RECORD NO. 14-1277

In The
United States Court of Appeals
For The Fourth Circuit

BRANDON RAUB,

Plaintiff – Appellant,

v.

MICHAEL CAMPBELL,

Defendant – Appellee.

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

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Stephen C. Piepgrass Date: April 11, 2014

Counsel for: Brandon Raub

CERTIFICATE OF SERVICE

****

I certify that on April 11, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTRODUCTION

Liberty and Security: These are the two great goals of government, and in our efforts to achieve one, it is crucial that we not trespass unduly upon the other. We must guard against both extremes.

We are all aware of those cases where the mental health system failed, allowing an individual who *needed* confinement and treatment to remain at large, with terrible, violent consequences. This is a case from the *other* side of the coin. Here, the mental health system failed, and an individual who did *not* need confinement or treatment – or even further assessment – was unjustly deprived of his liberty without probable cause.

It is to vindicate that liberty – and to encourage greater professionalism in our mental health system – that Brandon Raub brings this appeal.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction of this case under 28 U.S.C. §§ 1331 and 1343, for claims seeking redress under the laws of the United States for the deprivation of rights secured by the Constitution and laws of the United States.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1291, because it is an appeal of a final decision of a United States District Court that disposes of the claims of all parties.

The district court issued its final order on summary judgment on February 28, 2014, and Plaintiff-Appellant timely filed a notice of appeal on March 27, 2014.

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly articulate the applicable legal standard when it said that, in determining whether there is probable cause in the mental health context, the issue is "whether a reasonable person, exercising professional judgment and possessing the information at hand, would have concluded that Raub, as a result of mental illness, posed an imminent threat to others"?

2. Regardless how the standard is articulated, did the district court err by granting summary judgment for Campbell on Raub's unlawful seizure claim, especially given the sworn testimony of a licensed clinical psychologist that there was a "lack of evidence of mental illness" and that it was "a violation of professional standards" and "grossly negligent" for Campbell (i) to approve the seizure of Raub at his home, and (ii) to file the Petition for Involuntary Admission for Treatment against Raub?

3. Did the District Court err when it granted summary judgment for Campbell on Raub's First Amendment claim, when the evidence shows that Campbell had Raub seized and placed him in a mental hospital based on Raub's belief in anti-government conspiracy theories with which Campbell disagreed?

4. Did the district court err in dismissing Raub's request for a permanent injunction against Campbell to prevent him from unreasonably seizing Raub and/or retaliating against him for exercising his freedom of speech?

STATEMENT OF THE CASE

Overview

This case arose out of the seizure and detention of Brandon Raub, a Marine veteran who served in Iraq. The case began on August 16, 2012, when a large number of federal and local law enforcement officers arrived outside Raub's home in Chesterfield County, Virginia. They did not come because of any report of a disturbance. Nor did they have reason to believe that any crime had been committed. Indeed, both federal and state prosecutors had already eliminated that possibility. JA-192. Instead, they arrived to question Raub about his "conspiracy theory" views, as reported to federal authorities by another former Marine, Howard Bullen, who had served with Raub in Iraq five years before and who had read some of Raub's inflammatory rhetoric on the Internet.

After some initial questioning of Raub, the lead officer on the scene, Detective Michael Paris, collapsed to the ground unconscious (due to an unrelated medical issue) and, upon regaining consciousness, retired to a police car and spoke by phone with Campbell, a "senior clinician and certified prescreener" with the Chesterfield Community Services Board. JA-161. Following that call, Raub was

seized by two uniformed police officers, Daniel Lee Bowen and Russell Granderson, placed in a squad car and taken to the Chesterfield Police Station, where he was detained, hands handcuffed behind his back and tied to a bench for about five hours.

While detained, Raub was briefly interviewed by Campbell, who then prepared a report (JA-980, the "Campbell Report" or "Prescreening Report") and Petition for Involuntary Admission for Treatment (JA-869, the "Campbell Petition" or "Petition for TDO"), asking that Raub be detained still longer for a mental health evaluation. Based on the Campbell Report and Petition for TDO, a state magistrate decided that Raub should be detained at John Randolph Hospital for further evaluation and treatment and issued a temporary detention order ("TDO"). Raub remained confined pursuant to that TDO until August 20, 2012, when a new order, not the subject of this litigation, took effect. Raub was finally released on August 23, 2012, by order of the Circuit Court of the City of Hopewell, which found that "the petition [for involuntary confinement] is so devoid of any factual allegations that it could not be reasonably expected to give rise to a case or controversy." JA-879.

When Raub first brought this case, it was not clear to him who was responsible for what had happened. He initially named the two uniformed officers who had physically seized him, as well as Campbell, who had prepared the

Prescreening Report and Petition for TDO, plus two other mental health workers, whose names appeared on court papers as having a role in his detention. Fearful that the extensive federal presence at his door – and questioning about his political views – signaled some ongoing federal surveillance (and unaware of Bullen's role), Raub also named several "John Does," describing them as probably including federal agents.

As discovery progressed, it became clear who was, and who was not, really responsible for Raub's seizure and detention. Thus, Raub narrowed his complaint, voluntarily dismissing various defendants as discovery focused the blame away from them and onto Campbell.[1] The case therefore comes before this Court without extraneous parties, and with the issues sharply focused. The only issues on appeal are those that concern Campbell and his violation of Raub's federal constitutional rights.

[1] At one point, Raub amended his initial complaint to name both Paris (who also had federal duties as part of a joint anti-terrorism task force), and Terry Granger, a federal agent who had accompanied Paris to Raub's home. The district court had refused to allow Raub to take Paris' deposition unless he was named as a defendant, a move that would provide Paris an assurance of legal counsel at the deposition (federal and state agencies were squabbling over who would represent him if he was only a witness). In an abundance of caution and in response to a court-imposed deadline, Raub also added Granger as a defendant. Raub voluntarily dismissed both Paris and Granger when discovery pointed to Campbell as the person responsible for his seizure and detention.

The federal claims that Raub alleged against Campbell in the district court were as follows:

- **Unlawful Seizure under the Fourth Amendment.** In calling for Raub to be brought to the Chesterfield Police Station and in subsequently seeking his involuntary detention by petitioning for a TDO, Campbell, acting under color of state law, deprived Raub of his rights to be free of unreasonable seizure and deprivation of liberty without due process of law, as guaranteed by the Fourth, Fifth and Fourteenth Amendments. JA-815.
- **Deprivation of Freedom of Speech under the First Amendment.** Campbell's actions to seize and detain Raub under the pretext that Raub was suffering from a mental illness constituted an effort to discredit, silence and punish Raub for the content and viewpoint of his political speech, in violation of Raub's First Amendment rights. JA-816.

When Campbell responded to the initial complaint with a motion to dismiss based on qualified immunity, the district court properly denied that motion. JA-142-44. At the same time, however, the district court placed substantial limits on

Raub's ability to take discovery, limiting Raub to discovery related to qualified immunity.[2]

Following the conclusion of the limited discovery allowed to Raub, Campbell moved for summary judgment on the Second Amended Complaint based on qualified immunity. That motion was granted by the district court in an Order and Memorandum entered February 28, 2014. JA-948 and 975-76. At the same time, Campbell also sought – and was granted – dismissal of Raub's request for a permanent injunction.[3]

The Evidence

The facts can be divided into two parts. The first part deals with the facts surrounding the August 16 seizure of Raub at his home and resulting detention at

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[2] The district court allowed Raub to conduct discovery only on limited issues: (a) "[t]he nature and source of information supporting Defendants' belief that Plaintiff posed a danger to himself or others, including the extent to which any of them learned about the content of" the e-mail from Raub's acquaintance, Howard Bullen; (b) "[t]he content of any telephone call between Defendant Campbell and" Paris (who, at the time, was considered a possible John Doe Defendant); (c) "[t]he extent to which . . . Bowen and Granderson relied on any representations made by the John Doe Defendants or the professional judgment of Defendant Campbell in deciding to arrest Plaintiff;" and (d) "the identity of the John Doe Defendants." JA-142-44.

[3] The injunction sought by Raub would have prohibited Campbell or anyone acting on Campbell's behalf or in conjunction with him "from unreasonably seizing Plaintiff and/or retaliating against Plaintiff because of Plaintiff's exercise of rights and privileges protected by the Constitution and laws of the United States." JA-817.

the Chesterfield Police Station. The second part deals with actions taken by Campbell in preparing the Prescreening Report and Petition for TDO, which extended Raub's detention. As is appropriate in a motion for summary judgment, the facts and permissible inferences will be presented in the light most favorable to Raub, the non-moving party.

The Seizure at Raub's Home

On August 16, 2012, a large number of federal and local law enforcement officers arrived outside Raub's home. Although unknown to Raub at the time, the officers were responding to a communication from Howard Bullen, a former Marine acquaintance of Raub's, who had contacted them about certain inflammatory Facebook postings made by Raub, including postings calling for revolution and for the arrest of former presidents George W. Bush and his father, George Bush. JA-191; JA-989-90.

Raub's statements on Facebook, as reported by Bullen, included the following (many of which – marked here with asterisks (*) – are quotations from pop culture song lyrics):[4]

"This is revenge. Know that before you die."*

"Richmond is not yours. I'm about to shake some shit up."

[4] *See* JA-833 (Report of Dr. Catherine E. Martin, noting that "many of those statements are quotations of song lyrics").

> "This is the start of you dying. Planned spittin with heart of a lion."*
>
> "Leader of the New School. Bringing back the Old School. My life will be a documentary."*
>
> "I'm gunning whoever run the town."*
>
> "W, you're under arrest bitch."
>
> "The world will find this."
>
> "I know ya'll are reading this, and I truly wonder if you know what's about to happen."
>
> "W, you'll be one of the first people dragged out of your house and arrested."
>
> "And daddy Bush too."
>
> "The revolution will come for me. Men will be at my door soon to pick me up to lead it. **;)**" (Emphasis added)[5]
>
> "You should understand that many of the things I have said here are for the world to see."

JA-989-90.

In the e-mail, Bullen also stated that he had stopped keeping in touch with Raub a few years after he returned from Iraq in 2007, he had not spoken with Raub recently, and his only contact with Raub had been reading Raub's Facebook posts. JA-989.

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[5] The statement about Raub's future leadership of the revolution was followed by the symbol: " **;)** " This symbol is an "emoticon wink," indicating the author is speaking tongue-in-cheek. *See* JA-852 n.3.

Before deciding to confront Raub at his home, the officers sought the advice of the Chesterfield County Commonwealth's Attorney's office, regarding whether probable cause existed to arrest Raub based on his Facebook postings. The Commonwealth's Attorney's office responded that Raub had made no direct threat to any specific persons and had not violated any state law and, thus, there was no probable cause to arrest him. JA-192. The officers next consulted the U.S. Attorney's office, which likewise informed them that Raub had violated no federal laws. *Id.* Stymied in their efforts to identify any crime with which they could charge Raub, the officers decided to "make contact with Raub to see what mental state he is in and if he needed to be evaluated by Crisis Intervention." *Id.*

Upon arriving at Raub's house, the officers, led by Detective Paris, asked to speak with him to discuss his political views, including his views critical of the government. Confronted with this show of force, Raub agreed to speak with the officers in his front yard. Raub proceeded to discuss his political views with the officers present, including his belief that the United States government was involved with the attacks of September 11, 2011. JA-197. Raub made no threat to harm himself or any other person. JA-198.

Following a brief discussion of Raub's political views, Paris became ill, experiencing dizziness, weakness and hot flashes. *Id.* After struggling for several minutes to stand on his feet, Paris collapsed face-down on the ground, where he lay

temporarily unconscious. *Id*. When Paris recovered enough to stand, he made his way over to another officer's vehicle. While sitting in the vehicle, Paris spoke by phone with Campbell. *Id.* (At the time that Paris and Campbell spoke, Campbell had not seen the e-mail from Bullen containing Raub's Facebook postings. JA-652-53.) In a stunning omission, *Campbell never spoke with Raub on the phone, and never asked to do so.* JA-164.

Paris' notes in the Chesterfield Police Incident Report reflect that, "[a]fter informing Campbell of our contact with Brandon Raub, Campbell advised [Paris] to bring Raub in for evaluation." JA-198. Paris then "asked Campbell to repeat his decision to evaluated [sic] Raub," and Paris handed the telephone to another officer, who also "hear[d] directly from Campbell on the decision to evaluate Raub." *Id.* Campbell confirmed his role in deciding to seize Raub for evaluation, stating that Paris did not call him seeking "confirmation" of a decision he had already made, but "seeking guidance" from Campbell as to how to proceed. JA-670. Paris also reported that, "[a]fter speaking with Crisis [Campbell], it was determined that Brandon Raub should be brought in for an evaluation." JA-191 (emphasis added).

The officers then handcuffed Raub and forced him into the caged portion of a waiting police vehicle. At the time of this seizure, Raub was wearing only

shorts, and he asked to retrieve shoes and a shirt; however, the arresting officers refused his request. Raub was taken to the Chesterfield Police Station.

The Continuing Detention of Raub

Upon arriving at the Chesterfield Police Station, Raub was detained for an evaluation by Campbell. Forced to sit, tied to a wooden bench for five hours, with his hands cuffed behind him, Raub was seen by Campbell for only twelve minutes. JA-839, 842; *see also* JA-600. Campbell met with Raub in an open space in the police station, with people entering, leaving and moving about the room during the interview. JA-840. Sometime that evening, while Raub was in the police station, Campbell received, for the first time, a copy of the Bullen e-mail quoting Raub's Facebook postings. JA-590, 689.

Later that night, Campbell filled out his Prescreening Report (JA-980) and attached it to the Petition for TDO (JA-869-70). Relying on Campbell's representations in those papers, the state magistrate issued a TDO, ordering that Raub be temporarily detained at John Randolph Hospital for further evaluation and treatment. JA-871-72.

While at the hospital, Raub was evaluated by another mental health professional, James Correll.[6] On August 20, at the request of hospital personnel (who failed to provide any explanation for their request JA-873-74), a special justice ordered that Raub be transferred to the Veterans Administration Hospital in Salem, Virginia, for further confinement. JA-875-78. Raub was released on August 23, 2012, by order of the Circuit Court of the City of Hopewell. JA-879-80. Raub has no history of mental health problems or alleged problems before – or after – the events that are the subject of this lawsuit. JA-851.

Critical to this case is the expert report of Dr. Catherine E. Martin, a licensed clinical psychologist with experience in commitment proceedings (and providing psychological evaluations for veterans). *See* JA-830-54. In a nutshell, Dr. Martin conducted an extensive review of (i) the information available to Campbell when he spoke by telephone with Paris and instigated the seizure of Raub, and (ii) the information available to Campbell at the time of his police station evaluation of Raub. Dr. Martin concluded that there was a "lack of evidence of mental illness" and that "it was a violation of professional standards – and grossly negligent" for

[6] Correll's report (JA-991-93) was deeply flawed and heavily influenced by Campbell's misguided evaluation and the concerns of law enforcement; however, Correll was not a government actor, and his errors are beyond the scope of this lawsuit. Moreover, it is well-settled that after-the-fact evidence cannot be used to cure the lack of probable cause at the time a seizure was made. *See infra* n. 13.

Campbell to instigate the seizure of Raub and to file the Petition for TDO. JA-835, 850.

Analysis of Campbell's Initial Decision to Seize Raub

In her report, Dr. Martin reviews "evidence" that Campbell says he relied upon to call for Raub's initial seizure and provides her expert opinion why that evidence was insufficient to provide probable cause that there was a "substantial likelihood that, as the result of mental illness, [Raub would], in the near future . . . cause serious physical harm to himself or others . . . ," the applicable standard under Virginia law. JA-832-33. In order to present an efficient summary both of Campbell's "evidence" and Dr. Martin's professional opinion, much of her report is quoted verbatim in the blocks below:

- Campbell relates what Paris describes as threats made by Raub:

> "[Paris] informed me that Mr. Raub was an ex-marine who had made substantial, *specific* threats of violence against other people. . . . Detective Paris informed me that Mr. Raub had made online threats about killing people . . . . Detective Paris indicated to me that these statement and threats were made over the internet, and he described the language of some of the threats to me. Although I do not remember the exact wording of any of the threats now, they were *specific* threats of violent action against human beings."

[JA-573] (emphasis added.) I have reviewed the language of the statements attributed to Raub, as set forth in the August 15, 2012 email from Howard Bullen . . . and none of those statements constitute specific threats of harm in

the near future or specific threats of harm at all. (It should also be noted that many of those statements are quotations of song lyrics.) But, even if these statements are treated as threats, they do not establish a basis for the seizure of Raub because *they do not establish the likely presence of mental illness or the need for hospitalization or treatment as required by the statutory standard*. [Emphasis added.]

- Campbell also states that, according to Paris:

> "[Raub] believed that the United States government had perpetrated the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, and that he believed that the government was committing atrocities on American citizens by dropping a radioactive substance called Thorium on them from airplanes."

[JA-573.] *These are not psychological symptoms. They are political views.* [Emphasis added.] However ill-grounded these views may be in facts, they are views shared by a significant number of "conspiracy theorists" and, in any event, they cannot be the basis for a finding of mental illness.

- Campbell reports what Paris describes as Raub's behavior, stating that Raub appeared "preoccupied and distracted" and that "Mr. Raub would make eye contact with Detective Paris for a few seconds, but then his eyes would rove away while he continued to talk before returning to Paris." [JA-574.] But, what Paris described is actually *socially appropriate* eye contact, since he was

neither trying to "stare down" Paris with constant eye contact nor was he "staring into space" as he spoke. Contrary to Campbell's statement, such eye contact is not "evidence of psychosis." Moreover, to appear "preoccupied and distracted" is a *normal* reaction when a person is placed in a stressful situation, such as being confronted at one's home by a number of law enforcement officers.

- Campbell also reports that, according to Paris, "Mr. Raub had rapid mood swings during their conversation." [JA-574.] But there is insufficient detail provided to allow any conclusions to be drawn. Moreover, this "mood swing" observation is contradicted by another observation reported by Paris in the very next sentence, where he told Campbell "that Mr. Raub was extremely serious and intense during the *entirety* of the conversation, and that he never joked or expressed any kind of light-heartedness." [JA-574-75] (emphasis added). Again, Raub's reported response – seriousness when questioned by a team of law enforcement – is entirely appropriate. A failure to joke with investigators is not a sign of mental illness.
- Campbell also states that "when Detective Paris asked [Raub] about the specific threats which he had made, Mr. Raub would not answer his questions." [JA-574.] Such silence in the face of questioning perceived as accusatory is not a sign of mental illness, but is a frequent response in our society to questions by

> law enforcement, particularly since the "right to remain silent" is well known to most Americans.
>
> - Campbell states that "[he] did not ask to speak with Mr. Raub over the phone because [he] already had more than enough evidence based on Detective Paris' first hand observation to warrant an evaluation." [JA-575.] But, this is the wrong standard. The question is not whether there was enough evidence to warrant an *evaluation*, but whether there was enough evidence to warrant the *seizure* of Raub. Based on my review of the Answers of Michael Campbell to Limited Interrogatories Approved by the Court, as well as my review of the Campbell deposition, there was not enough evidence to warrant such a seizure under the statutory standard quoted above, Virginia Code § 37.2-808(a) and (g).

JA-833-35.

Given the lack of evidence of mental illness and Campbell's unwillingness to speak directly with Raub, Dr. Martin concludes that "it was a violation of professional standards – and grossly negligent – for Campbell to approve the seizure of Raub at his home on August 16, 2012." JA-835.

Also pertinent to the initial seizure is Campbell's statement that, until he reviewed the e-mail from Bullen while Raub was at the police station, the facts available to him were insufficient to create probable cause. As Campbell put it:

> Although one of the law enforcement officers had provided me with copies of some of Mr. Raub's Facebook posts, *these posts were not specific enough or threatening enough, in my opinion, to meet the standards for a temporary detention order*, and they also did not provide the input from Mr. Raub's marine acquaintance about the recent changes in Mr. Raub's behavior. Therefore, I asked the law enforcement officers to provide me with the communications which they had received from Mr. Raub's friends. . . .
>
> *After I read this e-mail*, I was convinced that Mr. Raub met the standards under Va. Code § 37.2-809 for issuance of a temporary detention order so that he could receive further evaluation and mental health treatment.

JA-688-89 (emphasis added).

Analysis of the Campbell Report and the Campbell Petition

The evidence also shows that Campbell's interview with Raub was performed incompetently and not in keeping with professional standards, thus undermining the reliability of any conclusion Campbell purports to draw. This is shown by Dr. Martin's observations about Campbell's interview with Raub, based on her review of the interview videotape:

- Raub was shirtless and barefoot, with his hands cuffed behind his back. The cuffs were tethered to a bench, on which Raub was seated. Throughout the interview, Campbell was standing, leaning against a wall a few feet away from Raub.
- The interview took place in a roomful of strangers, with officers coming and going during the interview. The presence of strangers during a psychological

interview can make a client uncomfortable speaking freely.

- *The setting and interview method I observed were not conducive to establishing a rapport with Raub, which is necessary to obtain reliable clinical information.* [Emphasis added.]
- The interview was very short, lasting only 12 minutes.

JA-840.

In the Prescreening Report, Campbell makes a number of statements purporting to explain his evaluation of Raub. Each of the key statements is cited and discussed by Dr. Martin. Thus, her report provides *both* a summary of the various points on which Campbell purportedly relied for filing a petition against Raub *and* Dr. Martin's explanation why there was no evidence of mental illness and, instead, a violation of professional standards by Campbell. The following passages are from Dr. Martin's report:

- The Prescreening Report includes a section entitled "Presenting Crisis Situation," with a line entitled "Reason for Referral," where Campbell writes: "Client has been posting threatening information on the internet. Client believes that 911 was a conspiracy caused by the U.S." While this entry may accurately reflect what Campbell was told, it is remarkable that there is *no*

mental health information included within the "Reason for Referral." [Emphasis added.]

- In the section entitled "Presenting Crisis Situation," there is also a subsection entitled "Assessment." There are a number of problems with this Assessment.
    - The vast majority of the Assessment consists of secondhand reports of Raub's *political views*. [Emphasis added.]
    - Campbell says that Raub's friends reported him to the FBI "for posting extreme conspiracy theories and threats to President Bush." As previously noted, a belief in conspiracy theories is not a symptom of mental illness. Moreover, I have reviewed the Facebook postings and e-mail from Howard Bullen and cannot find any "threats to President Bush." While Raub does predict that President George W. Bush will be "dragged out of your house and arrested . . . and Daddy Bush, too," this is not a threat because (1) Raub is not saying what action *he* will take; (2) Raub is predicting action that will occur at some indeterminate time in the future (not in the near future); and (3) use of the term "arrested" suggests that Raub was contemplating some action by law enforcement officials, not some illegal act.
    - After noting Raub's belief in "conspiracy theories," Campbell states: "This counselor contacted client's mother. She shares the same beliefs

and supports her son's behaviors." The fact that Raub's mother, with whom he resides, agrees with his political beliefs, is an indication that Raub's views are *not the byproduct of any mental illness*. [Emphasis added.] Additionally, while Campbell does not explain what "behaviors" he has in mind, there is no indication from the mother that her son has demonstrated a recent behavioral change. On the contrary, while not included in his Prescreening Report, the Progress Notes written and signed by Campbell affirmatively state that "Raub's mother, with whom he resides, 'has not seen any changes or psychotic behavior in [Raub].'" [JA 625, 705.]

- Campbell states: "Due to unpredictable behaviors and threats on the internet, a TDO is being requested to provide treatment and further evaluation." There are several problems with this statement. First, there is no history of "unpredictable behaviors" in the Assessment, nor does Campbell testify in his deposition that he witnesses any such behaviors. Moreover, a review of the videotape of Raub's confinement at the jail shows no such behaviors. Throughout the five hours or so that he was handcuffed (hands behind his back) and tethered to a bench, Raub displays complete compliance and behavioral self control. Second, Campbell says that the "threats on the internet" are attached, yet a review

of the e-mail from Howard Bullen . . . shows no specific threats of harm in the near future and, for that matter, no specific threats at all. Third, the statement refers to "provid[ing] treatment," yet the Assessment does not describe any mental health condition, much less a condition requiring hospitalization or treatment.

- *The Assessment is remarkable in that it contains absolutely no information regarding symptoms of mental illness.* [Emphasis added.]

- The Prescreening Report also includes a section called "Mental Status Exam." Again, there are a number of problems with this section.
  - In the subsection entitled "Significant Clinical Findings," under the "Mental Status Exam," Campbell was required to "further describe any symptoms checked above." Campbell writes, "Client had long pauses before answering questions." "Long pauses before answering questions" is not a symptom of mental illness, especially when the behavior occurs following a seizure and confinement of the sort experienced by Raub. Moreover, as is shown by the video, Campbell did not interview Raub in a private setting, but did so while (hands behind his back) . . . tethered to a bench in an area of the jail where there was substantial activity taking place. This other activity included several police officers coming and going or sitting at their desks while talking as well as bringing in another

detainee. At one point during the interview, there were as many as six people in the room (other than Campbell) who were carrying on their own activities and conversations during the interview. This is significant because in his deposition, Campbell says "there was something very distractible with him which is the red flag that I look for." [JA-634.] Given the context and setting in which the interview occurred no reliable inference can be drawn from any apparent distractibility.

- Under "Significant Clinical Findings" Campbell also writes, "very labile w/ the Secret Service." While "lability" may indicate a "mood disorder," it is not an indicator of psychosis (which was Campbell's diagnosis). In any event, lability must be evaluated in the context in which it is observed. It is important to note that Campbell does not claim to have witnessed any lability firsthand. Instead, he was relying upon reports from the "Secret Service" that are not included in the report, but that apparently relate to what someone observed when the law enforcement team confronted Raub at his home. This was a situation where mood lability would be a normal reaction. Campbell states that this is why he checked the box "labile" in the "Range of Affect" category earlier in the page. [JA-634.]

- While Campbell checks the boxes for "delusions," "grandiose" and "paranoid," he fails to describe in his Prescreening Report any symptoms corresponding to those checked boxes, even though such a description is required by the Prescreening Report form. All of these descriptions appear to be references to Raub's belief in "conspiracy theories," and not behavior directly observed by Campbell in the assessment. This is confirmed by Campbell's deposition. For example, Campbell regards Raub as "paranoid" chiefly because of his "extreme distrust of the government" [JA-634-35], and regards Raub as delusional chiefly because of his views about the activities of the United States government. Campbell describes Raub as believing that the United States government is "dropping Thorium through jet trails" and "sent a missile into the Pentagon." [JA-635]. *These views may be eccentric but they are views shared by many conspiracy theorists, and they are not delusional beliefs in a psychological sense. Similarly, "extreme distrust of government" is a political view and not a sign of paranoia in a psychological sense.*

[Emphasis added.]

- The Prescreening Report includes a section entitled "Diagnosis DSM IV R[7]." In this section, Campbell diagnoses Raub as "Psychotic D/O NOS," which means psychotic disorder not otherwise specified. Turning to the DSM-IV-TR (the standard reference for psychiatric diagnoses), the diagnosis applied by Campbell is defined as follows:

> This category includes psychotic symptomatology (i.e., delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior), about which there is inadequate information to make a specific diagnosis or contradictory information, or disorders with psychotic symptoms that do not meet the criteria for any specific Psychotic Disorder.

DSM-IV-TR at Section 298.9. The problem with this diagnosis is that there is nothing in the prescreening report to support it. The only "delusions" reported are Raub's beliefs in conspiracy theories, which is not a delusion in a psychological sense. There are no reports by Campbell of any of the remaining psychotic symptoms: "hallucinations, disorganized speech, grossly disorganized or catatonic behavior." In his deposition, Campbell confirms that he observed no such hallucinations, disorganized speech, grossly disorganized

[7] As Dr. Martin pointed out, there is no "DSM-IV-R;" rather, DSM-IV-TR was the version of this manual in use at the time of the assessment. JA-844 n.1. Campbell continued his mistaken assertion that he uses the "DSM-IV-R" rather than the DSM-IV-TR in his deposition. JA-639-40. This calls into question Campbell's level of familiarity with the authorities referenced in his report.

or catatonic behavior. [JA-631-32.]

- Campbell provides Raub a GAF score of "40." (The term "GAF" means Global Assessment of Functioning.") In assigning a GAF score, a psychologist is required to "consider psychological, social and occupational function on a hypothetical continuum of mental health-illness." DSM-IV-TR at Section Multi Axial Assessment Axis V: Global Assessment Function. A GAF score of 40 means:

> Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).

There is nothing in the Assessment to support any of these impairments, nor did Campbell provide any support in this Assessment for this low score. In his deposition, Campbell said that he gave Raub a score of 40 because of "his beliefs." [JA-642.] Again, this is using political beliefs as a basis for psychological diagnosis, which is inappropriate. Campbell also says that Raub's belief "impacts his ability to function in the community work environment [or] in a school." Yet, this is contrary to Campbell's decision not to check off any of the corresponding boxes under Axis IV of his diagnosis (in the section immediately prior to the GAF score). Campbell did check off the

box entitled "Support Group," but his explanation for that decision was his comment that "the support group that he has is all conspiracy theorists, and therefore, it continues his belief in the conspiracy theories." [JA-641.] The fact that Raub's support group (friends and family) shares his views is an indication that those views are political in nature and not an indication of a psychological disorder. Moreover, Campbell has misunderstood the reference to a "support group" under Axis IV. The "support group" should be checked if an individual has *problems* with his support group, not if they are supportive of him.

- On page 7 of the Prescreening Report, there is a section entitled, "Risk Assessment," and Campbell has checked a number of boxes on that page. Those boxes, and my opinion with respect to Campbell's decision to check them, are as follows:
  - According to Campbell's first set of check marks: "It appears from all evidence readily available that [Raub] . . . [h]as a mental illness and that there exists a substantial likelihood that, as a result of mental illness, [Raub] will, in the near future . . . [c]ause serious physical harm to . . . others as evidenced by recent behavior, causing, attempting or threatening harm, or other relevant information . . . and . . . [i]s in need of hospitalization or treatment." Following this set of check marks, there is space on the form for the evaluator to write in the findings that support

his/her check marks. Campbell did not write in any findings, and the other parts of his prescreening report are, as previously explained, insufficient to support the boxes he has checked.

- In a second set of checked boxes, Campbell has checked "No" for the following capacities:
  - "Able to maintain and communicate choice," "Able to understand relevant information," and "Willing to be treated voluntarily." Again there is a place for the evaluator to write his findings, however, Campbell has not done so and there is nothing in the previous portions of the Prescreening Report to suggest that Raub is unable to maintain and communicate choice or that he was unable to understand relevant information. In his deposition, Campbell said he checked these boxes "no" because Raub "did not feel he needed additional help" and "didn't believe that he was in need of any further assistance." [JA-644.] In other words, for Campbell, Raub's belief that he did not have a mental health issue was itself a sign of [a] mental health issue. This is entirely inappropriate. The purpose of these questions is to assess the individual's level of cognitive functioning not whether the individual agrees with the evaluator's assessment. Moreover,

Campbell's indication that Raub lacks capacity in these two areas is inconsistent with the fact that Campbell checked "Yes" next to the statement indicating that Raub is "[a]ble to understand consequences."

- In a final section of boxes entitled "Risk Factors," Campbell has checked boxes for "Homicidal ideation" as well as "Access to weapons," adding the word "potential" after that statement.
    - "Potential" access to weapons is, of course, an attribute of almost everyone in American society, and there is no indication anywhere in the Assessment that Campbell ever addressed, or ever explored, Raub's actual access to weapons. [JA-646-48.]
    - The term "homicidal ideation" is typically used when a patient reports thoughts about committing acts of homicide. In my review of the Assessment and the documents provided, I saw no evidence of homicidal ideation, nor does Campbell provide any evidence of homicidal ideation in his deposition.
- Under the category "Risk Factors," Campbell also checked the box marked, "Other," but failed to provide any indication of what he

had in mind in the space provided for that purpose.

- It is also very significant that Campbell chose not to check the box, "Actively psychotic," a decision that undermines the already unsubstantiated diagnosis of "Psychotic Disorder – Not otherwise specified."

JA-840-48.

The District Court's Decision

In sum, Dr. Martin provided a thorough review of Campbell's report as well as her unrebutted professional conclusion that there was a "lack of evidence of mental illness," and that it was "a violation of professional standards" and "grossly negligent" for Campbell to call for the seizure of Raub at his home and to file the Petition for TDO against Raub. Even so, the district court slipped into the role of fact-finder, rather than judge of legal issues, decided that it was unpersuaded by Raub's evidence and granted summary judgment to Campbell. Raub appeals that decision.

SUMMARY OF THE ARGUMENT

In articulating the standard for probable cause in the mental health context, the district court said the issue is "whether a reasonable person, exercising professional judgment and possessing the information at hand, would have

concluded that Raub, as a result of mental illness, posed an imminent threat to others." JA-963. While this is an accurate statement of the law, so far as it goes, the "exercise of professional judgment" must be understood to include a reasonable evaluation interview, where such an interview is possible. Campbell failed to conduct a reasonable interview, either by phone when Raub was initially seized, or later at the police station. This failure was enough to require denial of Campbell's motion for summary judgment.

Raub had a clearly established constitutional right to be free of seizure and detention unless Campbell had probable cause to believe that Raub posed a danger to himself or others, in the near future, as the result of mental illness. Even setting aside Campbell's failure to conduct a reasonable evaluation interview, this right was violated when Campbell (i) called for Raub's initial seizure, and (ii) petitioned for his further confinement. With respect to the initial seizure, the district court erred when it granted summary judgment despite evidence showing Campbell was responsible for that seizure, and despite Dr. Martin's report demonstrating Campbell did not have probable cause. The district court also erred when it discounted evidence Campbell had failed to exercise reasonable professional judgment and had been grossly negligent in petitioning for Raub's involuntary confinement. In making its decision, the district court improperly

understated the findings and conclusions in Dr. Martin's report, and took on the role of fact-finder rather than judge of the law.

The district court also erred when it dismissed Raub's claim under the First Amendment for violation of his right of free speech. Campbell's deposition revealed that he viewed as repulsive Raub's conspiracy theories and calls for revolution. Campbell admitted that it was these views and statements that caused him to label Raub "delusional" and "paranoid," and ultimately prompted him to petition for Raub's further detention in a mental hospital. As Dr. Martin's report explains, however, "These are not psychological symptoms. They are political views." JA-833. As such, Raub's right to express these views is protected by the First Amendment. From this evidence, a jury could infer that Campbell's actions were meant to punish Raub for his speech. Accordingly, Raub properly stated a First Amendment claim, which should have been allowed to proceed beyond summary judgment.

Additionally, the district court erred in granting Campbell summary judgment on Raub's claim for injunctive relief. The district court cited "public policy" concerns, based on speculation that Raub could, at some future point, become dangerous. JA-973. Such reasoning ignored the limited scope of the injunction sought by Raub, which would preclude only unreasonable seizures by Campbell (and others acting on his behalf or in conjunction with him) based on

Raub's political beliefs. The district court's ruling also ignored Campbell's own statements in the pleadings reaffirming his belief in his conclusions about Raub, despite the dismissal of the case against Raub by the state circuit court and despite Dr. Martin's contrary analysis.

ARGUMENT

Standard of Review

This Court "review[s] de novo an award of summary judgment on the basis of qualified immunity." *Durham v. Horner*, 690 F.3d 183, 188 (4th Cir. 2012). "Summary judgment is appropriate only if taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, 'no material facts are disputed and the moving party is entitled to judgment as a matter of law.'" *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (quoting *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 899 (4th Cir. 2003)). "The relevant inquiry is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Garofolo v. Donald B. Heslep Assocs.*, 405 F.3d 194,199 (4th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

An analysis whether there is qualified immunity involves two prongs: "first whether a constitutional violation occurred and second whether the right violated was clearly established." *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011).

Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

With respect to Raub's request for injunctive relief, this Court "review[s] the district court's grant or denial of a permanent injunction for an abuse of discretion." *Wilson v. Office of Civilian Health & Medical Programs of the Uniformed Servs.*, 65 F.3d 361, 363-64 (4th Cir. 1995). This is, however, not so much an uphill task as it might seem. "With respect to injunctive relief, 'what we mean when we say that a court abused its discretion, is merely that we think that [it] made a mistake.'" *Wilson*, 65 F.3d at 364-65 (quoting *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 814 (4th Cir. 1991)). In making that assessment, this Court "review[s] the district court's factual findings for clear error and its legal conclusions de novo." *Wilson*, 65 F.3d at 365.

I. The Exercise of Professional Judgment Requires the Conduct of a Reasonable Evaluation Interview Where, as Here, Such an Interview Is Possible. Campbell Failed to Meet This Standard.

The district court said that, in determining whether there is probable cause in the mental health context, the issue is "whether a reasonable person, exercising professional judgment and possessing the information at hand, would have

concluded that Raub, as a result of mental illness, posed an imminent threat to others." JA-963.

The district court's formulation – if properly understood – is a correct statement of the law; however, that formulation could be misconstrued so the mental health evaluator would only be required to apply his professional judgment to the facts actually in his possession. The "exercise of professional judgment" also must be understood to include a reasonable evaluation interview (where an interview is possible). In a setting where the basis for detention necessarily rests on conclusions about an individual's mental condition, there is simply no probable cause for detention where no reasonable interview of the individual ever occurred. Thus, to amend the district court's formulation, the applicable standard should be stated as follows:

> "Whether a reasonable person, exercising professional judgment, *including a reasonable evaluation interview (where possible)*, and possessing the information at hand, would have concluded that Raub, as a result of mental illness, posed an imminent threat to others."

What is reasonable will vary, depending on circumstances; however, in this case, Campbell *twice* failed to conduct a reasonable evaluation interview. First, when Campbell initially told Paris to seize Raub at his home, Raub was talking freely with the police, and he was only a few feet away from the phone that Paris was using to talk with Campbell. The same phone could have been used for Campbell to speak with Raub. But Campbell never spoke with Raub on the phone,

and never asked to do so. JA-164. As Dr. Martin explains, Campbell's refusal to speak with Raub was one of the reasons why the seizure of Raub was "grossly negligent" and a "violation of professional standards." JA-835.

Campbell seeks to justify this omission *not* by saying an interview was impossible, but by saying that he already had enough information for an "evaluation." JA-164. But this is clearly the wrong question. Even under a cramped reading of the district court's standard, the question is whether Campbell had enough information to warrant the *seizure* of Raub, not just an evaluation.[8]

Campbell also failed to conduct a reasonable evaluation interview of Raub at the police station. The evidence shows that Campbell performed that interview incompetently and not in keeping with professpional standards, thus undermining the reliability of any conclusions Campbell may purport to draw. As Dr. Martin observed based on the police station videotape, Campbell's interview lasted only

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[8] Under Virginia law, a seizure is justified only if the person ordering the seizure:

> has probable cause to believe that [the] person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, . . . cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, . . . (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment.

Va. Code § 37.2-808(A) and (G).

12 minutes and was conducted in the middle of a busy police station with Raub shirtless and barefoot, hands cuffed behind his back, tied to a bench. As Dr. Martin concluded, "the setting and interview method I observed were not conducive to establishing a rapport with Raub, which is necessary to obtain reliable clinical information." JA-840.

In short, given a full articulation of the applicable legal standard, Campbell's motion for summary judgment should have failed at the outset. Raub's evidence shows that Campbell went outside the bounds of professional judgment by failing to conduct reasonable evaluation interviews. That is reason enough for summary judgment to be denied.

Yet, even if Campbell were somehow excused for failing to conduct a pre-seizure phone interview Raub, and for conducting an incompetent, unprofessional interview at the police station, summary judgment still would be inappropriate. As shown below, the facts Campbell had in hand did not warrant the seizure or detention of Raub.

II. Even Under a Narrow Reading of the District Court's Standard, the District Court Erred by Granting Campbell's Motion for Summary Judgment on Raub's Claims of Unlawful Seizure and Detention.

Raub will show he had a clearly established constitutional right to be free from seizure and detention unless Campbell had probable cause to believe Raub posed an imminent danger to himself or others as the result of mental illness. He

will then show that, given the report of Dr. Martin, there is a genuine dispute of material fact whether Campbell had such probable cause and whether Campbell exercised reasonable professional judgment in filing his petition against Raub.

A. Raub Has a Clearly Established Constitutional Right to Be Free from Seizure and Detention without Probable Cause.

It is an unconstitutional deprivation of liberty for a government mental health worker to instigate the detention of someone for a mental health evaluation without probable cause. Indeed, "for the ordinary citizen, commitment to a mental hospital produces a massive curtailment of liberty, and in consequence requires due process protection." *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) (internal quotation marks and citations omitted). Thus, a "State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself. . . ." *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). Similarly, a State cannot constitutionally confine an individual whom it believes to be "dangerous" – even where that assessment is correct – without probable cause to believe that he is either *mentally ill* or has committed a *crime*. The unconstitutionality of such confinement is especially acute when the perceived "dangerousness" springs from the individual's incendiary – but constitutionally protected – political speech. Unlike the society portrayed in the 2002 movie, "Minority Report," our society is not one where government agents are allowed to arrest people when they are predicted to commit violence in the future.

Additionally, the law of the Fourth Circuit is clear that a government official is liable for an unreasonable seizure, even if the official mistakenly believes that he is acting reasonably. *Henry v. Purnell*, 652 F.3d 524, 532 (4th Cir. 2011) (*en banc*). An officer's subjective intentions are irrelevant. The relevant question is the "objective reasonableness of the officer's conduct in light of the relevant facts and circumstances." *Id.* at 534. Under the rule articulated in *Henry*, even a well-intentioned mental health professional who, due to his negligence (or, here, gross negligence), deprives someone of liberty is liable for his unconstitutional conduct.

Other courts have agreed. As one court explained:

> If [the mental health professional] had misrepresented [the detainee's] mental condition in the form or if he had no probable cause to believe that she qualified for involuntary detention under the statute and yet he initiated the process for having her arrested, then that situation could be sufficiently analogous to *Jones* [a case involving a false statement by a police officer] such that [the mental health professional] should be deemed to have been on notice that his conduct violated [the detainee's] constitutional rights.

Harbaugh v. Stochel, No. 3:12cv110(CDL), 2013 U.S. Dist. LEXIS 60440 (M.D. Ga. Apr. 29, 2013); *see also Olivier v. Robert L. Yeager Mental Health Ctr.*, 398 F.3d 183 (2d Cir. 2005).

Moreover, "qualified immunity does *not* protect an officer who seeks a warrant on the basis of an affidavit that a reasonably well-trained officer would have known failed to demonstrate probable cause – even if the magistrate erroneously issues the warrant." *Miller v. Prince George's County*, 475 F.3d 621,

632 (4th Cir. 2007) (citation omitted, emphasis in original). Similarly, Campbell is not protected by the fact that the magistrate issued a TDO, especially since the magistrate was relying on the Prescreening Report that was the product of Campbell's gross negligence and omitted a critical material fact: that Raub's mother, who lives with him, saw no changes in his behavior.[9]

B. The District Court Erred in Absolving Campbell of Responsibility for Raub's Initial Seizure.

One issue in this case is whether Campbell was responsible for the decision to seize Raub at his home and place him in custody for an evaluation, or whether that decision can be attributed solely to Paris, the lead officer on the scene where the seizure occurred.

In its opinion, the district court describes the events at Raub's home in a manner that presents Paris as initiating the seizure of Raub, with Campbell playing a subsidiary, concurring role. JA 953-54. Yet, a jury weighing the evidence could very well reach the opposite conclusion. On Campbell's motion for summary judgment, *Raub's* evidence must prevail. Raub's evidence shows that, as a

[9] This omission was critical because Bullen, Campbell's primary source of information for the Prescreening Report, had not kept in touch with Raub and his only "contact" with Raub was reading Raub's Facebook postings. JA-989. The officers on the scene, too, had no basis for determining whether Raub had exhibited any change in behavior. By contrast, Raub's mother, who was with him every day, could provide an accurate "baseline," with which to compare Raub's behavior on August 16. The fact that she reported no behavioral changes therefore was highly significant. Nonetheless, Campbell left this fact out of his report.

practical matter, it was *Campbell* who made the seizure decision, and that Paris was relying on Campbell when he signaled the uniformed officers to seize Raub.

In the written report prepared by Paris shortly afterward, he says the following:

- "After informing Campbell of our contact with Brandon Raub, Campbell advised [Paris] to bring Raub in for evaluation."
- Paris then "asked Campbell to repeat *his decision* to evaluated [sic] Raub," and Paris handed the telephone to another officer, who also "hear[d] directly from Campbell on *the decision* to evaluate Raub." *Id.*

JA-193 (emphasis added).

Thus, Paris fixed responsibility for *the decision* on Campbell, and his passing of the telephone for a repetition of that decision strongly suggests that Paris was trying to *avoid* taking responsibility and was using his fellow officer as a witness that it was *Campbell* who had called for Raub to be seized.[10] This was certainly understandable. Having regained consciousness only a few minutes earlier, Paris may have felt he was in no shape to make such a decision.

Moreover, in his deposition, Campbell was asked whether Paris called him to obtain "confirmation" of a decision that Paris had already made, or "guidance"

[10] Elsewhere in his notes, Paris speaks ambiguously, using the passive voice in a way that, standing alone, would not identify the decision maker: "After speaking with Crisis [Campbell], *it was determined* that Brandon Raub should be brought in for an evaluation." JA-191 (emphasis added). Yet, the previous identification of Campbell as the decision-maker is sufficient to rebut any argument that it was Paris who made the decision.

as to what action should be taken. Campbell's reply was "guidance." JA-670.[11] Given these facts – and the inferences that can be fairly drawn from them – a jury could decide that *Campbell* was responsible for the decision to seize Raub. Thus, for the district court to grant Campbell summary judgment, based on the theory that Campbell did not cause the seizure, was inappropriate.[12]

Nor can Campbell escape responsibility on the theory that, under Virginia law, it was the police – not Campbell – who were vested with the legal authority to seize Raub. Even *private* persons may be held liable under § 1983 if they willfully participate in joint action with state agents. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). Moreover, Campbell's purpose was not just to have the police seize and detain Raub, but to have them bring Raub *to Campbell* so that Campbell could continue to confine him for purposes of an "evaluation" conducted under color of state law. Any argument that Campbell had no formal authority to "order" Raub's seizure is simply irrelevant in the context of Raub's federal law claim. Campbell

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[11] The district court notes that Terry Granger, an FBI Special Agent, made the comment, "[W]e need to get this guy evaluated. You know, we can't leave here without doing something." JA-953. But, to his credit – and despite his likely embarrassment at having collapsed on the scene – Paris did not rely on any such undisciplined impulse to "do something." Instead, Paris called Campbell and relied on "his decision" to evaluate Raub.

[12] Moreover, Campbell's motion for summary judgment was based on *qualified immunity*, not on an alleged lack of any material dispute with respect to *causation*.

was a state actor, and his participation in the initial seizure of Raub at Raub's home is sufficient to implicate him in a civil rights violation under § 1983. Again, summary judgment was inappropriate.[13]

Moreover, Dr. Martin's report shows in detail why Campbell did not have probable cause for the initial seizure. In light of that report, the probable cause issue should be left to a jury, not decided on summary judgment.

Indeed, Campbell has admitted – perhaps, unwittingly – that he lacked probable cause to detain Raub at the time of Raub's initial seizure. In arguing that he had probable cause to file the post-seizure Petition for TDO, Campbell places great stock in the email from Bullen. Campbell did not see the Bullen email until after Raub was already seized, and he claims that it was this email that tipped the scales, creating the probable cause that was previously lacking. *See supra* at 15. In other words, Campbell admits that, before he reviewed Bullen's e-mail, there was not sufficient basis for a temporary detention order. Yet, the standard for a temporary detention order is *exactly the same* as the standard for an initial seizure

[13] It is also well-established that a lack of probable cause cannot be cured by facts discovered only after the seizure. *United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995) ("To determine whether probable cause existed, courts look to the totality of the circumstances *known to the officers at the time of the arrest*." (Emphasis added.)). Thus, even if Campbell later acquired probable cause to file his Petition for TDO (and he did not), that would not absolve him from liability for the initial seizure.

by law enforcement.[14] Since Campbell admits there was insufficient evidence for a TDO before he received the Bullen email, there was likewise insufficient evidence for the initial seizure, when Campbell did not yet have the e-mail. Given such an admission, summary judgment for Campbell was inappropriate.

C. The District Court Erred in Granting Summary Judgment for Campbell with Respect to the Petition for Involuntary Confinement.

As noted by the district court, a public official, such as Campbell, is entitled to qualified immunity if his actions were objectively reasonable. The district court went on to state that, in the mental health context, "the issue distills to whether a *reasonable person*, exercising *professional judgment* and possessing the information at hand, would have concluded that Raub, as a result of mental illness, posed an imminent threat to others." JA-963 (emphasis added).[15]

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[14] In both cases, there had to be probable cause to believe that Raub:

> ha[d] a mental illness and that there exist[ed] a substantial likelihood that, as a result of mental illness, [Raub] [would], in the near future, . . . cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any. . . .

Va. Code § 37.2-808(A) and (G).

[15] The proper interpretation of this standard is discussed *supra* at 35.

Yet, when it came time to apply this standard to the facts of the case, the district court failed to do so. Instead, the district court treated Campbell with far greater leniency:

> Campbell was able to particularize the factual basis for his conclusions, including specific comments by Raub supporting his findings. Under these circumstances, his conclusions and actions were objectively reasonable.

JA-969. Thus, the centerpiece of the *announced* standard – *reasonable professional judgment* – was quietly discarded. This was error. What matters is not whether Campbell could explain why he filed the petition; what matters is whether that explanation is within the bounds of *reasonable professional judgment*. If his explanation does not hold up to professional scrutiny, then it is not objectively reasonable and Campbell has no qualified immunity. As the court held in *Rodriguez v. City of New York*, 72 F.3d 1051, 1063 (2d Cir. 1995), considering a statute similar to the one at issue here:

> Though committing physicians are not expected to be omniscient, the statute implicitly requires that their judgment – affecting whether an individual is to be summarily deprived of her liberty – be exercised on the basis of substantive and procedural criteria that are not substantially below the standards generally accepted in the medical community. Due process requires no less.

Whether a mental health evaluator has exercised reasonable professional judgment can best be shown – and, perhaps, can *only* be shown – by expert testimony. "A doctor's decision to commit a person involuntarily . . . does not

ordinarily involve matters within the layman's realm of knowledge." *Olivier*, 398 F.3d at 190 (quotation omitted). Thus, a motion for summary judgment based on qualified immunity can be defeated if the plaintiff meets the "burden of producing competent evidence, typically in the form of expert testimony, regarding applicable medical standards and the defendants' alleged failure to meet those standards." *Fisk v. Letterman*, 501 F. Supp. 2d 505, 522 (S.D.N.Y. 2007). *See also, e.g.*, *Arnett v. Webster*, 658 F.3d 742 (7th Cir. 2011) (requiring expert testimony on whether there was an absence of professional judgment).

Here, the expert testimony is provided by Dr. Martin, who explains that there was a "lack of evidence of mental illness" and "it was a violation of professional standards – and grossly negligent – for Campbell to file the [Petition for TDO] against Raub." JA-850. *See supra* at 14. Such expert testimony provides the evidence needed to show that Campbell failed to exercise reasonable professional judgment. Yet, the district court granted summary judgment for Campbell anyway. This was error. As the Tenth Circuit has explained:

> [A] state official is *not entitled to qualified immunity* if there is a genuine issue of material fact concerning whether a reasonable person, exercising professional judgment and possessing the information before the defendant[], would have believed that [an individual was a danger to himself or others].

Scott v. Hern, 216 F.3d 897, 910 (10th Cir. 2000) (internal quotation marks and citation omitted, brackets in original) (emphasis added). *See also Fisk*, 501 F.

Supp. 2d at 522 & 524 n.10 (plaintiff could have survived summary judgment had she submitted an affidavit from a psychiatric expert showing that the decision of the professional to seek involuntary commitment fell below generally accepted medical standards); *Bolmer v. Oliveira*, 594 F.3d 134, 145 (affirming denial of summary judgment as to qualified immunity for involuntary commitment of patient, because of factual dispute over compliance with applicable standard).

The district court's error is exacerbated by its treatment of Dr. Martin's report. First, the district court treated that report as if it were a fact-finder evaluating evidentiary weight. *See* JA-974 ("In the final analysis, Raub places far *too much weight* on the studied opinion of his expert psychologist." (Emphasis added.)). The weight to be assigned to Dr. Martin's report is a matter for *a jury* to decide.

Second, the district court severely understated Dr. Martin's testimony. According to the district court:

> The fact that [Raub's] expert drew different conclusions than Campbell adds little impetus to his argument. Qualified immunity turns on the perspective of the public official whose actions are under review. . . . [A] subsequent diagnosis of no mental illness by a psychiatrist [does] not preclude a finding that detention for a mental evaluation was objectively reasonable

JA-974 (citing *Gooden v. Howard County*, 954 F.2d 960 (4th Cir. 1992), and *S.P. v. City of Tacoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998)). But, Raub does not fault Campbell simply because Campbell's evaluation was wrong. Raub faults Campbell because his evaluation fell outside the zone of reasonable professional

judgment. And, Dr. Martin does not simply say that she would have drawn different conclusions from Campbell. What she said was that there was a "*lack of evidence* of mental illness" and that "it was a *violation of professional standards* – and *grossly negligent* – for Campbell to file the [Petition for TDO] against Raub." JA-850 (emphasis added). If such an emphatic expression of professional opinion, by an experienced psychologist, cannot create a genuine issue of material fact, it is hard to see what sort of evidence ever would.

The district court says, in a footnote, that it made the assessment of objective reasonableness based on "how the situation was viewed by a mental health evaluator, not an experienced psychotherapist." JA-959 (citing *Reichel v. Howards*, ___ U.S. ___, 132 S. Ct. 2088, 2093 (2012)). But the citation on which the district court relies simply does not support the proposition that government mental health evaluators are held to a lesser standard of reasonableness than other professionals in the field. Nor should there be any such differential. If government mental health evaluators are not well-trained, the solution lies in giving them better training, not more authority.

Moreover, there is no evidence to suggest that Virginia's mental health evaluators are trained inadequately, or that they are trained to seek detention using different or broader grounds than other professionals. While an evaluator in Campbell's position might not always be as precise in his conclusions as a more

highly trained professional, he must stay within the zone of reasonable professional judgment. As Dr. Martin explained, Campbell failed to do so.

Even if mental health evaluators were allowed to detain citizens with less reason than other professionals (a disturbing suggestion), Dr. Martin's report does not simply say Campbell failed to live up to the standards of her fellow psychotherapists. Her condemnation is much broader. She said there was a "lack of evidence of mental illness" and that it was "a violation of professional standards" and "grossly negligent" for Campbell to file the petition against Raub. Implicitly, the standards he violated were *his* standards, not hers. On summary judgment – where all the inferences favor the non-moving party – Dr. Martin's report of Campbell's shortcomings precludes dismissal of the case.

The district court also seeks to excuse Campbell based on the fact that Dr. Martin was able to review the facts "in depth," while Campbell was conducting an "emergency evaluation" that did not permit "lengthy deliberation." JA-959.[16] Yet, Campbell has never suggested that he would have done things differently if only he

[16] The district court suggests that Dr. Martin's opinion was based on a "retrospective analysis" and "hindsight". JA-948, 962 n.11. It is true that, before preparing her final report, Dr. Martin sat down with Raub in October 2013, interviewed him for an hour and a half, and found no abnormalities in his mental status. JA-851. It was the reasonable thing to do, especially since Campbell surely would have criticized her if she had simply looked at documents and not conducted an in-person evaluation. While that 2013 interview "confirm[ed]" her views, JA-852, her conclusion that Campbell lacked probable cause to detain Raub in 2012 did not turn on that interview.

had more time. Besides, the need for a quick decision should not be a blanket excuse that covers even the sloppiest and most grossly negligent evaluation. It is simply one factor among many factors that should be placed before a jury.[17]

In sum, there is a genuine dispute of material fact whether Campbell had probable cause and whether he exercised reasonable professional judgment in filing the Petition for TDO against Raub. Thus, it was error to grant summary judgment.

III. The District Court Erred by Granting Campbell's Motion for Summary Judgment on Raub's Claim of a First Amendment Violation.

Raub also brought a claim against Campbell for a violation of his First Amendment right of free speech. The gist of that complaint is that Campbell took his adverse action against Raub – first, the seizure at Raub's home and, then, the Petition for TDO – because of Raub's unorthodox political statements.

The views that Raub expressed – and that sparked Campbell's adverse reaction – may seem bizarre and offensive to most Americans, but they are

[17] In another footnote, the district court stressed the serious public consequences if Campbell had not caused Raub to be detained, and Raub later turned violent. JA-962 n.11. But the same lack of professionalism that inappropriately detains one individual today may inappropriately release another tomorrow. And, a fear of making the wrong decision does not justify locking a person up without probable cause. Additionally, the district court's argument ignores the counterpoint: there also are serious consequences when an evaluator wrongly finds a sane person mentally ill, resulting in confinement in a mental institution. *See Vitek*, 445 U.S. at 492-94.

protected by the First Amendment. Raub's statements fall into two categories: (i) statements accusing the United States government of various nefarious activities, and (ii) statements about the need for revolution.

Raub's Accusations: A surprising number of Americans are "conspiracy theorists" and believe the United States government has committed – and is committing – serious wrongdoing. Raub is one of them. In particular, Raub asserts the United States government (i) perpetrated the September 11, 2001 terrorist attacks, and (ii) is using airplanes to release a harmful chemical into the atmosphere.

The record shows Campbell's decision to take adverse action against Raub was based largely on the fact that Raub espoused such views. In his deposition, Campbell explained why he had labeled Raub "delusional" in his petition to have him detained:

> Why did I check the "delusions" box?
>
> * * * * *
>
> Is that the question?
>
> The idea that the United States Government is dropping thorium through jet trails is delusional. The fact that the United States sent a missile into the Pentagon is delusional. The fact that he feels that he has been chosen to lead this revolution is delusional thinking.

JA-863.

Many of us have used terms like "delusional" or "crazy" to criticize ideas sharply at odds with our own view of the world.[18] But, there is an obvious distinction between using such terms to express political or social opprobrium and using such terms as part of a clinical diagnosis. As explained by Dr. Martin, there is absolutely no basis to conclude that Raub is delusional in the clinical sense because he shares a belief in conspiracy theories:

> During my assessment, I paid particular attention to those views held by Raub that were cited by Campbell as a basis for believing that there was mental illness present. These views include that the United States government was responsible for the attacks on 9/11 and that the United States government is dropping chemicals from airplanes. In discussing these views with Raub, I found no indication that they were evidence of any underlying psychological condition. On the contrary, Raub was able to provide support for his beliefs by showing me specific websites supporting his views. One does not need to agree with Raub's analysis or conclusions regarding these matters in order to recognize that his beliefs do not spring from any psychological condition

JA-851.[19]

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[18] For example, before Edward Snowden's revelations, many would have said the idea that our government is collecting everyone's email data was crazy or delusional.

[19] Dr. Martin's report provides citations to the websites Raub referenced, including:

- http://www.ae911truth.org/,
- http://en.wikipedia.org/wiki/ Ted_Gunderson,
- http://en.wikipedia.org/wiki/Albert_Stubblebine, and
- http://www.youtube.com/watch?v=l2VXAw3R0V0. JA-851 n.2.

Based on this evidence, a jury could infer that Campbell is a well-meaning but incompetent mental health evaluator (which would support the unlawful seizure claim), or it could infer that Campbell knew what he was doing and sought to punish Raub for his negative and "unpatriotic" attitude toward the United States (which would support both the unlawful seizure and free speech claims). Similar inferences could be drawn by the jury about Campbell's decision to label Raub "paranoid," based largely upon his "extreme distrust of the government." JA-861-62. To the extent Campbell used clinical terms like "paranoid" and "delusional," a jury could infer this was simply an attempt to hide his real motivation beneath psychological labels.

Raub's Call for Revolution: In addition to accusing the United States government of wrongdoing, Raub made a number of statements calling for or relating to revolution.

Some of these statements are quotations of song lyrics. But whether song lyrics or not, none of those statements constituted a crime. As the district court noted, both federal and state prosecutors correctly advised that there was no evidence Raub had committed any crime at all. JA-952 n.4. All of the statements qualify as protected speech under the First Amendment. *See Brandenburg v. Ohio*, 395 U.S. 444, 444-45 (1969) (holding that speech "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of

terrorism as a means of accomplishing industrial or political reform" is protected by the First Amendment "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

Notwithstanding *Brandenburg*, which the district court never mentions, the district court concluded that "the threatening language in Raub's emails undoubtedly exceeds the boundaries of First Amendment protected speech." JA-972 n.15 (citing *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014) and *United States v. Amawi*, 695 F.3d 457, 482 (6th Cir. 2012)). Yet, neither of those cases supports the proposition for which they were cited.

The *Hassan* case involved a conviction for criminal conspiracy in which the defendant's statements were used against him as evidence of that conspiracy. Although the trial court gave a general First Amendment instruction to the jury, the trial court refused to give more detailed *Brandenburg*-based instructions explaining when speech advocating violence is protected. On appeal, this Court upheld the trial court's refusal, *not* because the defendants' proffered instructions were wrong as a matter of law, but because the defendants failed to make the other showings necessary to find an abuse of discretion by the trial court. *See* 742 F.3d at 129.[20]

[20] Specifically, the defendants did not show "(1) that their proposals were not substantially covered by the court's jury charge, or (2) that their proposals dealt with points so important that the court's failure to give them seriously impaired the appellants' ability to conduct their defenses." 742 F.3d at 129.

Thus, *Hassan* does not support the view that Raub's speech was unprotected by the First Amendment.

In *Amawi*, the defendant was also convicted of criminal conspiracy and objected to the trial court's refusal to give his proposed instruction dealing with violent rhetoric and the First Amendment. That instruction, however, was far more sweeping than what was proposed in *Hassan* and well beyond the protections found in *Brandenburg*. Thus, the Sixth Circuit upheld the trial court's refusal to give the instruction. As the Sixth Circuit explained: "Forming an agreement to engage in criminal activities – in contrast with simply talking about religious or political beliefs – is not protected speech. [And] juries can consider speech as evidence in a conspiracy." 695 F.3d at 482. But, *Amawi* has no bearing on the case at bar because Raub was never charged with conspiracy. The standard for judging whether Raub's speech was constitutionally protected is *Brandenburg*; and, under that standard, his speech was well within the boundaries of the First Amendment.

Just as Raub's belief in conspiracy theories played a large role in Campbell's decision to take action against him, so too did Raub's incendiary political rhetoric. But, again, Dr. Martin makes it clear that Raub's statements do not support Campbell's finding that Raub is *mentally ill*. So, again, a jury could reasonably infer that Campbell is a well-meaning but incompetent mental health evaluator, or

it could reasonably infer that Campbell knew what he was doing and deliberately sought to punish Raub for his offensive – but constitutionally protected – political rhetoric.

In sum, the evidence will support a finding that Campbell's actions against Raub constituted a deprivation of his right of free speech. What remains to be discussed is whether the right violated was "clearly established" in August 2012. In ruling on this point, the district court misapprehended the nature of Raub's First Amendment claim.

The district court thought Raub was trying to make out a First Amendment claim for an arrest that was *improperly motivated*, but nevertheless "*supported* by probable cause." JA-971 (emphasis added) (citing *Tobey v. Jones*, 706 F.3d 379, 392 (4th Cir. 2013)). Raub, like the *Tobey* plaintiff, alleges that his arrest was *not* supported by probable cause. Just as the *Tobey* plaintiff was entitled to survive summary judgment, so too is Raub entitled to survive, because "'probable cause or its absence will be at least an evidentiary issue in practically all [ ] cases.'" 706 F.3d at 392 (emphasis in original) (quoting *Hartman v. Moore*, 547 U.S. 250, 265 (2006)). Given Dr. Martin's report, the presence or absence of probable cause is certainly an evidentiary issue here.

Thus, the questions are whether a seizure or detention *not supported* by probable cause, but based on animus against a speaker because of his political

views, makes out a First Amendment claim – and whether such a right was clearly established in August 2012. On these questions, there can be no doubt. "Political speech, of course, is at the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393 (2007) (internal quotation marks and citation omitted). If the First Amendment means anything, it means that government officials cannot seize and detain citizens because they have expressed unpopular or offensive political views. *See, e.g.*, *Brandenburg*. Every American should know this, and certainly every government official should. So, Campbell has no claim to qualified immunity on the First Amendment claim, and summary judgment should have been denied.

IV. The District Court Abused Its Discretion by Dismissing Raub's Narrowly-Drawn Request for Injunctive Relief, Especially Given Its Order Preventing Discovery on Injunction-Related Issues.

Raub asked not only for damages, but also for a permanent injunction against future violations of his rights. Specifically, Raub asked the district court to enter an injunction "prohibiting Defendant and/or agents acting on behalf of or in conjunction with Defendant from unreasonably seizing Plaintiff and/or retaliating against Plaintiff because of Plaintiff's exercise of rights and privileges protected by the Constitution and laws of the United States." JA-817. In addition to dismissing Raub's damage claims on qualified immunity grounds, the district court dismissed Raub's request for injunctive relief.

The district court correctly accepted Raub's argument that qualified immunity cannot insulate a public official from *injunctive* relief and concluded, instead, that "the public policy implications of [Raub's] request preclude injunctive relief in this case." JA-972. The district court speculated that Raub might again appear dangerous sometime in the future and that, the "public interest would be disserved" by such an injunction. JA-973. While Raub strongly disagrees with any suggestion that he was – or will become – dangerous, this Court need not resolve that question in order to recognize that the injunction he sought would *not* preclude public officials from dealing with such a circumstance. As described in his pleading, the injunction Raub sought would not have precluded *all* adverse action against him, only unreasonable seizures and retaliation because of his political beliefs. There is no public policy reason to allow such constitutional violations.

Moreover, the injunction Raub sought was not aimed at *all* Chesterfield mental health evaluators; it was aimed solely at Campbell (and anyone acting "on behalf of or in conjunction" with him). Thus, even if Campbell were precluded from performing any mental health evaluation of Raub for *any* reason (a broader restriction than the pleading sought, though no doubt an appropriate one), a large urban county like Chesterfield surely has other mental health evaluators who could fill the role.

The district court gave other grounds for dismissing Raub's request for injunctive relief, but none of those grounds can withstand scrutiny. For example, the district court said:

> Raub has also failed to demonstrate constitutional injury in the first instance, much less an immediate threat of future injury. Even if Raub had shown that his rights were violated on one occasion, it does not establish any likelihood of a reoccurrence.

JA-973. With respect to demonstrating *past* constitutional injury, the district court is relying on the same factual conclusions it relied on in granting summary judgment on the damages claims. For the reasons already explained, the presence *vel non* of constitutional injury is a question on which the facts are in dispute. The resolution of that issue must await trial. With respect to *future* injury, the fact that Campbell injured Raub once, and is unapologetic for having done so, strongly suggests another such injury is likely. The possibility is compounded by the attitude taken by Campbell in briefs filed in the district court, wherein he essentially reaffirms his belief in his conclusions, notwithstanding any advantages of hindsight and the insights shared by Dr. Martin. *See* JA-881-90. Moreover, Raub was precluded by the district court from taking any discovery with respect to what he might expect in the future from Campbell. *See* JA-143 ("strictly limit[ing] discovery to the issue of the qualified immunity defense"). It is unfair – and an abuse of discretion – for the district court to dismiss Raub's request for a

preliminary injunction based on an alleged lack of evidence when the court expressly precluded Raub from discovering such evidence.

Finally, the district court said that, "in the event of a reoccurrence, if Raub is able to prove that his detention for a subsequent mental evaluation is without probable cause or in violation of Virginia law, he has an adequate remedy at law in the form of compensatory and/or punitive damages." JA-973. The district court is simply mistaken. Monetary damages do not provide an "adequate remedy" for a deprivation of liberty, especially when the deprivation is bound up with violation of free speech rights and carries with it the stigma of mental illness. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Legend Night Club v. Miller*, 637 F.3d 291 (4th Cir. 2011) (quotation omitted). Similarly, "[i]t is indisputable that commitment to a mental hospital can engender adverse social consequences to the individual and . . . [whether] we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual." *Vitek*, 445 U.S. at 492 (quotation marks omitted.).

In sum, the decision to dismiss Raub's request for injunctive relief was an abuse of discretion. That decision should be vacated and the matter remanded with instructions that Raub be permitted to take full discovery, and that any decision on the issue of injunctive relief await a trial on the evidence.

CONCLUSION

Plaintiff-Appellant Brandon Raub, respectfully asks this Court to (i) vacate and reverse the decisions of the district court granting summary judgment to Defendant-Appellee Michael Campbell and dismissing the claim for injunctive relief, and (ii) remand the case to the district court for the taking of full discovery and trial.

ORAL ARGUMENT IS RESPECTFULLY REQUESTED.

Respectfully submitted,

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Dated: August 25, 2014

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I hereby certify that on this 25th day of August, 2014, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 25th day of August, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court and a copy of the Sealed Volume of the Joint Appendix to be served, via U.S. Mail, Postage prepaid, upon counsel for the Appellant, at the above address.

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