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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KESHARA SENANAYAKE, Plaintiff, v. JANE SYLVESTER, Principal, Gateway Central High School, in her official and individual capacities; EMILY SU, Superintendent, Gateway School District, in her official and individual capacities; and GATEWAY SCHOOL DISTRICT, Defendants.	**Case No. 20-cv-3352 CDP** **Civil Action**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Historically, Fourth Amendment cases resolved disputes about searches of items, such as purses, which contained limited private information. Now, courts must contend with cases involving devices that expose nearly unlimited amounts of sensitive information to searchers. The proliferation of smart phones, which serve not only as telephones, but also as cameras and computers, has transformed the nature of what people carry. These phones hold personal information on a wide range of subjects including but not limited to financial transactions, prescriptions, and romantic relationships. Their storage capacity exceeds that of most other possessions, and a comprehensive search of a cell phone can nearly reconstruct an individual's private life. Public school students have been faced with invasive searches of their cell phones by school officials. These searches are subject to the Fourth Amendment of the United States Constitution, which grants students the right to be free from unreasonable searches and seizures. To protect the liberty of the people, courts must carefully analyze the reasonableness of searches that substantially invade students' privacy interests. Unreasonable searches are unconstitutional.

Keshara Senanayake, an honor roll student and elite water polo player at Gateway Central High School, was subjected to a search of his cell phone by Jane Sylvester, his school principal. After failing to find any evidence of cyberbullying, which was the objective of the search pursuant the school's Student-Athlete Anti-Cyberbullying Policy (the Policy), Sylvester conducted another extensive search of Senanayake's cell phone after viewing an ambiguous Venmo push notification on the home screen regarding a "pod." She investigated his financial transactions on Venmo and entries on the Notes application, which included an embarrassing draft message to his partner, Erwin, and evidence that he sold e-cigarettes to other students. As a result of the search, Senanayake was suspended from his team at the school and lost his college

scholarship offer. Now, Senanayake seeks monetary damages, declaratory relief, and injunctive relief for deprivation of his constitutional rights under the Fourth Amendment. The defendants are not entitled to summary judgment because they have failed to meet the burden of producing evidence that both the Policy and the search were reasonable. A reasonable jury could return a verdict for Senanayake. Therefore, the motion for summary judgment must be denied.

STATEMENT OF MATERIAL FACTS

Keshara Senanayake is an eighteen-year-old student at Gateway Central High School who has been on honor roll for every semester since he matriculated at the school as a freshman. (Deposition of the Plaintiff, Keshara Senanayake ("Senanayake Dep."), at 15:7-26, attached as Ex. A). An elite water polo player, Senanayake was not only on the school team, but he also had been recruited to play water polo at many colleges. (Senanayake Dep., at 15:17-21). Senanayake had an athletic scholarship offer from the University of Southern California (USC), which has one of the best water polo teams in the country. (Senanayake Dep., at 15:7-26). Monday, May 4, 2020, started off as a regular school day for Senanayake. (Senanayake Dep., at 4:13-16). He woke up, ate breakfast, and drove to school. (Senanayake Dep., at 4:13-16). Having arrived on campus a few minutes early, Senanayake was chatting with his friends in the hallway when Jane Sylvester, the school principal, approached the group and demanded that he give her his cell phone for search under the school's Student-Athlete Anti-Cyberbullying Policy. (Senanayake Dep., at 4:13-16). Senanayake was shocked. (Senanayake Dep., at 4:13-16). He had never been in trouble for any kind of bullying at the school. (Deposition of the Defendant, Jane Sylvester ("Sylvester Dep."), at 10:17-21, attached as Ex. B). In fact, he had no record of disciplinary infractions of any kind. (Senanayake Dep., at 15:28-30). Afraid that he would lose his spot on the boys' water polo team, Senanayake handed over his phone. (Senanayake Dep., at 5:1-4).

The Gateway School District has a policy that requires students who participate on interscholastic sports teams at Gateway Central High School to (1) disclose to their school "the names of all electronic messaging applications (including but not limited to WhatsApp, iMessage and Facebook Messager, Instagram Direct Messages, [and] Twitter Direct Messages) or groups that they belong to" and (2) allow their school principal "to search those applications on student cellular phones or electronic devices at random throughout the season, including by providing any passwords needed to access the applications." (Student-Athlete Anti-Cyberbullying Policy ("Policy"), attached as Exhibit A). Under the Policy, the school principal will search the student's phone upon seizing it and then return it to them immediately upon dismissal at the end of the school day. (Policy). If a student-athlete refuses to submit to a phone search authorized under the Policy, he or she will be barred from participation in sports team activities, including practice and competitions. (Policy). If a search authorized by this policy finds that a student-athlete has engaged in cyberbullying, he or she will face consequences. (Policy). This policy targets student-athletes based on both anecdotal evidence of bullying by this population and alleged cyberbullying by members of the boys' lacrosse and girls' soccer teams. (Sylvester Dep., at 7:11-16). However, there have been no reported incidents of cyberbullying by members of the boys' water polo team at Gateway Central High School. (Sylvester Dep., at 8:1-4).

After confiscating Senanayake's cell phone, Sylvester rummaged through his messages on iMessage, Instagram, Twitter, Snapchat, and Whatsup, all of the applications that he had disclosed to the school and that she could search under the Policy. (Sylvester Dep., at 11:14-20). In the messaging applications Sylvester investigated, Senanayake had private conversations with his parents, friends, and partner, Erwin. (Senanayake Dep., at 4:13-16). He kept "literally everything in that phone" and hated the thought of someone going through his personal

messages. (Senanayake Dep., at 16:17-19). Upon reviewing these messages, Sylvester found no evidence that Senanayake was cyberbullying other students. (Sylvester Dep., at 11:22-26).

At the end of the school day, when she picked the phone up again to return it to Senanayake as mandated by the Policy, Sylvester saw a push notification from Venmo on the home screen. (Sylvester Dep., at 12:8-10). The notification indicated that another student at Gateway Central High School had sent Senanayake $10 on Venmo with a comment that said, "thanks for the pod" and included a puff of smoke emoji. (Sylvester Dep., at 12:8-15). On Venmo, people often provide comments to indicate what transactions they are sending money for. (Senanayake Dep., at 11:29-30). However, Venmo is neither an electronic messaging application nor an application that Senanayake disclosed to the school for search under the Policy, which is what allowed Sylvester to seize and search the phone in the first place. (Policy). While Sylvester described the push notification as "suspicious," its content was not only ambiguous, but also unrelated to cyberbullying. (Sylvester Dep., at 12:17-20). There are multiple definitions of the word "pod," and Sylvester later indicated that this term "probably could mean other things." (Sylvester Dep., at 13:18-23). Nevertheless, she jumped to the conclusion that "it definitely means Juuling." (Sylvester Dep., at 13:23-24). Sylvester alleged that this notification "clearly indicated" that Senanayake "was selling vaping pods to other students" on campus in violation of school policy. (Sylvester Dep., at 12:23-25). Wanting to confirm her suspicions, she searched Senanayake's phone again. (Sylvester Dep., at 12:5-6).

Sylvester opened Senanayake's Venmo application to snoop through his recent transactions. (Sylvester Dep., at 12:4-5). She found Senanayake's transactions with his mother, fellow students, and music teacher. (Sylvester Dep., at 14:4-10). After reviewing these Venmo transactions, she "meant to close out" the application and confront Senanayake right away, but

she failed to do so. (Sylvester Dep., at 14:4-10). Upon closing out Venmo, she saw open tabs from the Notes application, which she believed might provide information about Senanayake's recent Venmo transaction for the "pod." (Sylvester Dep., at 15:18-21). In violation of the Policy, Sylvester decided to continue her second search of the phone. (Sylvester Dep., at 14:12-19).

She opened Senanayake's Notes application, which is neither a messaging application nor an application that Senanayake's disclosed pursuant to the Policy. (Sylvester Dep., at 15:4-13). Sylvester read a Notes entry with a to-do list of Senanayake's chores, homework assignments and after-school events. (Sylvester Dep., at 15:26-28). This entry was unrelated to cyberbullying and vaping, which had prompted Sylvester's searches of the phone. (Sylvester Dep., at 16:1-5). Next, she read another entry about a homework assignment. (Sylvester Dep., at 16:12-14). But she didn't stop there. She then read a personal note with a draft of a message Senanayake was preparing to send to his partner, Erwin, in hopes of overcoming challenges in their relationship. (Sylvester Dep., at 16:18-19). Senanayake described the message as "really embarrassing." (Senanayake Dep., at 17:5-7). In the draft message, he had copied lyrics from the couple's favorite song. (Senanayake Dep., at 17:16-18). He never imagined that anyone would read the draft of this personal message. (Senanayake Dep., at 17:19-20). The message said, "I told u sorry and I mean it. I'm nothing right now. I keep listening to our song, crying. I keep drafting this to u and deleting it, I don't want to beg. Just come back." (Plaintiff's Ex. 1, attached as Ex. C).

The next Notes entry Sylvester snooped into was a log of payments that were received or owed for "Juulius Caesar" flavored vaping pods. (Sylvester Dep., at 16:28-31). "Juulius Caesar" is slang for "Juul," an electronic cigarette company that makes vaping devices. (Sylvester Dep., at 17:1-2). When Sylvester confronted Senanayake with her "evidence," "he admitted that he vaped" and had been "reselling Juul pods to other students" (Sylvester Dep., at 17:10-13).

However, they did not discuss the location of his vaping or selling of pods, including whether these activities ever occurred on campus. (Sylvester Dep., at 17:10-13).

The next day, Senanayake was called into his water polo coach's office and told that he was suspended from the boys' water polo team for the remainder of the semester, which was most of the water polo season, because he had sold pods to other students. (Senanayake Dep., at 14:8-14). The suspension was on the grounds that the school had a vaping problem and wanted "to send a strong message to other kids." (Senanayake Dep., at 14:28-30). Senanayake said, "I guess I am the example here, even though I don't think I did anything wrong." (Senanayake Dep., at 15:1-2). He tried to appeal the suspension. (Sylvester Dep., at 14:16-18). Senanayake explained to Sylvester, his coach, and the superintendent that he was legally old enough to vape, and he neither vaped in school nor sold pods to other students on school property (Senanayake Dep., at 14:19-22). But they refused to reverse the suspension. (Senanayake Dep., at 14:24-26).

As a result of his suspension from the boys' water polo team at Gateway Central High School, Senanayake faced major consequences, including academic, financial, and reputational harms. (Senanayake Dep., at 15:7-9). USC revoked his scholarship offer. (Senanayake Dep., at 15:7-9). There are very few collegiate water polo scholarships, and Senanayake has not received any other scholarship offers. (Senanayake Dep., at 15:15-21).

SUMMARY JUDGMENT STANDARD

A court may grant a motion for summary judgment if and only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of production in that they must show that there is no genuine dispute regarding any material fact. Fed. R. Civ. P. 56(c)(1)(A); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are facts

that are essential in establishing legal elements of a claim and can thereby influence the outcome of a lawsuit. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248 (1986). Judgment as a matter of law is only warranted if evidence is "so one-sided that one party must prevail as a matter of law." *Id.* at 251. All evidence must be viewed in the light most favorable to the non-moving party. *Id.* at 255. If the movant fails to show that there is no genuine dispute of material fact or "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," then the motion for summary judgment must be denied. *Id.* at 248.

ARGUMENT

The defendants' summary judgment motion should be denied because a reasonable jury could find that either (1) the Policy was unreasonable or (2) the cell phone search violated Senanayake's rights under the Fourth Amendment to the United States Constitution. The Fourth Amendment sets forth "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This constitutional right applies to searches by state officers, including public school officials. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). Searches of student cell phones mandated by the Policy are subject to the Fourth Amendment. *Id.*

Under the Fourth Amendment, the constitutionality of searches and seizures hinges on reasonableness. *Id.* Analyzing what is reasonable requires "a careful balancing of governmental and private interests." *New Jersey v. T.L.O.,* 469 U.S. 325, 341 (1985). To determine whether a search is reasonable, a court must consider "the context within which a search takes place." *Id.* at 337. Public schools have "custodial and tutelary responsibility" for students, which gives them "a degree of supervision and control that could not be exercised over free adults." *Vernonia*, 515 U.S. at 655. While some restrictions are eased in the public school environment, students do not

"shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Instead, these students have a right to be free from unreasonable searches. *T.L.O.,* 469 U.S. at 343. The Court's "reasonableness standard" has the objective of guaranteeing "that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.*

A reasonable jury could conclude that the Policy was unreasonable or, in the alternative, that Sylvester's search violated Senanayake's constitutional right to be free from unreasonable searches. Since the defendants have failed to show as a matter of law that the Policy and the search of Senanayake's phone were reasonable under the Fourth Amendment, summary judgment must be denied.

I. THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE A REASONABLE JURY COULD FIND THAT THE SCHOOL'S POLICY WAS UNCONSTITUTIONAL.

The motion for summary judgment should be denied because a reasonable jury could find that the Policy violated the Fourth Amendment since Senanayake's privacy interest with respect to his cell phones was reasonable, the search pursuant to the Policy was excessively intrusive, and the government concern was not important enough to merit a search that substantially intruded upon a legitimate privacy interest. In assessing whether a school's policy is unconstitutional, courts consider three factors through a balancing test. *Vernonia*, 515 U.S. at 660. The first factor is "the nature of the privacy interest upon which the search . . . intrudes." *Id.* at 654. The second factor is the "character of the intrusion." *Id.* at 658. The third factor is "the nature and immediacy of the government concern at issue," including "the efficacy of this means for meeting it." *Id.* at 660. Courts use a "sliding scale . . . in evaluating the reasonableness of a search" such that "the government is entitled to inflict more serious intrusions upon legitimate

expectations of privacy as the governmental interest served by the intrusions becomes more compelling." *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 355 (8th Cir. 2004). Here, Senanayake's substantial privacy interest combined with the excessive intrusiveness of Sylvester's search outweighed the government concern regarding cyberbullying.

A. Senanayake had a reasonable expectation of privacy with respect to his cell phone because the device stored a substantial volume of personal information, and the private electronic correspondence on his cell phone was password-protected.

Senanayake had a reasonable expectation of privacy with respect to his cell phone because it stored a substantial volume of personal information, and it contained private electronic correspondence that was password-protected. There are a few limitations to public school students' privacy interests since "the State is responsible for maintaining discipline, health, and safety" in these environments. *Bd. of Educ. v. Earls.*, 536 U.S. 822, 830 (2002). For example, student athletes have diminished expectations of privacy relating to their bodies because their participation on sports teams entails participating in mandatory preseason physical examinations and communal undress in school locker rooms, which "are not notable for the privacy they afford." *Vernonia*, 515 U.S. at 656-7. Nevertheless, "schoolchildren are entitled to expect some degree of privacy in the personal items they bring to school." *Doe*, 380 F.3d at 353.

Cell phones are categorially different from other types of possessions because of their massive storage capacity, and they afford reasonable expectations of privacy to their owners, even those who are subject to reduced privacy rights. *Riley v. California*, 573 U.S. 373, 393 (2014). In *Riley*, after the plaintiff was arrested on weapons charges, a police officer conducted a search incident to arrest whereby he seized the arrestee's smart phone from his pants pocket and then proceeded to search it. *Id.* at 379. The Court held that the plaintiff had a reasonable expectation of privacy with respect to his cell phone. *Id.* at 386. The Court reasoned that "the

storage capacity of cell phones has several interrelated consequences for privacy." *Id.* at 394. One consequence is that "a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record." *Id.* In 2014, a standard 16 gigabyte smart phone could hold "millions of pages of text, thousands of pictures, or hundreds of videos." *Id.* Another consequence of the storage capacity is that "the sum of an individual's private life can be reconstructed" through information, such as photographs, stored on a cell phone whereas "the same cannot be said of a photograph or two of loved ones tucked into a wallet." *Id.* The Court distinguished cell phones from other personal items in that "modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" *Id.* at 393.

Students have reasonable expectations of privacy with respect to their password-protected private electronic correspondence. *R.S. v. Minnewaska Area Sch. Dist.*, 894 F. Supp. 2d 1128, 1142 (Minn. 2012). In *R.S. v. Minnewaska Area Sch. Dist.*, a public school student told her school counselor that she has been discussing "naughty things" with a classmate online and off school grounds. *Id.* at 1134. School officials demanded the student's Facebook username and password, logged into her Facebook account, and exhaustively searched her public postings and private messages. *Id.* The court held that the student had a reasonable expectation of privacy with respect to her private Facebook messages because the electronic correspondence was only available to her and her correspondent, the messages were in her exclusive possession, and they were protected by her password. *Id.* at 1142. In this case, the court upheld the precedent that "the Fourth Amendment protects individuals from intrusions upon their private electronic conversations." *Id.*

Here, Senanayake had a reasonable privacy interest with respect to his cell phone because the device had nearly limitless storage capacity and the messaging applications that Sylvester searched contained password-protected private electronic correspondence. Like the arrestee in *Riley*, who was subjected to reduced expectations of privacy given his status but nevertheless had a reasonable expectation of privacy with respect to his cell phone, Senanayake had a legitimate privacy interest with respect to his cell phone notwithstanding his status as a student. Meanwhile, law-abiding students have fewer restrictions on their constitutional rights than do arrestees. Like the student in *R.S.* whose private messages on Facebook were investigated by school officials, Senanayake's private password-protected electronic correspondence was extensively searched by Sylvester. Thus, Senanayake's privacy interest with respect to his cell phone was substantial.

B. Sylvester's search of Senanayake's cell phone was excessively intrusive since she rifled through the contents of his cell phone, encroaching on his privacy in a way that was nearly limitless.

Sylvester's search of Senanayake's cellphone was excessively intrusive because she extensively searched the contents of his cell phone, thereby encroaching upon his privacy in a way that was practically unlimited. In determining the "character of the intrusion," courts must consider what information the search discloses about the student. *Vernonia*, 515 U.S. at 658.

If a school official extensively searches through a student's personal belongings, then the search is excessively intrusive. *Doe*, 380 F.3d at 354. In *Doe*, school officials conducted full-scale searches that involved "rummaging through [students'] personal belongings." *Id.* at 355. The students had to remove everything from their pockets and leave their belongings on their desks for search by school personnel. *Id.* at 351. The court held that the searches were highly intrusive and "invade[d] students' privacy interests in a major way." *Id.* at 354. The court reasoned that "students often carr[ied] items of a personal or private nature in their pockets and

bags," their belongings were subject to search anytime without notice or individualized suspicion, and the searches were extensive. *Id.* at 355.

Whereas physical searches are limited in their scope and intrusiveness, cell phone searches pose practically unlimited intrusions on individuals' privacy. *Riley*, 573 U.S. at 394. In *Riley*, the Court held that a police officer's search of an arrestee's cell phone was significantly intrusive because "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house" because "a phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home." *Id.* at 396-397. Searches of cell phones are particularly intrusive because these devices store "vast quantities of personal information." *Id.* at 386.

Here, Sylvester's search of Senanayake's phone was excessively intrusive. Like the students in *Doe* who were subjected to extensive searches of their physical belongings, Senanayake was subjected to a highly intrusive search of his property. However, Sylvester's search was not limited in scope in the same way as were the searches in *Doe*. Like the search of the arrestee's cell phone in *Riley* that revealed substantial amounts of private information, the search of Senanayake's cell phone was extremely intrusive and exposed enormous quantities of his personal information, including his messages with his parents, his friends, and his partner. Thus, Sylvester's search of Senanayake's cell phone was excessively intrusive.

C. While the government concern was not insignificant, it was of neither the magnitude nor the urgency to justify the search of Senanayake's phone, which significantly intruded upon his legitimate expectation of privacy.

While not insignificant, the government concern about cyberbullying among student-athletes was of neither the magnitude nor immediacy to justify the search of Senanayake's phone, which excessively intruded upon his legitimate privacy interest. A finding of sufficient

government concern requires compelling state interest "*important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *Vernonia*, 515 U.S. at 661. Courts must consider the magnitude and the urgency of the problem that the Policy seeks to address. *Doe*, 380 F.3d at 355.

If school officials have merely generalized concerns about an issue without evidence that the given problem is immediate and substantial in scale, then the government concern does not justify a search. *Doe*, 380 F.3d at 356. In *Doe*, the school had "some generalized concerns about the existence of weapons and drugs in its schools." *Id.* However, there was "nothing in the record regarding the magnitude of any problems with weapons or drugs" at the school. *Id.* The court held that the school officials "failed to demonstrate the existence of a need sufficient to justify the substantial intrusions upon the students' privacy interests that the search practice entail[ed]." *Id.* While this school, like all schools, had an interest in protecting its students from harm resulting from the use of weapons and drugs, the government concern was not immediate or substantial enough to justify the search. *Id.*

If a "a large segment of the student body, particularly those involved in interscholastic athletics" is affected by an issue related to health and safety, and disciplinary actions on the issue are widespread, then the government interest is very important. *Vernonia*, 515 U.S. at 662-663. In *Vernonia*, student-athletes were subjected to a school policy that aimed to protect their health and safety while reducing their drug use through random urinalysis testing for drugs. *Id.* at 650. The Court held that the government concern was important, and the Policy effectively addressed the problem of drug use by students. *Id.* at 661-663. The Court reasoned that "school years are the time when the physical, psychological, and addictive effects of drugs are most severe" because children's nervous systems are maturing, children grow chemically dependent more

quickly than do adults, and drug use impacts the educational process. *Id.* at 661. The Court emphasized that the effects of drug use on student-athletes are particularly significant because drug use poses "substantial physical risks to athletes," such as increased heart rate, increased blood pressure, myocardial infarction, reduced oxygen-carrying capacity of blood, and increased risk of sports-related injuries. *Id.* at 662. Meanwhile, the drug problem was "effectively addressed by making sure that athletes do not use drugs" *Id.* at 663.

Here, the government concern was not sufficient to justify Sylvester's search of Senanayake's phone pursuant to the Policy. Like the merely generalized concerns about drug and weapon use in *Doe*, the defendants' concern about cyberbullying was not individualized, immediate or significant enough to justify the search. Gateway Central High School had contended with alleged cyberbullying by members of the boys' lacrosse and girls' soccer teams. (Sylvester Dep., at 7:11-16). However, there had been no reported incidents of cyberbullying by members of Senanayake's water polo team. (Sylvester Dep., at 8:1-4). Unlike in *Vernonia* where the government concern about drug use among student athletes was highly important and urgent due to the widespread impacts of drug use on adolescents and the prolific disciplinary actions on this topic at the school, here, the issue of cyberbullying was not nearly as concerning because the problem was less prolific and less urgent. Thus, the government concern was not important enough to justify the excessively intrusive search of Senanayake's cell phone.

Considering the aforementioned factors—the reasonable expectation of privacy, the excessive intrusiveness of the search, and the relatively less compelling government concern—the Policy was unreasonable and unconstitutional. Therefore, summary judgment must be denied.

II. THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE A REASONABLE JURY COULD FIND THAT THE SEARCH WAS NOT JUSTIFED AT ITS INCEPTION OR REASONABLY RELATED IN SCOPE TO THE OBJECTIVES OF THE SEARCH.

Summary judgment should be denied because a reasonable jury could find that Sylvester's search was either not justified at its inception or not reasonably related in scope to the objectives of the search. Both findings need not be met. Determining whether a search is reasonable requires balancing "the individual's legitimate expectations of privacy and personal security" and "the government's need for effective methods to deal with breaches of public order." *T.L.O.,* 469 U.S. at 337. To determine whether a search of a student's property is unconstitutional, a court must consider "the reasonableness, under all the circumstances, of the search." *Id.* at 341. The reasonableness inquiry has two parts. *Id.* First, a court must determine "whether the ... action was justified at its inception." *Id.* Second, it must analyze "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 341. If a search is more intrusive, then it requires more suspicion. *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 376 (2009). The suspicion must "match the degree of intrusion." *Id.* at 375. Here, Sylvester's search of Senanayake's cellphone violated his Fourth Amendment rights because the search was excessively intrusive and not reasonably related in scope to the objectives of the search.

A. Sylvester's search was not based on reasonable suspicion to justify the search at its inception because she did not have evidence that Senanayake was smoking, selling, or bringing e-cigarettes on school grounds.

Sylvester's search was not based on reasonable suspicion because she lacked sufficient evidence that Senanayake was violating a school policy by possessing, smoking, or selling e-cigarettes on school grounds. A student search by a school official 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," meaning there is reasonable suspicion. *T.L.O.,* 469 U.S. at 341. For a search to be justified based on reasonable suspicion, it must be highly likely that it would reveal evidence of a violation of a school rule or criminal law. *Anable v. Ford*, 653 F. Supp. 22, 41 (W.D. Ark. 1985). A finding of reasonable suspicion requires a sufficient "nexus" between the search and "the infraction under investigation." *T.L.O.,* 469 U.S. at 345.

If a teacher catches a student smoking or in possession of cigarettes, then that discovery gives rise to reasonable suspicion that justifies a search of his or her physical possessions. *Id.* at 346. In *T.L.O.*, after a teacher reported that a student was smoking in the bathroom, the assistant vice principal opened the student's purse to see if it contained cigarettes. *Id.* at 328. She found a pack of cigarettes and some rolling papers. *Id.* The Court held that the teacher's observation provided reasonable suspicion that T.L.O. was in possession of cigarettes and that they were in her purse. *Id.* at 346. The subsequent finding of rolling papers gave rise to reasonable suspicion of possession of marijuana, justifying further exploration of the purse. *Id.* at 329-30; *see also Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 980-2 (8th Cir. 1996) (holding that a search for weapons among all male students in grades six through twelve was justified at its inception since "the principal had reasons to suspect that weapons had been brought to school that morning" following a report from the school bus driver that there were "fresh cuts on seats of her bus").

If a school official fails to have reason an initial reason to believe that the search of a student's cell phone will reveal evidence of unlawful activity, a violation of school rules, or imminent harm to someone on campus, then they lack "reasonable suspicion to justify the search at its inception." *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623, 634 (6th Cir. 2013). In *G.C.*, when a student who had been struggling with anger and depression violated a school policy by texting

in class, a school official read four of his text messages to see if there was evidence that he would do something to harm himself or someone else. *Id.* at 627-628. The court held that the defendants lacked "reasonable suspicion to justify the search at its inception" because they failed to demonstrate that a "search of the phone would reveal evidence of criminal activity, impending contravention of additional school rules, or potential harm to anyone in the school." *Id.* at 634.

Here, Sylvester did not have reasonable suspicion for searching Senanayake's phone. Unlike in *T.L.O.* where a teacher found a student smoking in the bathroom, providing evidence that the student had violated a school policy that sufficed as reasonable suspicion for a search, here, there was no reported physical evidence that Senanayake possessed, used, or sold e-cigarettes on campus. The push notification on his phone indicated that another student at the school had sent him money on Venmo "for the pod." (Sylvester Dep., at 12:8-15). While Sylvester alleged that this push notification "clearly indicated" that he "was selling vaping pods to other students" on campus in violation of school policy, the message content was ambiguous and inconclusive. (Sylvester Dep., at 12:23-25). There are multiple definitions of the word "pod," and Sylvester had no reason to suspect that this activity occurred on school grounds (Sylvester Dep., at 13:18-23). Senanayake was legally old enough to vape, and he neither vaped in school nor sold pods on school property. (Senanayake Dep., at 14:19-22). Like the defendants in *G.C.* who failed to demonstrate that a search of the student's phone would reveal evidence of illegal activity or a violation of school policy, here, the defendants failed to show that an extended search of Senanayake's phone, which intruded excessively into his Notes application, would indicate that he acted unlawfully or violated school policy. Thus, there was not reasonable suspicion to justify the second search of Senanayake's cell phone at its inception.

B. Sylvester's second search of Senanayake's cell phone was not reasonable in scope because it violated his subjective expectation of privacy and exceeded what was necessary to determine whether he had violated school policy.

Sylvester's second search of Senanayake's cell phone was not reasonable in scope because it not only violated Senanayake's reasonable subjective expectation of privacy, but also exceeded what was necessary to determine whether he had violated school policy. A search is reasonable in 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." *T.L.O.*, 469 U.S. at 342. To determine whether a search is excessively intrusive, a court must look to a student's "subjective expectation of privacy against such a search." *Safford*, 557 U.S. at 374. Since Sylvester's search was excessively intrusive based on Senanayake's expectation of privacy, and it was not reasonably related to the objective of the search, which was to determine whether he had violated school policy, the search was not reasonable in scope.

If a search violates a student's reasonable subjective expectation of privacy, then the search is not reasonable in scope because it is excessively intrusive. *Id.* In *Safford*, a student "was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree." *Id.* at 369. The Court held that "the intrusiveness of the strip search here [could not] be seen as justifiably related to the circumstances." *Id.* at 378. The student described the search as "embarrassing, frightening, and humiliating" such that it violated her subjective expectation of privacy. *Id.* at 374-5. The reasonableness of her privacy expectation was "indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifie[d] the patent intrusiveness of exposure." *Id.* at 375. The Court found that "the content of the suspicion failed to match the degree of intrusion." *Id.*

A search by a school official is not reasonable in scope if it exceeds what is necessary to determine whether a student has violated school policy because it is thereby not reasonably related to the objective of the search. *Mendoza v. Klein Indep. Sch. Dist.*, No. H-09-3895 2011 U.S. Dist. LEXIS 166686, at *27 (S.D. Tex. Mar. 16, 2011). In *Mendoza*, when a school official suspected that a student was using her cell phone during school hours in violation of school policy, she seized and searched the phone. *Id.* at *22. While this school official admitted that she did not need to open individual text messages to determine if the student had used the phone during school hours, she nevertheless investigated the contents of the messages. *Id.* at *26-27. The court held that it could not conclude as a matter of law that the search was reasonable in scope because the school official continued the search after uncovering enough information to determine whether the student violated school policy. *Id.* at *27. The court reasoned that "a continued search must be reasonable and related to the initial reason to search or to any additional ground uncovered during the initial search." *Id.* at *26-27; *see also G.C. v. Owensboro Pub. Sch.*, 711 F.3d at 633 (holding that a student's "using a cellphone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction" because such a search would be unreasonable in scope).

Here, Sylvester's second search of Senanayake's cell phone was not reasonable in scope because it violated his subjective expectation of privacy and exceeded what was necessary to determine whether he had violated school policy. Like the strip search in *Safford*, which violated the student's reasonable subjective expectation of privacy by embarrassing her, Sylvester's search of Senanayake's cell phone was "really embarrassing" for him in a way that was consistent with how other teenagers would feel if their private notes were read by school

officials. (Senanayake Dep., at 17:5-7). Like the cell phone search in *Mendoza* where a school official exceeded what was necessary to determine whether a student had violated school policy, here, Sylvester continued the search such that the scope was unreasonable because it was not reasonably related to the objective of the search. While it may have been appropriate for Sylvester to either search Senanayake's belongings for e-cigarettes or review his recent transactions on Venmo to determine whether he had violated school policy, her continuation of the search into private entries in the Notes application rendered the search unreasonable in scope.

A reasonable jury could find that the second search of Senanayake's cell phone was not justified at inception or not reasonable in scope. Thus, summary judgment should be denied.

CONCLUSION

The motion for summary judgment must be denied because a reasonable jury could return a verdict for the non-moving party based on a finding that the Policy was unconstitutional or that the search of Senanayake's cell phone was not reasonable. The Fourth Amendment does not permit unreasonable searches. The record establishes that the Policy and the search were unreasonable since they violated Senanayake's rights under the Fourth Amendment, which is an important safeguard of liberty. While the government concern underpinning the Policy was not insignificant, cyberbullying at Gateway Central High School was neither of the magnitude nor the urgency to justify the search of Senanayake's phone, which excessively intruded upon his reasonable privacy interest. Meanwhile, in the alternative, the motion for summary judgment should be denied because a reasonable jury could find that the search was either not justified at its inception or not reasonably related in scope to the objectives of the search. The defendants have failed to meet their burden of production and are not entitled to judgment as a matter of law. Therefore, the motion for summary judgment must be denied.

Dated: February 18, 2022

Respectfully submitted,
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ATTORNEYS FOR PLANTIFF,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Opposition to Defendant' Motion for Summary Judgment was served this day via email to counsel for Defendant at the following address:

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