NO. 24-2047

In The

United States Court Of Appeals

For The Fourth Circuit

DYANIE BERMEO,

Plaintiff - Appellant,

v.

BLAKE ANDIS, Sheriff; JAMIE BLEVINS, Captain; SCOTT ADKINS, Detective; BRAD ROOP, Detective,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ABINGDON

BRIEF OF APPELLEES

Nathan H. Schnetzler
Austin L. Obenshain
FRITH ANDERSON & PEAKE, PC
29 Franklin Road, S.W.
Post Office Box 1240
Roanoke, Virginia 24006-1240
(540) 772-4600

Counsel for Appellees

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 24-2047 Caption: Dyanie Bermeo v. Blake Andis, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Blake Andis
(name of party/amicus)

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

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

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

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

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

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Nathan H. Schnetzler Date: 11/1/2024

Counsel for: Blake Andis

CERTIFICATE OF SERVICE

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I certify that on 11/1/2024 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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No. 24-2047 Caption: Dyanie Bermeo v. Blake Andis, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Jamie Blevins
(name of party/amicus)

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

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

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Nathan H. Schnetzler Date: 11/1/2024

Counsel for: Jamie Blevins

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No. 24-2047 Caption: Dyanie Bermeo v. Blake Andis, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Scott Adkins
(name of party/amicus)

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

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

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Nathan H. Schnetzler Date: 11/1/2024

Counsel for: Scott Adkins

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No. 24-2047 Caption: Dyanie Bermeo v. Blake Andis, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Brad Roop
(name of party/amicus)

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

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

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Nathan H. Schnetzler Date: 11/1/2024

Counsel for: Brad Roop

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STATEMENT OF THE ISSUES

Did an audio recording considered by the District Court at the motion to dismiss stage, coupled with plaintiff's own factual allegations, blatantly contradict the plaintiff's allegation that she was coerced into confessing to a crime?

Did the District Court err in granting the defendants' Motion to Dismiss?

STATEMENT OF THE CASE

Dyanie Bermeo ("Bermeo") filed a police report about an alleged sexual assault during a traffic stop in September 2020. She later admitted to investigators that the report was false, and they charged her with filing a false report. Ultimately, she was acquitted of the charge. She then filed this action alleging the investigators and others violated her civil rights and other claims under Virginia law. The District Court dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Dyanie Bermeo Reports a Traffic Stop and Sexual Assault

In September 2020, Dyanie Bermeo was a 21-year old college student in her third year at King University. JA13, ¶ 2. She was a

double major in criminal justice and psychology and hoped to complete an internship with the Federal Bureau of Investigation. JA13, ¶ 2.

On September 29, 2020, while en route to her college campus in Bristol, Tennessee, Bermeo traveled through Abingdon, Virginia, and was stopped by a vehicle with blue flashing lights driven by an individual who presented himself as a police officer. JA16, ¶¶ 17–19. During the course of the traffic stop, Bermeo claims she was sexually assaulted by that individual. JA17, ¶ 20.

The next day, Bermeo reported the assault to the Washington County Sheriff's Office ("WCSO") in Abingdon, Virginia. JA17–18, ¶¶ 23–26. WCSO Detective Scott Adkins ("Adkins") and Captain Jamie Blevins ("Blevins"), along with Major Scott Snapp, interviewed Bermeo for approximately 50 minutes, during which she described her assailant's physical appearance, voice, and vehicle. JA18, ¶ 27. Adkins began investigating Bermeo's claims. JA20, ¶ 36.

After the investigation began, however, Bermeo's story began to unravel. Adkins visited nearby businesses to gather available security footage from the time of the alleged stop. JA20, ¶¶ 36–39. One business told Adkins that its security footage showed Bermeo's vehicle with no

other vehicles behind her. JA20, ¶ 39. Another business's security footage did not show any vehicles matching the description Bermeo provided. JA20, ¶ 37. Adkins obtained footage from a nearby residence, but Bermeo claims the metadata showed that recording was from the wrong date. JA21, ¶ 41.

Adkins also "sat outside [a] potential suspect's house to observe if a vehicle matching the description of the Assailant's appeared on the property." JA21, ¶ 43. Adkins twice visited the property and, finding no similar vehicle, "ruled out this individual as a person of interest." JA21, ¶ 44.

On October 13, 2020, Adkins interviewed Bermeo again, along with Detective Brad Roop ("Roop"). JA22, ¶ 49. Based on Bermeo's behavior and the lack of evidence supporting her allegations, Adkins and Roop became suspicious Bermeo might be lying about the alleged assault. JA23, ¶¶ 52–53.

Later that day, Bermeo received four threatening text messages from an unknown number. JA23, ¶ 55. Bermeo called her father, who tried to call the unknown number. JA23, ¶ 57. When he did so, Bermeo's own phone rang. JA23, ¶ 57. At her father's direction, Bermeo

contacted Adkins about the text messages, and Adkins and Roop traveled to Bermeo's college campus to look at the messages on Bermeo's phone. JA24, ¶¶ 58–59.

II. In a Recorded Interview, Bermeo Confesses that the Traffic Stop Never Occurred.

After arriving at Bermeo's campus, Adkins and Roop met with Bermeo over the course of about twenty-four minutes. JA24, ¶¶ 60–61. They recorded their conversation with Bermeo. JA24, ¶ 59.

Adkins and Roop offered to take and "dump" Bermeo's phone to find the device from which the threatening text messages originated. JA24, ¶ 61. Roop told Bermeo that the surveillance footage from the night of the alleged assault showed her vehicle but no other vehicle behind her. JA24, ¶ 65.

Roop then said to Bermeo, ". . . we need you to tell us the truth . . . no stop happened here." JA25, ¶ 69. Bermeo agreed with Roop. JA25, ¶ 70.

Roop asked Bermeo why she made up the story about the alleged assault. JA25, ¶ 71. Instead of denying that she made the story up, Bermeo said, "I don't know." JA25, ¶ 71.

Roop then asked Bermeo how she sent the text messages to herself. JA25, ¶ 73. Instead of denying that she sent the text messages to herself, Bermeo replied, "there's an app." JA25, ¶ 73.

Bermeo *did not allege* that (a) she attempted to terminate the encounter at any time, (b) she was confined in a room with Adkins and Roop, (c) she asked for an attorney to be present, or (d) she asked for a parent to be present. Bermeo *did not allege* that she was physically mistreated or intimidated during the encounter.

Adkins and Roop reported Bermeo's confession to campus police. JA26, ¶ 78.

III. The Audio Recording of Bermeo's Confession

While Adkins and Roop met with Bermeo on King University's campus, Bermeo called the unknown number, and it rang back to her own cell phone. JA125 (citing ECF No. 51-1). When Adkins and Roop offered to "dump" Bermeo's phone, Bermeo asked whether the text messages could come back to her phone. See WCSO Audio Recording at 07:23; JA125. Adkins replied that, if Bermeo had sent the messages to herself, then the analysis would identify her phone as the sender. See WCSO Audio Recording at 07:30–08:36; JA125.

Adkins also explained that the traffic stop had seemed random but that the text messages appeared more targeted, as if the assailant had concrete information about the status of the WCSO's investigation. See WCSO Audio Recording at 08:40–10:00; JA126. Adkins and Roop then began to inquire about the veracity of Bermeo's claims. See WCSO Audio Recording at 08:42–13:21; JA126. Roop told Bermeo that video footage of the area where the traffic stop was allegedly conducted showed no traffic stop. See WCSO Audio Recording at 13:23; JA126.

Eventually, Roop said "We need you to keep it between us . . . but we need you to tell us the truth. No stop happened here, did it?" WCSO Audio Recording at 14:17; JA126. Bermeo responded, "Uh-uh", confirming no stop ever happened. WCSO Audio Recording at 14:34; JA25, ¶ 70; JA126.

Roop asked Bermeo why she made up the story, to which Bermeo replied, "I don't know." WCSO Audio Recording at 14:41; JA126. When asked how she received the threatening text messages, Bermeo confirmed that she used an app to send the messages to herself, and the messages would trace back to her phone if the WCSO had "dumped" it. WCSO Audio Recording at 16:16; JA25, ¶ 73; JA126. After discussing Bermeo's mental wellbeing, Adkins told Bermeo that he would close the police report and that he would not share the events that had

transpired with anyone other than his supervisor and King University's security personnel. See WCSO Audio Recording at 21:00–21:55; JA126. At the end of the conversation, Bermeo told the officers that she appreciated their work and that she was sorry. See WCSO Audio Recording at 22:20–22:32; JA126.

IV. After Confessing, Bermeo is Charged, Convicted, and Then Acquitted

According to Bermeo, Adkins' supervisor, WCSO Sheriff Blake Andis ("Andis"), ordered Adkins to obtain an arrest warrant charging Bermeo with knowingly filing a false report with the intent to mislead law enforcement under Virginia Code § 18.2-461. JA27, ¶ 81.

Adkins obtained a warrant from a Virginia magistrate and arrested Bermeo. JA27–28, ¶¶ 82, 90. After Bermeo's arrest, WCSO created a press release and Facebook post about the arrest using Bermeo's photograph, her name, university, and city of residence. JA28–29, ¶¶ 94–96. The post stated that:

> After a thorough investigation and evidence gathered because of [Bermeo's] report, it was determined that this incident lacked validity and appeared to be fabricated. When confronted with the evidence gathered by Washington County Detectives Adkins and Roop, Bermeo admitted that she had fabricated the entire story.

JA59.

Bermeo was found guilty by a Virginia General District Court judge and sentenced to 90 days in jail, suspended for good behavior. JA32, ¶¶ 120–121. Bermeo appealed that conviction and was acquitted in a Virginia Circuit Court. JA33, ¶ 122.

V. Procedural History

After her acquittal, Bermeo filed this 42 U.S.C. § 1983 action against Andis, Blevins, Adkins, and Roop (collectively the "Officers"). She initially filed this case in the Western District of North Carolina, Charlotte Division, but it was later transferred to the Western District of Virginia. JA1. While the case was still in the Western District of North Carolina, Bermeo attached to one of her filings (ECF No. 34-4) a purported transcript of the WCSO Audio Recording. See JA7.[1]

After the transfer of the case, the Officers filed a joint motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and attached a copy of Bermeo's recorded confession. JA8; ECF No. 51-1. In response, Bermeo filed her Second Amended Complaint asserting various causes of action for:

[1] Citations to "ECF No." refer to documents filed in the District Court, and citations to "Dkt. No." refer to documents filed in this Court. Pincites to both refer to the page numbers in the documents' headers.

1. Fourth Amendment – Unlawful Seizure (Andis and Adkins)
2. Fourth Amendment – Malicious Prosecution (Andis and Adkins)
3. Fifth Amendment – Self-Incrimination (Adkins and Roop)
4. Fourteenth Amendment – Right to Privacy (All Officers)
5. Fourteenth Amendment – Equal Protection (All Officers)
6. Failure to Intervene (All Officers)
7. Failure to Supervise (Andis)
8. Failure to Train (Andis)
9. Civil Rights Conspiracy (All Officers)
10. Intentional Infliction of Emotional Distress (All Officers)
11. Fraud (Adkins and Roop)

JA9; JA35–57, ¶¶ 138–281.

In response, the Officers filed another Motion to Dismiss. JA9; ECF No. 63. They again referred the District Court to the recording previously submitted. ECF No. 64. Bermeo did not object to the Court's consideration of the recording in her opposition brief. ECF No. 68. The District Court heard oral argument on the Motion to Dismiss. JA10; JA81–119.

During oral argument, the District Court directly asked Bermeo's counsel whether the recording could be considered. Bermeo's counsel said yes. JA101.

On August 16, 2024, the District Court entered an order and accompanying opinion granting the Officers' Motion to Dismiss and dismissing the case with prejudice. JA11. Bermeo filed a Motion to Vacate, arguing the District Court committed legal error in considering

the audio recording of Bermeo's confession. JA11. The District Court denied Bermeo's Motion to Vacate, and this appeal followed. JA11.

SUMMARY OF ARGUMENT

The District Court correctly dismissed Bermeo's Second Amended Complaint for failure to state a claim. Because the audio recording of Bermeo's confession "blatantly contradicted" Bermeo's claim that Adkins and Roop coerced her into confessing, the District Court did not impermissibly weigh any evidence. The District Court applied the correct standard of review, correctly disregarded Bermeo's legal conclusions and conclusory allegations in the Second Amended Complaint, and ruled that Bermeo failed to state any claim that was plausible on its face. Indeed, setting aside the recording, Bermeo's own allegations were fatal to her claims.

Alternatively, the District Court did not reach many of the Officers' other arguments in support of why the case should be dismissed as to each of them. These were independent reasons to dismiss all of the claims. Thus, if the District Court reached the correct result, albeit for the wrong reason, the judgment below should not be disturbed. See Tankersly v. Almand, 837 F.3d 390, 395 (4th Cir. 2016).

ARGUMENT

The District Court's ruling should be affirmed. First, the District Court did not err in considering the WCSO audio recording because its contents "blatantly contradict" Bermeo's conclusory allegation that she was coerced into confessing. Second, the totality of the circumstances surrounding the confession, based solely on Bermeo's own allegations in the Complaint, was insufficient as a matter of law to meet the standard for coercion. Finally, additional arguments not addressed by the District Court warranted dismissal of Bermeo's claims.

I. Standard of Review

This Court reviews the District Court's granting of a motion to dismiss *de novo*. Doe v. Va. Polytechnic Inst. & State Univ., 77 F.4th 231, 236 (4th Cir. 2023). The Court must "accept as true the well-pled allegations of the Complaint and construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." Id. (internal quotations omitted).

A claim should be dismissed "'if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all factual inferences from those facts in the plaintiff's favor, it appears certain

that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.'" McCaffrey v. Chapman, 921 F.3d 159, 164 (4th Cir. 2019) (quoting Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999)). Thus, pleadings that offer mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not suffice. Id. at 678 (internal quotations omitted). Indeed, "legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments" need not be accepted as true. Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 365 (4th Cir. 2012).

Federal Rule of Civil Procedure 12(d) ordinarily prohibits a court from considering evidence outside the pleadings on a motion to dismiss, unless the court converts the motion to one for summary judgment. However, a court may consider a recording submitted at the motion to dismiss stage when that recording is "integral to the complaint and its authenticity is not challenged," but only insofar as the recording "blatantly contradicts the plaintiff's allegations, rendering the plaintiff's allegations implausible." Doriety v. Sletten, 109 F.4th 670, 679–80 (4th Cir. 2024) (citing Saalim v. Walmart, Inc., 97 F.4th 995, 1002 (6th Cir. 2024)) (internal quotations omitted).

II. After Failing to Object and Consenting to the District Court's Consideration of the Recording, Bermeo Cannot Now Complain of Error

Under the invited error doctrine, it is well-established that "[a] party cannot successfully complain of error for which [she, herself], is responsible . . . ." Cranston Print Works Co. v. Pub Serv. Co. of N.C., 291 F.2d 638, 349 (4th Cir. 1961). In other words, "[t]he invited error doctrine recognizes that a court cannot be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request." United States v. Jackson, 124 F.3d 607, 617 (4th Cir. 1997). This Court has applied the invited error doctrine to decisions made at the motion to dismiss stage. See Dawkins v. Arthur (In re Pratt-Miller), 701 F. App'x 191, 192 (4th Cir. 2017) (unpublished).

Here, Bermeo took the initial step of injecting the audio recording into this matter by referencing it and purporting to quote from it in her Complaint. JA24–26. Furthermore, Bermeo introduced a purported transcript of the audio recording as an exhibit in support of her memorandum in opposition to the Officers' initial motion to dismiss. JA7, JA85. As Bermeo herself first invited the District Court(s) to

consider the contents of the audio recording, she cannot now "successfully complain of error" insofar as the District Court considered it.

Moreover, Bermeo failed to object to the District Court's consideration of the recording despite twice having the opportunity to do so on brief. And finally, when directly asked by the District Court, Bermeo agreed that the recording could be considered at the Rule 12(b)(6) stage. Bermeo had multiple opportunities to halt the District Court's consideration of the recording, and therefore, to the extent there was any error below, it was at Bermeo's own invitation. Accordingly, the District Court's ruling should be affirmed.

III. The District Court Did Not Err by Considering the Audio Recording

Bermeo contends the recording does not blatantly contradict her allegations, and therefore it should not be considered for purposes of a motion to dismiss in light of this Court's recent ruling in Doriety v. Sletten, 109 F.4th 670 (4th Cir. 2024). The audio recording at issue is authentic and integral to the complaint. Bermeo conceded that point, and the District Court correctly concluded that the Audio Recording "blatantly contradicted" Bermeo's allegation that she was unlawfully coerced into confessing.

a. A recording attached to a motion to dismiss may be considered if it blatantly contradicts the allegations in the Complaint

To meet the "blatantly contradicts" standard, the recording must "utterly discredit[ ]" a plaintiff's version of events such that the allegations constitute "visible fiction, such that no reasonable jury could . . . believe[] them" Lewis v. Caraballo, 98 F.4th 521, 529 (4th Cir. 2024) (internal citation and quotations omitted). Insofar as Bermeo cites to Doriety in support of her position, the audio recording at issue here is distinct from the video at issue in Doriety. In Doriety, this Court addressed whether a *video* recording blatantly contradicted the plaintiff's allegations, but the nature of the video made it "difficult to discern many critical details" such that it did not "clearly depict" key points at issue. Doriety, 109 F.4th at 680.

Here, the audio recording of Bermeo's confession is intelligible in its entirety and presents no difficulties of interpretation requiring remand like in Doriety. As the District Court concluded, the recording presented in this case satisfied the applicable standard: it "blatantly contradict[ed]" Bermeo's allegation that she was coerced into confessing. As coercion constitutes the keystone of many of her claims, the absence

thereof resulted in the collapse of her case. Notably, Bermeo's Opening Brief does not dispute that conclusion.

b. The recording blatantly contradicts Bermeo's conclusory allegation that she was coerced into confessing

Here, Bermeo alleges that Roop deceived her by claiming that video surveillance showed that no vehicle followed Bermeo. JA24, ¶ 62–65. Bermeo characterizes Roop and Adkins as making "veiled threats," such that she felt compelled to admit that she lied about being subjected to a traffic stop because she "did not think she had any choice but to tell Roop and Adkins what they wanted to hear." JA25, ¶¶ 68, 70. Bermeo also claims that her fear was exacerbated by the "inexplicable text messages [she] had received," and "the fact that [her] cell phone was in WCSO custody earlier that morning." JA26, ¶ 75. All these allegations culminate in Bermeo's conclusion that her confession was coerced. JA34, ¶ 129; JA38, ¶ 157.

Yet, the recording blatantly contradicts Bermeo's allegations.

Bermeo argues that the District Court's determination that the recording "plainly shows" that there was "no coercion whatsoever," JA134–135, must mean it "virtually ignore[d] all of the contextually

relevant factual allegations underlying [her] claims," such as the claim that she was "sexually assaulted by a purported law enforcement officer" and "reported this incident in a profoundly vulnerable state."

Bermeo's argument, however, misconstrues the test for determining whether a confession was the result of coercion. The test does not rest on Bermeo's mere subjective feelings. See United States v. Braxton, 112 F.3d 777, 781 (4th Cir. 1997) ("Subsequent testimony by an accused about his prior subjective mental impressions and reactions must be carefully scrutinized, as such testimony is always influenced by his self-interest."). Rather, a court must look to all the surrounding circumstances to make an objective determination as to whether a confession was in fact the product of coercion. Id.

Critically, Bermeo did not allege that Adkins or Roop ever made any gestures or expressions that she perceived as threatening and would be imperceptible on an audio recording. Nor did she make any allegations about what happened before the recording started or after it stopped in support of her allegation of coercion. The recording contains the entire conversation, not cherry-picked quotations and innuendo,

that appropriately informed the District Court's totality of the circumstances analysis.

As the District Court noted, contrary to Bermeo's allegation that Adkins and Roop tried to portray her as mentally and emotionally unstable, the audio recording clearly demonstrates that "the officers repeatedly expressed their concern for Bermeo's wellbeing and offered to connect her with counselors." JA133. In the recording, Bermeo clearly agrees that she was dealing with mental health issues, required mental health counseling, and that she was afraid to share that fact with her parents. In response, Adkins and Roop offered to try to help connect her with counseling resources. WCSO Audio Recording at 15:00–19:51. Thus, Bermeo's allegations and implications that Roop and Adkins purposefully attempted to discredit or demean Bermeo are blatantly contradicted by the recording.

Contrary to Bermeo's allegation that the officers "interrogated" her, the recording confirms that Adkins and Roop spoke to Bermeo in a gentle and polite tone. As the District Court observed, it would be unreasonable to find that their interview of Bermeo was coercive in any respect. Finally, Bermeo agreed that the District Court could consider

the audio recording at the motion to dismiss stage and offered no objection to such consideration. JA101, 21:18–25; JA102, 22:1–3.

Therefore, the District Court was correct in its ruling that the WCSO audio recording blatantly contradicted Bermeo's allegation that her confession was coerced. Because the District Court did not err by considering the recording, and Bermeo does not argue that she should prevail even if the recording is considered, this Court should affirm.

IV. Bermeo's Allegations Do Not Support an Inference of Coercion

The District Court correctly concluded that, based on the allegations made and the contents of the audio recording, Bermeo's Second Amended Complaint failed to state a claim upon which relief could be granted because Adkins and Roop did not coerce Bermeo into making a false confession. Yet, even without considering the recording, the result is the same.

Bermeo claims that Adkins and Roop coerced her into making a false confession by using "fabricated evidence" and making false statements to her. She also argues that she subjectively felt compelled to falsely confess. Neither argument is sufficient for purposes of making a reasonable inference that her confession was the product of coercion.

a. The Court must consider the totality of the circumstances surrounding the confession

Determining whether a statement was unconstitutionally obtained requires a court to "assess[] the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Factors to consider include a lack of education, low intelligence, the length of the detention, the use of physical punishment, the nature of the questioning, and the setting of the interview. Id.; Braxton, 112 F.3d at 780–81.

Here, the totality of the circumstances—based solely on Bermeo's own allegations—do not support any inference of coercion.

First, at the time of the meeting on campus, Bermeo was an intelligent, 21-year-old college student double-majoring in criminal justice and psychology with aspirations to become a federal law enforcement officer. JA13, ¶ 2. She intended to pursue an internship with the FBI. Id.

Bermeo initiated the contact by calling Adkins about the disturbing text messages; there was no surprise when Adkins and Roop

arrived on her campus. Furthermore, the questioning by Adkins and Roop lasted only twenty-four minutes. JA24, ¶¶ 60–61. Bermeo does not allege that, over the course of those twenty-four minutes, she was subjected to physical punishment, verbal abuse, or any other punitive measures that would support an inference of coercion. Nor does she allege that she was ever detained or otherwise prevented from voluntarily terminating the interview at any time. The interview occurred on her college campus, not the sheriff's office. She does not allege she was confined in a room with Adkins and Roop, that she asked for an attorney to be present, or that she asked for a parent to be present.

While Bermeo argues that her subjective feeling at the time of the interview was that she was being coerced, that is not the end of the analysis. The test is one of totality. And considering the totality of the circumstances, the Court should affirm the District Court's finding that the allegations did not support Bermeo's allegation that Adkins and Roop coerced her into confessing.

Just as this Court concluded in United States v. Braxton, "it would be hard to imagine a more routine, benign, and noncoercive

investigatory scenario" than Bermeo's interaction with Adkins and Roop. Braxton, 112 F.3d at 781. In Braxton, this Court rejected a criminal defendant's claim that he felt subjectively pressured into confessing when "Braxton was not under arrest, the pre-arranged interview took place in his mother's home with others present, the interview lasted only an hour, Braxton appeared at all times to be acting cooperatively and voluntarily, and he was not taken into custody even after the interview." Id.

By contrast, Bermeo cites Gilliam v. Sealey, 932 F.3d 216 (4th Cir. 2019), for the proposition that a coerced confession "does not give police probable cause to arrest the suspect," Gilliam, 932 F.3d at 234. However, in Gilliam, law enforcement used tactics that were clearly coercive in order to compel two intellectually-disabled young men into signing false confessions. See id. at 226–28. One of the young men, McCollum, was threatened with "get[ting] the gas chamber," having his mother incarcerated, and was told that if he signed the confession, he could go home. Id. at 227. The other young man, Brown, was told he would be taken to a gas chamber if he did not waive his rights as a juvenile, was assaulted with racial epithets, and was told that signing a confession would ensure his release. Id. at 227–28.

The interrogations of the young boys lasted hours late into the night and early morning. Id. at 223, 227. The boys asked for their mother to be present, but the officers refused. Id. at 227.

Here, however, neither Adkins nor Roop engaged in such coercive tactics. Bermeo alleges that (1) Roop deceived her by telling her that video footage showed that no car was behind her, (2) Roop and Adkins told her they did not want to embarrass her, and (3) Roop asked Bermeo to tell the truth. JA24–25, ¶¶ 65–69. These allegations are insufficient to support any inference of coercion.

b. Adkins' and Roop's alleged misrepresentations did not render Bermeo's confession involuntary.

Deceptive practices by law enforcement do not render a confession coerced. United States v. Whitfield, 695 F.3d 288, 302 (4th Cir. 2012) ("[M]isrepresentations are insufficient, in and of themselves, to render a confession involuntary."). Over and again, the Supreme Court has repeatedly said that law enforcement may use deception to lead a person to make a confession, and such a confession is not coerced. See Illinois v. Perkins, 496 U.S. 292, 297–99 (1990); Frazier v. Cupp, 394 U.S. 791, 739 (1969). These tactics include using misleading statements, misleading ploys, deception, or even minor fraud. United

States v. Umana, 750 F.3d 320, 344–45 (4th Cir. 2014) (collecting cases). Indeed, in this Circuit, only explicit promises by a questioning official that he will do, or not do, a specific act in exchange for the confession is sufficient to critically impair a person's capacity for self-determination. See United States v. Shears, 762 F.2d 397, 401–02 (4th Cir. 1985).

Roop's statements that he did not want to embarrass Bermeo and that she needed to tell the truth are not the type of "direct or implied promises" to render a confession involuntary. In Braxton, this Court concluded that an officer's statement that "if you come clean, you will not be prosecuted," did not meet the high bar to render a defendant's confession involuntary. Braxton, 112 F.3d at 782–83. Roop's statements, as alleged in the Complaint and contained in the recording, do not come close to making such an implied promise.

c. The sexual assault policy does not support an inference of coercion

For the first time, Bermeo also argues that the WSCO sexual assault policy attached to her Complaint shows that Adkins and Roop "knew—or, at a bare minimum, should have known—how easy it would be to elicit an incriminating statement from Bermeo." 4th Cir. Dkt. No.

13, *26. Bermeo did not raise this argument before the District Court, and this Court has routinely refused to consider issues and arguments raised by litigants for the first time on appeal.

Nevertheless, Bermeo's reliance on the sexual assault policy should be tossed aside immediately because Bermeo specifically alleged that neither Adkins nor Roop had any knowledge about the sexual assault policy. JA33, ¶ 126; JA34, ¶ 128.

In any event, Bermeo's ultimate conclusion that "defendants . . . knew that Bermeo was likely to recant her report with the slightest provocation," is not supported by the sexual assault policy. While the policy expressly states that victims might "become hesitant or fearful and refuse to cooperate further," JA79, Bermeo did not "fail to cooperate further;" instead, she confessed to making a false report. The sexual assault policy makes no provisions for alleged victims who expressly *recant* their testimony. Here, Bermeo expressly *admitted* that she fabricated the story of the traffic stop and sexual assault and that she sent the threatening text messages to herself. JA25, ¶¶ 69–73; WCSO Audio Recording at 16:16.

For the foregoing reasons, the District Court correctly ruled that the facts alleged in the Second Amended Complaint failed to demonstrate that Bermeo's confession was the product of coercion. As such, the District Court's rulings as to each of Bermeo's claims premised on the voluntariness of her confession should be affirmed.

V. Counts One and Two Failed to State a Claim for Relief Due to Bermeo's Voluntary Confession and Subsequent Probable Cause Determinations.

Counts One and Two were claims for unlawful seizure and malicious prosecution claims pertaining only to Adkins and Andis. Both claims fail if an arrest is supported by probable cause. Massey v. Ojaniit, 759 F.2d 343, 356 (4th Cir. 2014); Humbert v. Mayor & City Council of Balt. City, 866 F.3d 546, 555 (4th Cir. 2017).

In light of Bermeo's voluntary confession, the District Court correctly concluded that Adkins and Andis had probable cause to arrest Bermeo for making a false report, which defeated Bermeo's unlawful seizure and malicious prosecution claims.

a. Bermeo's confession was sufficient for a probable cause determination.

"Probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to

warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed an offense." Humbert, 866 F.3d at 555 (cleaned up).

Probable cause is analyzed under an objective standard in which courts consider the totality of the circumstances known to the officer(s) at the time of the seizure without consideration of the subjective beliefs of the officers involved. See Smith v. Munday, 848 F.3d 248, 253 (4th Cir. 2017). Officers need not "resolve every doubt about a suspect's guilt before probable cause is established." Torchinsky v. Siwinski, 942 F.2d 257, 264 (4th Cir. 1991).

In this case, Adkins and Andis had probable cause to arrest Bermeo because she expressly admitted that (1) no traffic stop ever occurred and (2) she fabricated the threatening texts to further bolster the false report. Bermeo claims that the Adkins and Andis lacked probable cause because Adkins and Roop "knew that their threats and false promises would likely elicit an incriminating response" when they spoke to her on October 13, 2020. But as set forth in section IV above, there are insufficient factual allegations to show coercion, therefore

Adkins and Andis had probable cause to arrest her, and Counts One and Two failed to state a claim for relief.

b. A magistrate found probable cause to arrest, a General District Court Judge found sufficient evidence to convict, and a Circuit Court Judge found sufficient evidence to overrule two motions to strike the prosecution's case.

Andis and Adkins also argued below that the independent determinations of a magistrate, General District Court Judge, and Circuit Court Judge were sufficient to find Bermeo's arrest was supported by probable cause. The District Court did not reach this argument.

This Court previously recognized that:

> Under Virginia law a conviction for the offense charged, *even though subsequently reversed, dismissed, or vacated*, is conclusive evidence of probable cause, unless the conviction was procured by the defendant through fraud or by means of evidence that he knew to be false. *Ricketts v. J. G. McCrory Co.*, 138 Va. 548, 121 S.E. 916 (1924).

Cramer v. Crutchfield, 648 F.2d 943, 946 (4th Cir. 1981) (emphasis added); see also Kane v. Hargis, 987 F.2d 1005, 1008 n.1 (4th Cir. 1993).

Here, a magistrate found probable cause to issue a warrant for Bermeo's arrest, and Bermeo was convicted in General District Court. JA27, JA32. When Bermeo appealed her conviction to the Circuit Court,

the Circuit Court twice overruled Bermeo's motion to strike the prosecution's case. JA83.[2] If there was no probable cause to support Bermeo's arrest, the Circuit Court would have been compelled to grant Bermeo's motions in that criminal proceeding. JA83:5–25; ECF No. 69-1. While Bermeo was eventually acquitted in a Virginia Circuit Court, her conviction in a Virginia General District Court "is conclusive evidence of probable cause." While the District Court declined to make its probable cause determination based on her state court conviction, see JA135, n.8, this Court may do so.

For the reasons explained above, the District Court correctly concluded that Adkins and Andis had probable cause to support Bermeo's arrest. Thus, the dismissal of the unlawful seizure and malicious prosecution claims against Adkins and Andis should be affirmed.

[2] In her Opening Brief, Bermeo incorrectly characterizes the motions to strike as "motions to strike the audio recording at her second criminal trial." 4th Cir. Dkt. No. 13, *31.

VI. Bermeo's Fifth Amendment Claim Failed because There is No Civil Remedy for Self-Incrimination and Her Confession was Neither Coerced nor Involuntary

Bermeo claimed Adkins and Roop violated her Fifth Amendment rights when they questioned her on campus and used her statements against her at trial. The District Court dismissed Bermeo's Fifth Amendment claim because it concluded that the Fifth Amendment does not provide a cause of action for a civil plaintiff. JA136. Bermeo failed to address this aspect of the District Court's decision in her opening brief and has therefore waived review of it on appeal. Barrett v. PAE Gov't Servs., 975 F.3d 416, 433 (4th Cir. 2020) (collecting cases).

Even if the dismissal of Bermeo's Fifth Amendment claim is subject to review by this Court, the District Court's ruling should not be disturbed.

a. There is no civil cause of action for a Fifth Amendment violation.

As the District Court acknowledged, a defendant's alleged violation of a plaintiff's rights under Miranda v. Arizona, 384 U.S. 436 (1966), does not give rise to a cause of action that may be pursued under 42 U.S.C. § 1983. Vega v. Tekoh, 597 U.S. 134 (2022) (6-3).

The Fifth Amendment to the United States Constitution provides that no one "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. But it has long been held that the "privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial* right of criminal defendants." United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (citation omitted) (emphasis added).

In Vega, the Supreme Court addressed "whether a plaintiff may sue a police officer under Rev. Stat. § 1979, 42 U.S.C. § 1983, based on the allegedly improper admission of an 'un-*Mirandized*' statement in a criminal prosecution." Vega, 597 U.S. at 138. The plaintiff in Vega was a nursing assistant, and a patient accused him of sexually assaulting her. Id. A sheriff's deputy questioned the plaintiff without giving a Miranda warning, and the plaintiff "eventually provided a written statement apologizing for inappropriately touching the patient's genitals." Id. at 139. The deputy allegedly used "coercive investigatory techniques to extract the statement . . . ." Id. The plaintiff was arrested and charged with unlawful sexual penetration, and the plaintiff's request to exclude his written confession from evidence was twice

denied. Id. The plaintiff's first criminal trial resulted in a mistrial, and the plaintiff was acquitted after a second trial. Id. The plaintiff then sued the investigating deputy and others, alleging the deputy violated the plaintiff's Fifth Amendment right against self-incrimination. Id.

The civil case proceeded to a jury trial, resulting in a defense verdict. On appeal, the United States Court of Appeals for the Ninth Circuit remanded the case for a new trial, finding that the plaintiff had established a violation of his Fifth Amendment right by showing that the deputy violated Miranda. Id. at 140.

The Supreme Court reversed the decision of the Ninth Circuit. Id. at 152. Ultimately, the Vega Court concluded that a violation of Miranda rules does not provide a basis for a claim under 42 U.S.C. § 1983. Id. at 150. Writing for the Vega Court majority, Justice Alito observed "[t]hat [the] prophylactic purpose [of Miranda] is served by the suppression *at trial* of statements obtained in violation of Miranda and by the application of that decision in other recognized contexts. Allowing a victim of a Miranda violation to sue a police officer for damages under § 1983 would have little additional deterrent value, and

permitting such claims would cause many problems." Id. at 151 (emphasis added).

Indeed, allowing such claims would "disserve judicial economy" and create potential conflicts in factual and legal findings between federal and state courts. Id. at 151–52 (internal quotations and citations omitted). Additionally, allowing such claims would raise "many procedural issues" regarding deference to a lower court's factual findings, the application of forfeiture and plain error rules, and whether "civil damages are available in instances where the unwarned statements had no impact on the outcome of the criminal case." Id. at 152. Accordingly, the Vega Court saw "no justification for expanding Miranda to confer a right to sue under § 1983 . . . ." Id.

In English v. Clarke, this Court further recognized the principle that the proper remedy for an alleged Fifth Amendment violation is suppression of the confession at the defendant's criminal trial. English v. Clarke, 90 F.4th 636, 648 (4th Cir. 2024). While the plaintiff in English couched his claim as a First Amendment claim, this Court was clear that the proper remedy for a coerced confession is suppression at trial. The English Court did not even acknowledge that such a claim

could potentially proceed as a Fifth Amendment claim in a separate civil action. Id.

Because the District Court was correct that Bermeo's Fifth Amendment claim was not cognizable in a civil cause of action, the dismissal of Count Three should be affirmed.

b. Even if Bermeo could pursue a Fifth Amendment claim, she still failed to state any such claim

The District Court noted in the alternative that it would dismiss the Fifth Amendment claim for the additional reason that Bermeo's confession was not coerced. JA136. Bermeo argues she adequately alleged a Fifth Amendment violation because she alleged that Adkins and Roop testified at Bermeo's criminal trials about Bermeo's confession. For the same reasons discussed above, Bermeo's confession was neither coerced nor involuntary. As a result, the Court should affirm the District Court's ruling that Bermeo failed to state a plausible claim for a violation of her Fifth Amendment rights.

VII. Because the Officers Published Only General, Publicly Available Information About Bermeo, Her Fourteenth Amendment Right to Privacy Claim Failed

Bermeo alleged that the WCSO press release violated her right to privacy. The District Court dismissed Bermeo's Fourteenth Amendment

claim because the information contained in the press release and Facebook post were not "personal matters" entitled to the constitutional right to privacy. JA136–137. Again, Bermeo's argument in her Opening Brief fails to address this aspect of the District Court's decision and constitutes waiver on appeal. Moreover, she argues, for the first time, that Adkins' and Roop's promise to maintain her confidentiality supported her Fourteenth Amendment claim. She neither alleged such a claim in her Complaint nor argued it below and should be precluded from asserting it for the first time in this Court.

Nevertheless, to the extent the Court reaches this issue, "[t]he constitutional right to privacy extends to the individual interest in avoiding disclosure of personal matters." Payne v. Taslimi, 998 F.3d 648, 655 (4th Cir. 2021). "But that right to privacy protect[s] only information with respect to which the individual has a reasonable expectation of privacy." Id. (internal quotations omitted). Information that is "freely available in public records" does not satisfy the first step of this Circuit's two-part inquiry for claims alleging violations of the constitutional right to privacy. Id. at 655–56.

As the District Court recognized, the Supreme Court of the United States has rejected the assertion that the publication of personal information about an arrestee runs afoul of the Constitution. Paul v. Davis, 424 U.S. 693, 711–12 (1976); see also Atwater v. City of Lago Vista, 532 U.S. 318, 355 (2001) (finding that plaintiff's "arrest and booking [which included a mug shot] were inconvenient and embarrassing to [plaintiff], but not so extraordinary as to violate the Fourth Amendment").

The information at issue here: the outcome of the investigation, Bermeo's arrest, her photograph, her hometown, her age, and her current college, do not give rise to a privacy claim under the Due Process Clause of the Fourteenth Amendment.

On brief, Bermeo makes two arguments. First, she contends that because she had a reasonable expectation of privacy that arose from the promise that her confession would remain confidential, she adequately states a Fourteenth Amendment claim regarding her right to privacy. Second, she claims that the Officers were prevented from publishing any information about her because she was a reported victim of a sexual assault. As to the latter, she had confessed to making up the story about

the assault, so she could not be the victim of a reported assault. As to the former, an individual's promise to maintain confidentiality, even if unfulfilled, does not implicate the constitutional right to privacy, and Bermeo cites no authority to the contrary.

Accordingly, the District Court's dismissal of the Fourteenth Amendment right to privacy claim should be affirmed.

VIII. Bermeo's Fourteenth Amendment Equal Protection Claim Failed because She Failed to Allege Selective Enforcement of the Law and Failed to Allege any Personal Animus on the Part of any of the Officers

Bermeo claimed that the Officers violated the Equal Protection Clause by publishing the press release and because she is Hispanic. The District Court dismissed Bermeo's Equal Protection claim because Bermeo did not show how the publication of the press release violated her constitutional rights and failed to show that the investigation violated her constitutional rights. JA138–139.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Thus, law enforcement officers may not selectively enforce laws based on race. Johnson v. Holmes, 782 F. App'x 276–77 (4th Cir. 2019) (citing

Whren v. United States, 517 U.S. 806, 813 (1996)). The guarantee is one of laws, not results. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

a. The Facebook post and press release cannot support an equal protection claim.

Bermeo based her equal protection claim under a "class of one" theory. To survive a motion to dismiss, an equal protection claim based on a class of one theory must allege facts showing government action that constitutes "irrational and wholly arbitrary discrimination of [an] individual." Kerr v. Marshall Univ. Bd. of Governors, 824 F.3d 62, 82 (4th Cir. 2016) (internal quotations omitted).

Bermeo's equal protection claim failed because it is not based on the Officers' enforcement of laws but rather their alleged decision not to issue a press release and Facebook post about another female, Jane Doe. An equal protection claim against law enforcement officers—even a class of one claim—must stem from an alleged selective enforcement of the *law* based on race. Johnson v. Holmes, 782 F. App'x 269, 276–77 (4th Cir. 2019). According to the Complaint, both Bermeo and Jane Doe were charged with the same offenses. The decision as to whether to issue a press release does not implicate the Equal Protection Clause in

this context because there was no selective enforcement of the *law*. Kelly v. Conner, 769 F. App'x 83, 89 (4th Cir. 2019) (citation omitted).

Thus, the District Court was correct that the press release did not violate Bermeo's constitutional rights.

b. Bermeo failed to allege facts sufficient to infer discriminatory animus.

The District Court did not address this argument below, but Bermeo's equal protection claim failed for another reason: she did not allege facts demonstrating any of the Officers harbored any discriminatory animus. An equal protection claim must be based on factual allegations supporting an inference "that the unequal treatment was the result of discriminatory animus." Sheppard v. Visitors of Va. State Univ., 993 F.3d 230, 238 (4th Cir. 2021); English, 90 F.4th at 649. The mere fact that Bermeo believes that race was the reason for the alleged discriminatory action, "absent more, does not suffice to render [her] claim plausible." Sheppard, 993 F.3d at 238.

Accordingly, the District Court's dismissal of Bermeo's equal protection claim should be affirmed.

IX. Because Bermeo's Other Constitutional Claims Required an Underlying Constitutional Violation, the District Court Correctly Dismissed Them

Consequently, because Bermeo's constitutional claims fail, the District Court correctly concluded that Bermeo's claims contingent on an underlying constitutional violation—failure to intervene, failure to supervise, failure to train, and conspiracy—also fail. JA139. Additional reasons existed for dismissing some or all of these claims as to the individual officers.

a. Failure to intervene

Also known as "bystander liability," a failure to intervene claim requires the plaintiff to establish that he suffered a sufficiently serious injury and that the defendant was deliberately indifferent. See Brown v. North Carolina Dep't of Corr., 612 F.3d 720, 723 (4th Cir. 2010). Thus, an officer may be liable if he "(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." Randall v. Prince George's Cnty., 302 F.3d 188, 204 (4th Cir. 2002).

In addition to there being no underlying constitutional violation, this claim failed as to defendants Andis and Blevins for the additional

reason that there were no facts alleged creating an inference as to how either individual knew of or was aware of any ongoing constitutional violations by the other defendants.

Thus, there were independent grounds for dismissing this claim as to Andis and Blevins.

b. Failure to supervise

"The doctrine of *respondeat superior* has no application under [42 U.S.C. § 1983.]" Wright v. Collins, 766 F.2d 841, 850 (4th Cir. 1985) (internal quotations omitted). Rather, the "plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

A supervisor may be held liable for the constitutional violations of his subordinates only when the following three elements are established: "(1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization

of the alleged offensive practices," and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994) (internal quotations and citations omitted).

Bermeo does not allege any facts regarding Andis other than that Adkins allegedly told Bermeo that Andis directed Adkins to charge Bermeo. There are no factual allegations to raise an inference that Andis was aware of any alleged risk of constitutional injury or that he had any awareness of the "alleged offensive practices" of which Bermeo complains. Accordingly, Bermeo failed to state a claim for failure to supervise.

c. Failure to train

Bermeo's failure to train claim also failed because she did not allege facts showing that the alleged constitutional violations were more likely the result of inadequate training as opposed to independent decisions by individual deputies. See Revene v. Charles Cnty. Comm'rs, 882 F.2d 870, 874–75 (4th Cir. 1989). Indeed, the Second Amended Complaint contained no allegations demonstrating that Andis was even

aware of the circumstances of the investigation as a whole or what led to Bermeo confessing to making a false report. Accordingly, that was an independent reason for the District Court to dismiss the failure to train claim against Andis.

d. Civil Rights Conspiracy

While the District Court dismissed this claim due to no underlying Constitutional violation, the District Court also observed that Bermeo failed to allege sufficient facts to show that the Officers conspired to violate her constitutional rights. JA139. Bermeo did not challenge that finding in her Opening Brief and, again, has waived review of it on appeal.

If the Court reaches this issue, however, it should affirm the dismissal of the conspiracy claim. Bermeo asserted her civil rights conspiracy claim pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1985. Given that Bermeo also submitted an equal protection claim based on race discrimination, the 42 U.S.C. § 1985 claim presumably fell under section (3) of that statute.

1. *Conspiracy to violate civil rights*

A civil conspiracy under 42 U.S.C. § 1983 is an independent source of liability. Hinkle v. City of Clarksburg, 81 F.3d 416, 421 (4th Cir. 1996). To establish conspiracy under 42 U.S.C. § 1983, the plaintiff must show that the defendants acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in . . . deprivation of a constitutional right." Id. Because a "meeting of the minds" represents a critical element of a conspiracy, there must be "facts from which a conspiratorial agreement can be inferred." Wiggins v. 11 Kew Garden Court, 497 F. App'x. 262, 264 (4th Cir. 2012) (citing Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 178 (3d Cir. 2010)).

First, as regards Blevins and Andis, there are zero factual allegations to support a "meeting of the minds" to violate Bermeo's rights. Second, as to Roop and Adkins, while there are allegations that Adkins and Roop agreed that Bermeo eventually became a "suspect of false reporting," there are no allegations that Adkins and Roop reached a meeting of the minds to intentionally violate Bermeo's civil rights by overbearing her will to achieve an involuntary confession.

Accordingly, the failure to allege facts supporting an underlying constitutional violation notwithstanding, Bermeo failed to allege a cognizable civil rights conspiracy claim.

2. *Conspiracy to violate civil rights based on race*

42 U.S.C. § 1985(3) provides a cause of action for conspiracy to deny equal protection of the laws. Simmons v. Poe, 47 F.3d 1370, 1376–77 (4th Cir. 1995). In order to state such a claim, a plaintiff must allege the following:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

A Soc'y Without a Name, for People Without a Home, Millennium Future-Present v. Virginia, 655 F.3d 342, 346 (4th Cir. 2011) (internal quotations omitted). There must be an "agreement or a meeting of the minds by the defendants to violate the plaintiff's constitutional rights." Id. (internal quotations omitted).

"Further, in order to state a § 1985 conspiracy claim, Plaintiff must [allege] that the co-conspirators were each motivated by a specific class-based, invidiously discriminatory animus." Id.

In addition to not alleging facts to support a meeting of the minds, Bermeo failed to allege any defendant harbored a "class-based, invidiously discriminatory animus" just as with her equal protection claim. See Sheppard, 993 F.3d at 238 (internal quotations omitted).

As such, Bermeo's 42 U.S.C. § 1985 conspiracy claim failed as a matter of law.

X. Bermeo's Federal Claims Also Fail because the Officers are Entitled to Qualified Immunity

While the District Court did not reach the Officers' qualified immunity argument, it too serves as additional grounds for dismissing all of Bermeo's federal claims.

Qualified immunity serves the dual purpose of holding "'public officials accountable when they exercise power irresponsibly and . . . shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably.'" Danser v. Stansberry, 772 F.3d 340, 345 (4th Cir. 2014) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)). The defense applies so long as the defendant's conduct does not

violate a clearly established right of which a reasonable person would have known. Id. (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The Court must determine "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." Williamson v. Stirling, 912 F.3d 154, 186 (4th Cir. 2018) (internal quotations omitted).

For purposes of qualified immunity, the Court must determine, without the benefit of hindsight, whether "the contours of the right . . . [were] sufficiently clear [such] that [a] reasonable official would understand that what he is doing violates that right." Brosseau v. Haugen, 543 U.S. 194, 198 (2004). Indeed, the question is not whether the official's actions were correct but, rather, whether those actions were reasonable under the circumstances. Id.

In the Fourth Circuit, whether a right is clearly established hinges on "'the decisions of the Supreme Court, [the Fourth Circuit Court of Appeals], and the highest court of the state in which the case arose.'" Owens v. Lott, 372 F.3d 267, 279–80 (4th Cir. 2004) (quoting Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999)). While not conclusive, "'[i]f a right is recognized in some other circuit, but not

in this one, an official will ordinarily retain the immunity defense.'" Edwards, 178 F.3d at 251 (quoting Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998) (en banc)).

It is a "longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)). Thus, before holding a government officer liable for breaching a clearly established right, the Court must "identify a case where an officer acting under similar circumstances . . . was held to have violated" the plaintiff's rights. Id.

There must be clearly established law that is "'particularized to the facts of the case' so as to avoid transforming qualified immunity into 'a rule of virtually unqualified liability.'" Safar v. Tingle, 859 F.3d 241, 246 (4th Cir. 2017) (quoting White, 137 S. Ct. at 552). In essence, qualified immunity exists so that officials are not liable for "'bad guesses in gray areas.'" Id. at 245 (quoting Braun v. Maynard, 652 F.3d 557, 560 (4th Cir. 2011)).

Here, it was not "clearly established" that (1) the circumstances surrounding Bermeo's confession would lead a reasonable officer to

believe that her confession was involuntary or coerced; (2) that there is no probable cause for an arrest and subsequent prosecution where a plaintiff was convicted in one court but acquitted on appeal; (3) a person's Fifth Amendment right against self-incrimination extends outside the context of criminal courtroom proceedings; (4) that an arrestee has a Constitutionally protected privacy right to information about their age, address, and college; and (5) that a press release can serve as "selective enforcement of law" for purposes of an Equal Protection claim. Therefore, Bermeo's claims are barred by the doctrine of qualified immunity.

XI. Bermeo Failed to Adequately Allege State Law Claims Against the Officers

Bermeo asserted a state law claim under Viginia law against all of the Officers for intentional infliction of emotional distress ("IIED") and asserted a common law fraud claim against Adkins and Roop. The District Court concluded the IIED claim failed because the allegations did not rise to the level of outrageous conduct to support such a claim under Virginia law. JA140. It dismissed the fraud claim because Bermeo could not claim a false representation was made to her when she had personal knowledge of the issue at hand and an unfulfilled

promise about a future event does not give rise to a fraud claim. JA141. Those decisions should not be overturned.

a. Bermeo failed to allege outrageous conduct by the Officers and failed to allege sufficient facts to show her emotional distress was severe.

Bermeo's claim of intentional infliction of emotional distress ("IIED") failed not only because she failed to adequately allege outrageous conduct by the Officers but also because she failed to allege she suffered the "severe" emotional distress necessary to support such a claim under Virginia law.

Under Virginia law, an IIED claim contains the following elements: "1) the wrongdoer's conduct was intentional or reckless; 2) the conduct was outrageous or intolerable; 3) there was a causal connection between the wrongdoer's conduct and the resulting emotional distress; and 4) the resulting emotional distress was severe. Supervalu, Inc. v. Johnson, 276 Va. 356, 370, 666 S.E.2d 335, 343 (2008).

The fourth element is particularly difficult to establish. See Harris v. Kreutzer, 271 Va. 188, 205, 624 S.E.2d 24, 34 (Va. 2006); Russo v. White, 241 Va. 23, 28, 400 S.E.2d 160, 163 (1991).

As set forth above, the Officers' conduct was not "outrageous or intolerable." Bermeo voluntarily confessed to making a false report.

Furthermore, Bermeo's IIED claim failed because the allegations did not rise to the level of severe emotional distress recognized by Virginia's Supreme Court.

Bermeo alleges that, as a result of the Officers' alleged misconduct, she has suffered "extreme depression and anxiety, feelings of worthlessness and hopelessness, and post-traumatic stress disorder," and was "required to seek professional counseling." JA55. She was also "unable" to drive, return to school, work, be home alone, or sleep. JA55.

Virginia law requires more for an IIED claim to survive. In Russo v. White, the Supreme Court of Virginia concluded that complaints of nervousness, sleep deprivation, stress and "its physical symptoms," withdrawal from activities, and the inability to concentrate at work were insufficient to state a claim. In Harris v. Kreutzer, the Supreme Court of Virginia again ruled that allegations of "nightmares, difficulty sleeping, extreme loss of self-esteem and depression" and subsequent counseling, mortification, humiliation, shame, disgrace, and injury to reputation did not state an IIED claim.

In light of the Supreme Court of Virginia's rulings in Russo and Harris, Bermeo's allegations are simply insufficient to state an IIED claim because she does not allege the "severe" emotional distress recognized by the Supreme Court of Virginia to support such a claim.

Accordingly, the District Court's dismissal of Bermeo's IIED claims should be affirmed.

b. Bermeo failed to allege common law fraud

The elements of a cause of action for actual fraud under Virginia law are: (1) a false representation, (2) of material fact, (3) made intentionally or knowingly, (4) with the intent to mislead, (5) reliance by the misled party, and (6) injury resulting from the reliance. Beck v. Smith, 260 Va. 452, 457 (2000); see also Sales v. Kecoughtan Hous. Co., 279 Va. 475, 481 (2010). A claim of fraud must be plead specifically and distinctly. Fed. R. Civ. P. 9(b); Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 295 (1996).

As discussed above, Bermeo voluntarily admitted that she fabricated her traffic stop report, and so she knew that the surveillance video would not reveal another vehicle behind her own. See Beck v. Smith, 260 Va. 452, 457 (Va. 2000) (explaining that a plaintiff cannot

rely on a false representation where she already has personal knowledge of the issue at hand).

Furthermore, Bermeo's allegation that she relied on Detectives Adkins and Roop's statement that they would maintain her privacy is insufficient for a claim of fraud, because an unfulfilled promise about future events cannot give rise to a fraud claim. See Lissmann v. Hartford Fire Ins. Co., 848 F.2d 50, 53 (4th Cir. 1988) ("a promise to perform an act in the future is not, in a legal sense, a representation as that term is used in the fraud context.").

Bermeo contends that neither Adkins nor Roop intended to keep their promise to maintain her privacy, but her allegations in the Complaint do not support that contention. In fact, Bermeo alleged that the decisions to arrest and distribute a press release were the decision of Sheriff Andis, not Adkins or Roop. JA27–28, ¶¶ 81, 91, 95.

As a result, Bermeo failed to adequately state a cause of action under Virginia law, and the District Court's dismissal of that claim should not be disturbed.

CONCLUSION

For the foregoing reasons, Appellees' respectfully request that the Court affirm the trial court's Final Order dismissing this case with prejudice.

Respectfully Submitted,

BLAKE ANDIS
JAMIE BLEVINS
SCOTT ADKINS
BRAD ROOP

/s/ Nathan H. Schnetzler
Nathan H. Schnetzler (VSB #: 86437)
Austin L. Obenshain (VSB #: 99494)
FRITH ANDERSON & PEAKE, PC
29 Franklin Road, S.W.
Post Office Box 1240
Roanoke, Virginia 24006-1240
(540) 772-4600 – Telephone
(540) 772-9167 – Facsimile
Email: nschnetzler@faplawfirm.com
aobenshain@faplawfirm.com

Counsel for Appellees
Blake Andis, Jamie Blevins,
Scott Adkins, and Brad Roop

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Nathan H. Schnetzler

Counsel for Appellees