not entitled to qualified immunity where she pursued the legitimate job-related goal of

acting in her assigned child's best interest by providing care directly to the child because acting "as the child's caretaker or guardian" fell "outside the scope of her authority." *Lenz v. Winburn*, 51 F.3d 1540, 1547 (11th Cir. 1995). And this Court has denied qualified immunity to a prison warden pursuing the legitimate job-related goal of "decision-making related to the provision of medical care of inmates" by entering a do-not-resuscitate order for an inmate, which he lacked authority to do under Alabama law. *Est. of Cummings v. Davenport*, 906 F.3d 934, 941–42 (11th Cir. 2018).

The District Court did not analyze whether Defendants acted within their authority here.[9] And Defendants simply asserted that "[s]upervising SHS faculty and students were [sic] within [their] official duties and the scope of [their] authority." Doc 43 - Pg 17. This bare assertion cannot satisfy Defendants' burden of proving that they acted within their discretionary authority. Although supervising students is surely a legitimate job-related goal of school administrators, the discretionary authority inquiry does not stop there. Defendants must also prove that they pursued that goal "through means that were within [their] power to utilize." *Holloman ex rel. Holloman*, 370 F.3d at 1265.

[9] The District Court did separately analyze whether Defendants acted "beyond authority" for purposes of state-agent immunity. Doc 65 - Pg 23–27. But that state-law question turns on a separate and unrelated legal inquiry, *see id.* at 25 (assessing whether LCBE policy constitutes a "guideline" or "detailed rule"), and the District Court's analysis was legally erroneous. *See infra* at Section II(A).

Defendants cannot meet this burden because Lamar County Board of Education policy specifically forbade them from conducting a strip search without approval of the superintendent. The policy states: "Student searches must be conducted by a school administrator in the presence of another certified school employee and may include a private pat down of the student, a search of personal items and clothing, *or a more thorough search upon specific approval of the Superintendent*." Doc 43 - Pg 25 (emphasis added). Requiring a student to strip naked, lift her breasts, raise her arms above her head, and bend over for inspection plainly constitutes "a more thorough search" than "a private pat down of the student" or "a search of personal items and clothing." *See id.* Thus, school policy required "specific approval of the Superintendent." *Id.* And it is undisputed that Defendants neither sought nor received the superintendent's specific approval for either search. *See id.* at 26; Doc 43-5 - Pg 2. In sum, the Lamar County Board of Education expressly removed unapproved strip searches from the arsenal of tools that Defendants could use in carrying out their duties, and Defendants nonetheless chose to conduct one. Because they acted outside the scope of their granted authority, Defendants are not entitled to qualified immunity here.

2. Defendants are not entitled to qualified immunity for the first strip search because the right they violated was clearly established.

For qualified immunity, "'the salient question . . . is whether the state of the law . . . gave [the officers] fair warning that their alleged treatment of [the plaintiff] was unconstitutional.'" *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). A plaintiff may satisfy their burden in one of three ways: they may identify (1) "binding precedent that is materially similar," *Jones v. Fransen*, 857 F.3d 843, 851–52 (11th Cir. 2017); (2) "'a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.'" *D.H. by Dawson*, 830 F.3d at 1318 (citation omitted). A principle may be clearly established, and thus control in a particular case, so long as "'the reasoning, though not the holding'" of prior decisions provides state officials with the requisite fair warning. *Jones*, 857 F.3d at 852 (citation omitted).

Even if Defendants could properly invoke the qualified immunity defense, their conduct violated T.R.'s clearly established Fourth Amendment rights in two separate respects. First, Defendants' strip search was not justified at its inception under clearly established law because Defendants did not possess a "reasonable suspicion . . . of resort to underwear for hiding evidence of wrongdoing." *D.H. by*

Dawson, 831 F.3d at 1317 (quoting *Safford*, 557 U.S. at 377). Second, Defendants' strip search unconstitutionally exceeded its permissible scope under clearly established law because Defendants "escalate[d] a strip search of a student by forcing h[er] to remove h[er] underwear when—as here—due to the design of the underwear, an exhaustive search could be performed through [less intrusive means]." *Id.* at 1318 n.8. Each violation of clearly established law is independent cause for reversal.

The reasoning of *Safford* and *D.H. by Dawson* clearly establish both principles of law. First, *Safford* and *D.H. by Dawson* clearly establish that Defendants could not search T.R. without "a 'reasonable suspicion . . . of resort to underwear for hiding evidence of wrongdoing.'" *D.H. by Dawson*, 830 F.3d at 1317 (quoting *Safford*, 557 U.S. at 377). To make this showing, Defendants could not just point to facts indicating that T.R. might possess contraband *somewhere*. *See Safford*, 557 U.S. at 373-74, 376 (finding reports that student was distributing pills to other students, without specific evidence that she had hidden pills in her underwear, insufficient to justify strip search). That sort of "general background possibilit[y] fall[s] short." *Id.* at 376. Instead, Defendants needed to provide a "'justification in suspected facts'" that T.R. had hidden drugs in her underwear "before a search c[ould] reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.'" *D.H. by Dawson*, 830 F.3d at 1314 (quoting *Safford*, 557 U.S. at 376, 377).

The District Court did not dispute the existence of this clearly established principle. Doc 65 - Pg 10 (restating *Safford*'s holding that "without some circumstantial evidence linking the missing drugs to the student's private areas, administrators had no cause to 'make the quantum leap from outer clothes and backpacks to exposure of intimate parts'") (quoting *Safford*, 557 U.S. at 377). Rather, the District Court simply asserted that Defendants *did* have "reason to suspect TR had illegal drugs hidden on her person" because of the close temporal proximity to the policy violation and because Defendants did not find a marijuana cigarette in T.R.'s belongings. *See id.* at 11. Based on these two facts, the District Court concluded that "administrators might have reasonably concluded she hid the missing cigarette in or under her clothing." *Id.*

The District Court's decision erred in multiple respects. First, the District Court simply presumed that T.R. did, in fact, smoke the marijuana cigarette in class. This presumption is based upon a piece of evidence—a report made by two students to Dr. Stamps—that Defendants learned only *after* the first strip search. Second, the two facts cited by the District Court to justify the search—temporal proximity and the unsuccessful search of T.R.'s backpack—provide no specific basis to think that T.R. "'resort[ed] to underwear for hiding evidence of wrongdoing,'" *D.H. by Dawson*, 830 F.3d at 1314 (quoting *Safford*, 557 U.S. at 377). Assuming that T.R. may have hidden drugs in her underwear based solely on the possibility that she may

possess drugs somewhere is exactly the sort of "general background possibilit[y]" that the Supreme Court ruled inadequate for such a search.

The language used by the District Court further confirms that it misunderstood the proscription on making the "quantum leap from outer clothes and backpacks to exposure of intimate parts" without evidence that the student "resort[ed] to underwear for hiding evidence of wrongdoing." *Safford*, 557 U.S. at 377. Rather than state that the Defendants had reason to suspect that T.R. hid drugs in her underwear, the District Court ruled that Defendants had "reason to suspect TR had hidden illegal drugs *on her person*." Doc 65 - Pg 11 (emphasis added). In the very next sentence, the District Court stated that "administrators might have reasonably concluded that T.R. "hid the missing cigarette *in or under her clothing*." *Id.* (emphasis added). But *Safford* and *D.H. by Dawson* expressly note that such concerns could be addressed through a pat-down, flanking, or other less intrusive searches expressly mentioned in both cases. Indeed, the central point of *Safford* and *D.H. by Dawson* is that the "exposure of [a schoolchild's] intimate parts" is categorically distinct and requires suspicion that the child "resort[ed] to underwear for hiding evidence of wrongdoing." *D.H. by Dawson,* 830 F.3d at 1316–17 (quoting *Safford*, 557 U.S. at 377). The District Court's analysis conflated the suspicion necessary for *any* search with the "'categorically distinct'" requirements necessary for an "inherently embarrassing, frightening, and humiliating" strip search. *Id.* at

1314 (citing *Safford*, 557 U.S. at 374–75). That was error, and the District Court's decision must be reversed on this basis.

Second, *D.H. by Dawson* clearly established that Defendants' strip search of T.R. was unconstitutionally excessive in scope. According to the District Court, *D.H. by Dawson* could not provide fair warning to Defendants because it "held unreasonable only one type of search: one where an official requires a student 'to strip down to his full naked body in front of several of his peers.'" *See* Doc 65 - Pg 13. In the District Court's mind, this set of circumstances was "inapposite" because D.H. was strip-searched in a room with some of his peers while T.R. was merely strip-searched in a room where "peers and unnecessary school officials 'could have' peered in and 'could have' seen T.R.'s nakedness." *Id.* at 14. The District Court deemed this risk "remote" and held, "without some evidence that peers witnessed the search, the Court lacks a factual basis to say TR faced the level of humiliation and intrusiveness at issue in *D.H.*" *Id.* at 14–15. And based on this single factual difference, the District Court decided that Defendants "were not obligated to extrapolate *D.H.*'s reasoning and apply it to an inapposite set of circumstances." *Id.* at 14.

The District Court's decision is incorrect. First, *D.H. by Dawson* took pains to ensure that future officials were given fair warning about the permissible scope of strip searches and would not be "obligated to extrapolate" from its reasoning.

Although the decision did turn on both the presence of D.H.'s peers and the intrusive character of the search, this Court provided explicit warning to future school administrators that the search was constitutionally problematic separate and apart from the presence of D.H.'s peers. To that end, the panel wrote: "we can think of *no circumstance* where it would be permissible for a school administrator to escalate a strip search of a student by forcing him to remove his underwear when—as here—due to the design of the underwear, an exhaustive search could be performed through 'flanking.'"[10] *D.H. by Dawson*, 830 F.3d at 1318 n.8 (emphasis added); *see also id.* at 1317 (explaining that search was excessive because officials "could have simply required D.H. to pull the waistband of his underpants away from his body rather than fully remove his underpants," which "is no doubt far less invasive . . . and would still achieve the purposes of the search in the circumstances here"). Here, Defendants could have attempted a pat-down, or performed an exhaustive search through flanking, as in *D.H. by Dawson* and *Safford*. It takes no "extrapolation" by Defendants to understand that *D.H. by Dawson* did not permit them to make T.R. remove her underwear, lift her breasts, and bend over with her arms raised over her head when they could have conducted a less intrusive search.

[10] The panel's reference to "flanking" denotes a search performed by requesting the student "to pull the waistband of his underpants away from his body" without entirely removing the underwear. *D.H. by Dawson*, 830 F.3d at 1319.

Third, the District Court's efforts to factually distinguish *D.H. by Dawson* rested on drawing impermissible inferences in favor of Defendants. To start, the District Court asserted—without any support in the record—that T.R. faced only the "remote" possibility that a classmate could have seen officials strip her naked and inspect her body. That inference is inconsistent with the evidence, which showed that the window looked out on a public corridor near the cafeteria, not tucked away in some rarely trafficked nook, and is certainly inappropriate at this stage. T.R. was entitled to the reasonable inference that the presence of the uncovered window facing into a public corridor of the school, right by the school's cafeteria, created the *potential* for her to be seen—just as the student in *D.H. by Dawson*. 830 F.3d at 1315. And just as in *D.H. by Dawson*, officials had no legitimate reason to strip-search T.R. where her peers could "potentially" watch. *Id.* at 1317.

Finally, the District Court's analysis entirely omits the myriad ways in which Defendants' strip search of T.R. was far more intrusive than the strip search of D.H. In *D.H. by Dawson*, D.H. was only required to "pull[] his underwear down to his ankles." 830 F.3d at 1312. He was not required to touch himself or contort his body; T.R., by contrast, was forced to lift her breasts and bend over with arms raised over her head. The fact that the much less intrusive search in *D.H. by Dawson* was unconstitutionally excessive provided fair warning to Defendants that the more intrusive search here was too.

3. Any reasonable school official would know that strip-searching a student without any basis to suspect contraband violates the Fourth Amendment.

Nor are Defendants entitled to qualified immunity for their decision to strip-search T.R. after eliminating any suspicion that she had hidden marijuana inside her clothing. The law has long been clear that separate strip searches require separate justification, and that the fruitlessness of earlier searches must inform—and will nearly always undermine—the existence of reasonable suspicion for subsequent intrusive searches.

a. It has been clear for decades that a fruitless strip search of a student eliminates any basis to conduct a subsequent strip search.

As early as 1997, this Court has recognized that the results of prior searches must inform the assessment of whether an official has reasonable suspicion to conduct further intrusive searches. *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 825 (11th Cir. 1997) (interpreting *T.L.O.* as "grounded solely in the notion that each successive discovery of items in [the student's] purse by the vice principal provided reasonable suspicion and thereby legitimated further searching."). Applying this rule in 2001, this Court held that border agents violated the Fourth Amendment by conducting a strip search of a detainee on suspicion of smuggling after searches of the detainee's bags and outer clothing revealed nothing. *Brent*, 247 F.3d at 1301. Thus, by no later than 2001, it was clear that prior searches

that reveal nothing limit the ability of officials to conduct intrusive searches like a strip search.

Since 2001, both this Court and the Supreme Court have repeatedly applied this principle to find that officials violate the Fourth Amendment when they fail to consider prior fruitless searches before conducting strip searches, both in the context of school officials and otherwise. In 2005, this Court, sitting en banc, denied qualified immunity to an officer who conducted a strip search of two motorists after pat-downs and a pocket check revealed no contraband—reversing a panel opinion that found the law was not clearly established. *Evans*, 407 F.3d at 1280. In the school strip search context, in 2009, the Supreme Court in *Safford* ruled the strip search of a student constitutionally impermissible in part because "the preceding search of [a different student] . . . yielded nothing." *Safford*, 557 U.S. at 376. Defendants here were presented with a much stronger basis to reconsider whether a subsequent search was appropriate than in *Safford* or *Evans*. The fruitless search in *Safford* was of *another* student—thus leaving open the possibility that the plaintiff student possessed drugs. The fruitless search in *Evans* was a pat-down—thus leaving open the possibility that a more intrusive search could turn up evidence. But here, the Defendants conducted two searches of T.R. that were identical in scope. Both times, T.R. was forced to strip completely naked, lift her breasts, then raise her hands over

her head and bend over. Nothing about the second search could have even theoretically revealed evidence that the first search had missed.

In short, the law has been clear for decades that school officials may not disregard the results of prior searches in determining whether reasonable suspicion exists to strip search a student. Yet that is precisely what Defendants did. The District Court's grant of qualified immunity to the Defendants was thus erroneous and should be reversed.

b. The unconstitutionality of the second strip search should have been obvious even absent specific precedent.

Even if this Court and the Supreme Court had not specifically and repeatedly held that the fruitlessness of prior searches vitiates suspicion to conduct subsequent strip searches, qualified immunity would still be inappropriate. "The unconstitutionality of outrageous conduct obviously will be unconstitutional." *Id.* at 377. It is well-settled that qualified immunity may not shield officials from liability where "a general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotation marks in original). The more egregious an official's conduct, therefore, the more likely it is that general constitutional principles will suffice to defeat qualified immunity. *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam).

Defendants' decision to conduct a second strip search *after* a full-body strip search completed shortly prior left *no* suspicion that T.R. was hiding drugs under her clothing "made this violation—on the day of the search—clear from the terms of the Constitution itself." *Evans*, 407 F.3d at 1283. As *Safford* itself noted, the Fourth Amendment requires reasonable suspicion before *any* body search—and such suspicion must be specifically about the prospect of hidden contraband inside a student's clothing when asking a student to submit to the "embarrassing, frightening, and humiliating" experience of a strip search. *Safford*, 557 U.S. at 374–75. But Defendants introduced literally "no evidence that [the second strip search] w[as] compelled by necessity or exigency." *Taylor*, 141 S. Ct. at 54.

No reasonable official could have believed that, in 2017, the Constitution permitted them to force a fourteen-year-old girl to strip naked, lift her breasts, and bend over despite knowing that she was not carrying contraband inside her clothing—even absent precedent directly on point. Defendants are not entitled to qualified immunity, and the District Court's erroneous entry of summary judgment must be reversed.

II. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S STATE LAW CLAIMS.

Defendants are not entitled to summary judgment on their state law claims. State-agent immunity is unavailable to state officials who exceed the bounds of their

authority—which, under the plain text of LCBE policy, Defendants did here. And the tort of outrage is available for conduct that shocks the conscience, including forcing a fourteen-year-old girl to strip naked, lift her breasts, and bend over for inspection for no reason whatsoever.

A. Defendants Are Not Entitled to State-Agent Immunity.

The District Court granted summary judgment on Plaintiff's invasion of privacy claim by holding that Defendants were entitled to state-agent immunity. Doc 65 - Pg 27. State-agent immunity safeguards state employees "'in the exercise of their judgment in executing their work responsibilities.'" *Ex parte Kennedy*, 992 So. 2d 1276, 1280 (Ala. 2008) (quoting *Ex parte Hayles*, 852 So. 2d 117, 122 (Ala. 2002)). It provides no shield, however, "'when the State agent acts . . . beyond his or her authority, or under a mistaken interpretation of the law.'" *Id.* at 1281 (quoting *Ex parte Cranman*, 792 So. 2d 392, 405 (Ala. 2000)). Thus, state-agent immunity is not available where a plaintiff "proffer[s] evidence that the State agent failed to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist." *Id.* at 1282–83 (internal quotations omitted) (quoting *Giambrone v. Douglas*, 874 So. 2d 1046, 1052 (Ala. 2003)).

The record here demonstrates precisely such a failure to comply with detailed rules and regulations. As set forth *supra*, Section I(B)(1), LCBE policy unequivocally states that any search that is "more thorough" than "a private pat down

of the student" requires "specific approval of the Superintendent." Doc 46-5 - Pg 5. The District Court concluded that this bright-line rule "leaves much to discretion." Doc 65 - Pg 26. In so finding, the District Court read ambiguity into how to determine the "thoroughness" of a search; in its view, a private pat-down search is somehow more thorough than requiring a student strip completely naked, lift her breasts, and bend over. *See id*.

That conclusion is unsupported by logic or case law. This Court has described the intrusiveness of a brief pat-down as "minimal." *United States v. Puglisi*, 723 F.2d 779, 784–85 (11th Cir. 1984). It has thus characterized strip searches as categorically more intrusive and thorough than pat-downs, requiring additional justification before they may be undertaken. *See Brent*, 247 F.3d at 1300 (describing an increasingly invasive search as "progress[ing] from a stop, to a pat-down search, to a strip search" and characterizing each search as "the next level of intrusion"). That characterization is the only reasonable one; no reasonable person would conclude that a strip search is somehow less invasive than any of the thousands of pat-downs conducted across the country. Furthermore, the District Court's strained interpretation of the LCBE policy language is particularly inappropriate at summary judgment, where the evidence must be viewed in the light most favorable to Plaintiffs.

Even if this Court declines to treat strip searches as categorically more invasive than pat-downs, however, there is little question that the particular strip searches

here—involving the complete removal of all clothing and underwear, a lifting of T.R.'s breasts, and a bending over with arms raised to reveal the most intimate parts of her body—were far more intrusive than a simple frisk. The District Court's grant of state-agent immunity to Defendants on T.R.'s claim for invasion of privacy should be reversed.

B. The Record Supports T.R.'s Claim for Outrage.

To recover under the tort of outrage, a plaintiff must demonstrate that "the defendant's conduct '1) was intentional or reckless; 2) was extreme and outrageous; and 3) caused emotional distress so severe that no reasonable person could be expected to endure it.'" *Little v. Robinson*, 72 So. 3d 1168, 1172 (Ala. 2011) (quoting *Green Tree Acceptance, Inc. v. Standridge*, 565 So. 2d 38, 44 (Ala. 1990). The District Court relied on the list articulated in *Little* to note that "the Supreme Court of Alabama has found sufficiently extreme conduct in on [sic] only three instances: '(1) wrongful conduct in the family-burial context; (2) barbaric methods employed to coerce an insurance settlement; and (3) egregious sexual harassment." Doc 65 - Pg 28 (quoting *Wilson v. Univ. of Ala. Health Servs. Found., P.C.*, 266 So. 3d 674, 677 (Ala. 2017)). But *Little* disclaimed such a limited universe, immediately qualifying the above-quoted list by saying, "That is not to say, however, that the tort of outrage is viable in only the three circumstances. . ." *Little v. Robinson,* 72 So. 3d at 1172–1173. Indeed, the Supreme Court of Alabama has expressly cautioned that

its statements in *Little* were not meant to create an exhaustive list—a warning the District Court failed to heed here. *Wilson*, 266 So. 3d at 677 ("The trial court's holding that the tort of outrage 'is limited to three situations' is an incorrect statement of the law. As noted in *Little*, the tort can be viable outside the context of the above-identified circumstances and has previously been held to be so viable."). And courts *have* recognized outrage claims in other contexts far less egregious than the case here. *See, e.g.*, *Ex parte Lumbermen's Underwriting All.*, 662 So. 2d 1133, 1136 (Ala. 1995) (sustaining outrage claim premised on insurer's decision to halt worker's compensation payments pending appeals); *Davis v. White*, No. 7:17-cv-01533-LSC, 2020 WL 4732073, at *20–*21 (N.D. Ala. Aug. 14, 2020) (Coogler, J.) (finding that plaintiffs who were charged ballooning debt by sewer service company stated claim for outrage).

Defendants' conduct here was far more egregious than suspending worker's compensation payments while the award of payments was appealed, or charging unreasonable interest on debt for sewer services. Courts have uniformly recognized the degradation, embarrassment, and humiliation that can accompany any strip search—particularly for a minor. *Safford*, 557 U.S. at 374-75 (noting that strip searches are "embarrassing, frightening, and humiliating," and "fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable"); *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616,

623 (5th Cir. 2018) ("Underwear searches are embarrassing, frightening, and humiliating. . .") (citation and internal quotations omitted); *Doe v. Renfrow*, 631 F.2d 91, 92–93 (7th Cir. 1980) ("It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency.")

Indeed, T.R. herself continues to live with the trauma of this embarrassment. Defendants' conduct resulted in T.R. growing depressed and anxious, giving up on school, losing confidence in herself, and giving up on her hopes and dreams. Doc 43-1 - Pg 133.

Furthermore, the District Court dramatically understates the severity of the facts at issue here, describing T.R.'s outrage claim as merely alleging that "defendants unreasonably searched her after finding evidence of a Schedule-1 Drug in her backpack." Doc 65 - Pg 28. But T.R. did not merely allege that Defendants unreasonably searched her. She alleged that Defendants made her entirely disrobe, lift her breasts, and bend over in front of a window open to a public corridor. And then she alleged that Defendants did so *again* knowing for a fact that she did not have drugs and that the search would yield nothing. On top of that, Defendants told T.R. that the second search was required by protocol—a protocol that does not, in fact, exist. Requiring a fourteen-year-old child to submit to this kind of search when

school officials know in advance that the only possible result is her needless humiliation "go[es] beyond all possible bounds of decency," *see* Doc 65 - Pg 28, and states a cognizable claim of outrage.

CONCLUSION

The District Court's decision granting Defendants Dr. Lisa Stamps and Kathy Dean summary judgment on T.R.'s claims for unreasonable searches under the Fourth Amendment, invasion of privacy under Alabama law, and outrage under Alabama law should be reversed.

Respectfully submitted,

s/ Christopher Kemmitt

CHRISTOPHER KEMMITT
GEORGINA C. YEOMANS
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, D.C. 20005
(202) 682-1300
ckemmitt@naacpldf.org

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL
ASHOK CHANDRAN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

LEROY MAXWELL
AUSTIN RUSSELL
MAXWELL & TILLMAN LAW FIRM
2326 2nd Ave N.
Birmingham, AL 35203
(205) 216-3304

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as the brief contains 11,928 words, excluding those parts exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6), as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

s/ Christopher Kemmitt
Christopher Kemmitt