CASE NO. 22-11421-J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES ERIC McDONOUGH

Plaintiff-Appellant

v.

CITY OF HOMESTEAD, FLORIDA
GARLAND WRIGHT
CARLOS GARCIA

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Florida

District Court Case Number 19-cv-21986- FAM

APPELLANT'S INITIAL BRIEF

Alan Greenstein
8121 S.W. 138th St.
Palmetto Bay, Fl. 33158
305-772-7083

Attorney for Appellant
James Eric McDonough

James McDonough v. Carlos Garcia, et al., Case No. 22-11421-J

STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant does not have a parent corporation and is not a publicly held corporation.

Interested parties are as follows:

City of Homestead, Florida; Defendant-Appellee

Flanagan, Anne; Weiss, Serota, Helfman, Cole & Bierman, P.L., Attorney for the Defendants-Appellees

Garcia, Carlos; Defendant-Appellee

Greenstein, Alan; Attorney for the Plaintiff-Appellant

Guedes, Edward G.; Weiss, Serota, Helfman, Cole & Bierman, P.L., Attorney for the Defendants-Appellees

Mandel, Matthew; Weiss, Serota, Helfman, Cole & Bierman, P.L., Attorney for the Defendants-Appellees

McDonough, James Eric; Plaintiff-Appellant

Moreno, Hon. Frederico A.; U.S. District Court Judge

Wright, Garland; Defendant-Appellee

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument in this appeal from the granting of Appellee's Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment. The appeal raises a number of issues concerning qualified immunity and municipal liability involving the First and Fourth Amendments to the United States Constitution. Oral argument will enable the parties to address these issues adequately and respond to the Court's questions and concerns.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Constitution

Federal Statutes

State Statutes

Rules of Court

JURISDICTIONAL STATEMENT

Jurisdiction is proper in this case as it involves claims arising under the U.S. Constitution and 42 U.S.C. § 1983 and pursuant to 28 U.S.C. §1637(a), supplemental jurisdiction, to adjudicate the Appellant's state law claims, which are related to and form part of the same controversy.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 (review of final decision dismissing Complaint). The District Court filed an order on March 31, 2022 dismissing Plaintiff-Appellant's Second Amended Complaint after granting the Defendants-Appellees' Motion for Summary Judgment and denying the Plaintiff-Appellant's Motion for Summary Judgment. Plaintiff-Appellant filed a timely notice of appeal on April 28, 2022.

STATEMENT OF ISSUES ON APPEAL

1. Whether Sergeants Garland Wright and Carlos Garcia of the Homestead Police Department are entitled to qualified immunity for the arrest of the Appellant for disorderly conduct.

2. Whether the Homestead police had probable cause to arrest the Appellant for disorderly conduct and cyberstalking.

3. Whether the City of Homestead is liable under *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978) for its policy maker directing that an indefinite trespass order be issued prohibiting the Appellant from speaking at future City Council meetings.

5. Whether Homestead Police Sergeant Wright is entitled to qualified immunity for ordering the Appellant be trespassed from Homestead City Hall and indefinitely prevented from speaking at future City Council meetings.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Dr. James Eric McDonough was arrested for disorderly conduct on August 24, 2016 and cyberstalking on September 1, 2016 by officers of the City of Homestead, Florida. Additionally, he was trespassed from the premises of the City Hall and prevented from speaking to the City Council. A complaint was filed in Miami-Dade Circuit Court on March 22, 2019 and removed to the United States District Court for the Southern District of Florida by the Appellees on May 15, 2019.

After motions to dismiss were filed and ruled upon, the Appellant filed a seven count Second Amended Complaint. On March 31, 2022, the District Court granted the Appellees' Motion for Summary Judgment and denied the Appellant's Motion for Summary Judgment. On April 28, 2022, the instant appeal was filed.

II. FACTS

The Homestead City Council ("the Council") holds council meetings once a month in City Hall. The City Council prepares an agenda of topics for discussion at the meeting. The agenda includes a public comment section. Members of the public are permitted at this point to speak for three minutes on any topic even if unrelated to the council meeting's agenda. Appendix ("Appx"), Document ("Doc") 56-8, pp 10-11; Doc. 56-1. Pg. 1.

On July 27, 2016, the Appellant attended the council meeting to speak before the Council. At the appointed time, the Appellant came forward to the podium to address the Council. Appx, Doc. 56-1. Pg. 1. He spoke of the accountability of the Homestead Police Department ("HPD"); complained that HPD Officer Alejandro Murguido had falsified a police report concerning an individual named Rosemary Brackett; spoke in favor of HPD officers obtaining body worn cameras; complained that the HPD Chief of Police Alexander Rolle, had falsified a destruction log and that the HPD Chief had retaliated against a citizen for saying that the Chief had committed misconduct in office; complained of rampant nepotism within HPD; and

addressed Councilman Elvis Maldonado to say that if he had something to say to him (the Appellant) that he should say it in public and not behind his back. Appx., Doc. 56-1, pp 1-2; Doc. 58-1, Exhibit P.[1] The Appellant never raised his voice nor threatened any member of the Council, verbally or physically. Appx., Doc. 56-1, pg. 2; Doc. 58-1, Exhibit P. At that point, although only approximately two and a half minutes had elapsed, HPD Sergeant Garland Wright approached the Plaintiff, prevented him speaking further at the podium and removed him from the Council chambers. Appx., Doc. 56-1, pg. 2; Doc. 58-1, Exhibit P. Sergeant Wright stopped the Plaintiff's speech to the Council because he thought the comments about Councilman Maldonado were threatening and impeding the meeting. Appx., Doc. 56-12, pp 19-20. The Appellant was not trespassed nor was he told he could return to City Hall that day. Appx., Doc. 56-1, pg. 2; Doc. 56-8, pg. 19. In addition, he was not told that he was barred from speaking at the next Council Meeting. Appx. Doc. 56-1, pg. 2; Doc. 56-8, pg. 19.

The Council meeting rules of decorum in effect were amended in April of 2016. Appx. Doc. 56-6, pp. 1,14. The policy stated that: "No individual shall make slanderous or unduly repetitive remarks or engage in any other form of behavior that

[1] The exhibits that are part of Doc. 58-1 are videos that were conventionally filed in the lower court on a thumb drive. The Clerk of the District has supplied the thumb drive as part of the record in the case.

disrupts or impedes the orderly conduct of the meeting as determined by the Mayor and or Sergeant at Arms." Appx. Doc. 56-6, pp. 4-5. That amended policy had deleted a provision that allowed the Mayor to bar an individual from speaking at future meetings unless the Council grants permission. Appx. Doc. 56-6, pp. 6-7. The Plaintiff did not make any slanderous or unduly repetitive remarks nor engage in any other form of behavior that disrupted or impeded the Council meeting. In fact the meeting was never disrupted, nor were the Appellant's comments threatening to Councilman Maldonado. Appx. Doc. 56-1, pg. 2; Doc. 58-1, Exhibit P.

While being escorted out of the council chambers, the Appellant asked for Sergeant Wright's name and after being told said, "Sergeant Wright! Ok." Then in response to Sergeant Wright stating, "have a good one," the Appellant walked out of chambers and responded saying "you have a good one too, I'll be suing the shit out of you dumb ass." The Plaintiff then walked into the lobby area and stated, "Well now we have Homestead Police officers again violating my First Amendment rights, because they are fucking idiots and they don't know shit." He then left City Hall. Appx. Doc. 56-9, pg. 1.

In response to the Plaintiff's removal from the Council meeting on July 27th, a number of City officials met before the next Council meeting on August 24, 2016. Appx. Doc. 56-8, pp. 19-24; Doc. 56-12, pg. 29. The meeting included the Mayor, the City Manager, Chief of Police Rolle, Sergeant Wright and other City and police

officials. Appx. Doc. 56-8, pp. 19-24; Doc. 56-12, pg. 29. Captain Raymond DeJohn, as part of the group, initially sought advice from the Miami-Dade State Attorney's office as whether the City could trespass the Appellant. He spoke to an unknown individual who advised that a trespass would be permissible as long as the police felt justified. Appx. Doc 69-1, pp. 11-14. There was no discussion of the implications of the First Amendment.

Chief of Police Rolle, who is in charge of the police department and the policy maker for the City of Homestead, determined that the Appellant be issued a trespass warning, refused entry into City Hall and barred from speaking at future Council meetings. Appx. Doc. 56-11, pp. 35-36; Doc. 56-12, pp. 31-32. The decision was made by the Chief of Police in consultation with members of the City and police administration. Appx. Doc. 56-8, pg. 24; Doc. 56-12, pp. 28-29, 31-32. The City, through the City Manager, left matters such as issuing trespass orders to the HPD. Appx. Doc. 56-4, pp. 53-54. The Chief of Police and his staff were the agency that had the authority to issue a trespass order. Appx. Doc. 56-2, pg. 30.

On August 24th when the Appellant returned to speak at the Council meeting, Sergeant Wright met the Appellant in the lobby. He escorted the Appellant out of the City Hall lobby without incident. Appx. Doc 56-1, pg. 2; Doc 56-12, pp. 36-37; Doc. 58-1, Exhibit M. Sergeant Wright advised the Appellant that he was being trespassed from City Hall, as well as the parking lot, and was required to vacate the

premises. Appx. Doc 56-1, pg. 2; Doc. 58-1, Exhibit Q. When the Appellant inquired when he would be allowed to return, Sergeant Wright told him that he could write a letter. Appx. Doc 56-1, pg. 2; Doc. 58-1, Exhibit Q. Based on the order by Sergeant Wright, the Appellant did not return to speak at a Council meeting until December of 2016 for fear of being arrested. Appx. Doc 56-1, pg. 3.

After being ordered by Sergeant Wright to leave the City Hall premises, the Appellant began to walk away to go home. Appx. Doc 56-1, pg. 2; Doc. 58-1, Exhibits Q,N. While walking away he showed his middle finger to Sergeant Wright stating, "[c]an't wait to see you at the deposition" and "[i]'m leaving buddy bye-bye." Appx. Doc 56-1, pg. 2; Doc. 58-1, Exhibit Q. The Appellant never cursed, nor did he grab his genitals as Sergeant Wright said in his deposition. Appx. Doc 56-1, pg. 2; Doc. 56-12, pg. 50. Doc. 58-1, Exhibit Q. There were no citizens watching this encounter nor did the Appellant urge anyone to do anything in response to the police directive. Appx. Doc. 56-12, pg. 63. Doc. 58-1, Exhibits Q,M,N,O. The Appellant kept walking until Sergeant Wright ordered him to stop and put his hands behind his back. Appx. Doc. 56-1, pg. 2; Doc. 58-1, Exhibits Q,N. He was handcuffed by HPD Officer John Monaco and told he was under arrest. Appx. Doc. 56-1, pg. 2. Sergeant Wright, in addition, placed the Appellant under arrest for disorderly conduct. Appx. Doc. 56-12, pg. 56. The only reason the Appellant did

not leave City Hall premises was because he was ordered to stop and placed under arrest. Appx. Doc. 56-1, pg. 3.

Sergeant Carlos Garcia came on the scene shortly thereafter and told the Appellant that he was under arrest for trespassing. Appx. Doc. 56-1, pg. 3. Garcia spoke to the officers involved and reviewed the video of the incident provided by the City of Homestead. Appx. Doc. 56-7, pp. 15, 28. He then, under oath, prepared the arrest affidavit charging the Appellant with disorderly conduct and trespassing. Appx. Doc. 56-7, pp. 15; Appx. Doc. 56-10, pp. 1-2. The arrest form indicated there were four female pedestrians in the parking lot and several other people who entered the building to attend the City Council meeting. Appx. Doc. 56-10, pp. 1-2. The arrest form further stated that the females stopped to observe the Plaintiff's breach of the peace. Appx. Doc. 56-10, pp. 1-2. Sergeant Wright in his supplemental report also wrote that the Appellant said "Fuck you" to him and that several citizens were walking to the building and others were in the parking lot. Appx. Doc. 56-9. According to his report all of them stopped to witness the Plaintiff's actions. Appx. Doc. 56-9.

The videos recorded what occurred that evening. They indisputably show that there were only two females leaving the building, neither of whom paid attention to the Appellant's actions. Appx. Doc. 58-1, Exhibits M,N,O. Additionally, the videos show only one person entering the building at that time, a councilman, who was not

paying attention to the confrontation between the police and the Appellant. Appx. Doc. 58-1, Exhibit M.

While awaiting trial on the above charges, the Appellant posted comments on a website entitled “LEO Affairs” concerning Officer Monaco a witness to the arrest of the Appellant on August 24th. Appx. Doc. 56-1, pg. 3. All of these posts were made within a fifteen-minute time period. Appx. Doc. 56-1, pg. 3; Doc. 56-5.

The Appellant began his post by asking "When did John Monaco become the P.I.O.?"[2] The post included a link to a Youtube video showed Officer Monaco speaking at a Council meeting, where among other things, Officer Monaco told the audience his home address, while arguing against bodycams. Appx. 56-1, pg. 3; Doc. 56-5. The other posts were as follows:

> "Challenge for the coward. Officer Monaco you stated if the citizens want you to wear a bodycam you will. As 90% of citizens want officers wearing bodycams, I am giving you an opportunity to show you don’t lie everytime you open you [sic] mouth.”
>
> “I will buy you a cam and pay for the storage, if you will agree to wear it. You can be the beta tester. You can contact me at 571-245-5410 or phd2b05@gmail.com. That is if you are not the giant twat we all think you are.”

[2] P.I.O. stands for public information officer.

"Comeone [sic] show you have an infitesimal [sic] sliver of integrity. A man who is not good for his word, is good for nothing. Step up to the plate big boy. Cower down and run like the slipttail [sic]we are expecting you to be."

"Also be warned I have recording devices on me at all time, and any further retaliation will be dearth [sic] with swiftly, harsly [sic], and lawfully."

"Vail [sic] is in your court, so whatbare [sic] youngoing [sic] tondo [sic] you frigging coward?"

"Also I be be [sic] blasting your address so thanks for providing that". Appx. 56-1, pp. 3-4; Doc. 56-5.

Based upon these posts, HPD Detective David Mata after allegedly consulting with the Miami-Dade State Attorney's Office, determined there was probable cause to arrest the Appellant. Appx. Doc. 64-8. On September 1, 2016 the Appellant was arrested for cyberstalking and tampering with a witness. Appx. Doc. 56-1. pg. 4; Doc 56-3, pp. 1-4. At the first appearance hearing the next day, Judge Mindy Glazer found there was probable cause for the cyberstalking arrest. Appx. Doc. 64-10, pp. 1-16. The State Attorney eventually chose not to go forward with the prosecution. The Assistant State Attorneys reasoned in the case closeout memo that "[t]he defendant voiced his dissatisfaction with Officer Monaco on a public forum and never made any threat to the officers." Appx. Doc. 69-2, pp. 1-2.

The Appellant filed his Second Amended complaint alleging seven counts of Constitutional and Florida Law violations. Count I alleged a First Amendment violation by Sergeant Wright on July 27, 2016.[3] Counts V and VI allege Fourth Amendment violations by Sergeants Wright and Garcia on August 24, 2016. Counts IV and VII allege State law violations by the HPD on August 24th and September 1st. Finally, Counts II and III allege First Amendment violations by the City of Homestead and Sergeant Wright on August 24th. Appx. Doc. 38, pp.1-38.

III. STANDARD OF REVIEW

A District Court's granting of summary judgment based on the defense of qualified immunity is reviewed de novo. *See Holmes v. Kucynda*, 321 F.3d 1069 (11th Cir. 2003). "Summary judgment is appropriate only when the evidence before the court demonstrates that 'there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.' *Holmes* at 1077 (quoting Fed. R. Civ. P. 56(c))." *May v. City of Nahunta, Georgia*, 846 F.3d 1320, 1327 (11th Cir. 2017). "The Court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co*. 398 U. S. 144, 157 (1970). Summary judgment can be entered on a claim or defense only if it is shown "that there is no genuine dispute as to any material fact

[3] The Appellant is not alleging error in the District Court's ruling on Count I and will not be arguing it in this appeal.

and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *Darby v. Carnival Corp.*, 2021 WL 6424601, at *1 (S.D. Fla. Nov. 19, 2021), *report and recommendation adopted*, 2022 WL 105216 (S.D. Fla. Jan. 11, 2022)

SUMMARY OF ARGUMENT

Both parties in the District Court filed motions for summary judgment. The court, in determining whether to grant either motion was required to view the undisputed evidence in the light most favorable to the opposing party. In granting the Appellees' motion the lower court did not consider the evidence in the light most favorable to the Appellant. The court also erred in not granting the Appellant's motion for summary judgment.

The facts show that HPD Chief of Police Rolle, in response to the Appellant allegedly causing a disturbance at the prior City Council meeting, determined that the Appellant should be barred from speaking at the next and future City Council meetings. As the final policy maker, Chief Rolle had the authority to issue such a trespass order. When the Appellant returned on August 24, 2016, Sergeant Wright met him the lobby of City Hall. He advised the Appellant that he was being trespassed from City Hall, would have to leave the premises, and could only gain readmission to address the Council if he wrote a letter.

Under *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978), the City of Homestead is liable for Chief of Police Rolle's decision to violate the

Appellant's First Amendment rights. Chief Rolle's prospective restriction was not narrowly tailored to avoid any further disruptions, nor did it allow for an ample avenue of communication for the Appellant to address the City Council.

Similarly, Sergeant Wright is not entitled to qualified immunity as the case law was clearly established that this prospective restriction would be in violation of the Appellant's constitutional rights. The District Court erred in finding the restriction was narrowly tailored because Sergeant Wright provided a procedure that would enable the Appellant to return to council meetings. That procedure was created by Sergeant Wright as the Council had deleted a similar procedure from their decorum policy earlier that year. The prospective ban prohibiting the Appellant from speaking at subsequent City Council meetings was a prior restraint and violated his First Amendment rights.

Officers of a municipality are not entitled to qualified immunity if they violate a citizen's constitutional rights and there was clearly established law prohibiting the behavior of those officers. The arrest of the Appellant by Sergeants Wright and Garcia for disorderly conduct violated that clearly established law. Simply giving the "finger" to Sergeant Wright while walking away and saying "[c]an't wait to see you at the deposition" and "[i]'m leaving buddy bye-bye" is not sufficient under Florida and Eleventh Circuit case law for even arguable probable cause to conduct a lawful arrest. Sergeant Wright, by placing the Appellant under arrest and Sergeant

Garcia, by interviewing witnesses, viewing the video of the incident and then writing the arrest affidavit, were both active participants in the unlawful arrest. Neither Sergeant is entitled to qualified immunity. The City is likewise liable under Florida State tort law for the illegal arrest by its officers of the Appellant.

The Appellant's arrest for cyberstalking while out on bond on the disorderly conduct arrest was unlawful for lack of probable cause. He posted comments about one of the officers involved in his arrest on a website called LEOAffairs. The comments were lawful under Florida law as it was posted for a legitimate purpose, was protected speech under the Constitution and constituted a single act of communication, not repeated as required by the Statute. The City of Homestead is liable for the actions of its officers under Florida law for the unlawful arrest.

The Appellee's motion should have been denied and the Appellant's motion granted, even when looking at the evidence in the light most favorable to the Appellees. At a minimum, this Court should reverse and remand for trial on all of the issues this Court finds that are disputed.

ARGUMENT

I. Sergeant Garland Wright violated clearly established law and is not entitled to qualified immunity when he unlawfully arrested the Appellant for disorderly conduct on August 24, 2016.

By granting Sergeant Wright qualified immunity in Count V, the disorderly conduct arrest, the lower court not only misapplied the law to the undisputed facts,

but created an element (fear of future escalation) of the Appellant's alleged offense that is not in the relevant statute nor any case law.

Qualified immunity is a court created doctrine that protects government officials from liability for civil damages. Once it is determined that the officials were operating within the scope of their discretionary duties, as the officers were in this case, the plaintiff must show that the official's actions violated one or more constitutional rights and those rights were clearly established at the time that the official's actions occurred. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). There are three ways that a plaintiff can meet the clearly established requirement.

> *First*, the plaintiffs may show that a materially similar case has already been decided. *Second*, the plaintiffs can point to a broader, clearly established principle that should control the novel facts of the situation. *Finally*, the conduct involved in the case may so obviously violate the constitution that prior case law is unnecessary. (internal citations omitted),

Gaines v. Wardynski, 871 F.3d 1203, 1208 (11th Cir. 2017)

In the Fourth Amendment context, even an arrest without probable cause will not deprive the officials of qualified immunity as long as they had "arguable probable cause" for the arrest. "Arguable probable cause exists if "reasonable officers in the same circumstances and possessing the same knowledge as the [d]efendants could have believed that probable cause existed to arrest the plaintiff." *Alston v. Swarbrick*, 954 F.3d 1312, 1318 (11th Cir. 2020).

Disorderly conduct in Florida is governed by Florida Statute §877.03. It reads:

> Breach of the peace; disorderly conduct.—Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree…

The Florida Supreme Court in *State v. Saunders*, 339 So. 2d 641 (Fla. 1976), determined that the statute was constitutional, but only after limiting the application to "fighting words."

> …[W]e now limit the application of Section 877.03 so that it shall hereafter only apply either to words which "by their very utterance . . . inflict injury or tend to incite an immediate breach of the peace," (internal citations omitted)... We construe the statute so that no words except "fighting words" or words like shouts of "fire" in a crowded theatre fall within its proscription, in order to avoid the constitutional problem of overbreadth, and the danger that a citizen will be punished as a criminal for exercising his right of free speech…

Id. at 644.

Based on the Florida Supreme Court's holding and case law from this Court, as well as the United States Supreme Court, Sergeant Wright was on notice that the Appellant's actions and words were not violative of the disorderly conduct statute. They were not fighting words that tend to incite an immediate breach of the peace.

The United States Supreme Court in *Lewis v. City of New Orleans,* 415 U.S. 130 (1974) reversed the conviction of the defendant and invalidated an ordinance

that made it unlawful to curse at a member of the city police force. The court made it clear that the Government can only punish words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id*. at 133. The Court later found in *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987) that, "[s]peech is often provocative and challenging.... [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest". (Internal citation omitted).

This Court in *Petithomme v. Cty. of Miami-Dade*, 511 F. App'x 966 (11th Cir. 2013), held that asking a number of benign questions to the police officers on the scene could not be disorderly conduct under Florida law. Although the facts in this case are slightly different, this Court went to say that "[u]nder Florida law, screaming obscenities at an officer is not sufficient to violate the statute…" *Id* at 972. The opinion cited to *Barry v. State,* 934 So.2d 656, 658 (Fla. 2nd DCA.2006), that reversed a conviction for disorderly conduct when the defendant cursed and screamed obscenities at an officer and to *Miller v. State,* 667 So.2d 325, 328 (Fla. 1st DCA 1995) which held that "there must be evidence of something more than loud or profane language or a belligerent attitude" to support a disorderly conduct charge. *Pettihomme* at 972.

Additionally, although no citizens in this case stopped to observe the Appellant's actions, even if people were on the scene and saw the Appellant show Sergeant Wright his middle finger, it would still not be enough for arguable probable cause.

> Furthermore, the mere fact that neighbors exited their home and observed the scene is not, of itself, sufficient to give rise to arguable probable cause for disorderly conduct unless there is "some evidence that the crowd is actually responding to the defendant's words in some way that threatens to breach the peace" *citing Barry*, 934 So. 2d at 659.

Petithomme at 972

The videos show that the women in the parking lot only turned to pay attention after Wright had begun chasing down the Appellant. Appx. Doc. 58-1, Exhibits M,N,O. There is no evidence that anyone responded to the Appellant's actions in a way that would threaten to breach the peace.

Finally, in *Merenda v. Tabor*, 506 F. App'x 862, 866 (11th Cir. 2013) this Court reversed a Georgia disorderly conduct conviction where the defendant called a police officer a "fucking asshole" where it appeared that no one else could hear the words.

As these cases demonstrate the Appellant's actions, showing Sergeant Wright his middle finger, were perfectly legal, and Sergeant Wright did not have arguable probable cause to make the arrest.

The only case the District Court cited to support its position in its grant of qualified immunity to Sergeant Wright is *Gold v. City of Miami* 121 F.3d 1442 (11th Cir. 1997). In doing so, the court misinterpreted the meaning of *Gold* for its use as precedent this case. In *Gold,* this Court found that the officers had arguable probable cause to arrest a citizen when that citizen used profanity loudly in the presence of others and therefore were entitled to qualified immunity. Importantly, this Court also ruled that the officers did not have *actual* probable cause to make the arrest.

> The evidence, viewed in the light most favorable to Gold, reflects that Gold twice used profanities in a loud voice, in a public place, and in the presence of others…We pause at this point to reemphasize that the arguable probable cause inquiry is distinct from the actual probable cause inquiry. It is clear from the facts viewed in the light most favorable to Gold that the officers *did not have actual probable cause* to arrest Gold for disorderly conduct. (emphasis added)

Id. at 1446

At the time of the *Gold* decision in 1997, this Court held that there were no cases that would put the officers on notice that the words and actions of Gold were not against the law. However, this Court's holding of no *actual* probable cause in *Gold* is now precedent that put Sergeant Wright on notice that cursing at police officers, or simply giving them the finger, cannot justify an arrest for disorderly conduct.[4] The finding in *Gold* from 1997 had been established law for nineteen

[4] Law becomes clearly established when decisions are rendered that precede the actions taken by the officers in question. So what may be arguable probable cause in 1997 to justify the granting of qualified immunity, is no longer "arguable" in 2016

years in 2016.[5] Wright cannot argue that he was not on notice that the actions of the Appellant did not violate clearly established law.

In addition to the undisputed facts discussed above, it is apparent that Sergeant Wright himself believed his actions were unlawful. On August 25, 2016, the day after the arrest, Wright authored a case supplement report. In an attempt to justify the arrest and make it seem as if the Appellant was disturbing the peace he wrote, "[m]r. McDonough then raised his right hand and stuck his middle finger toward myself and Ofc. Monaco, and said 'Fuck you.' While conducting these actions there were several citizens walking into the building to attend the city council meeting that stopped to observe him. There were also several citizens in the parking lot area, who also stopped and witnessed his actions." Appx. Doc. 56-9. He also testified in his deposition that the Appellant appeared to grab his genitals.[6] Appx. Doc. 56-12, pg. 50.

Based on the videos filed with the District Court, these are not accurate recitation of the facts. From the recordings it is obvious that the Appellant never cursed at Sergeant Wright nor grabbed his genitals. Appx. Doc. 58-1, Exhibits

---

because the officers are on notice as to what is required for a probable cause arrest under a similar factual situation. Such is the case with the *Gold* decision.

[5] Additionally, *Petithomme v. Cty. of Miami-Dade*, cited above, was decided after the *Gold* decision.

[6] Again, even if he had grabbed his genitals, no one observed this action and otherwise it was not against the law.

M,N,O. Additionally, only one individual was entering the building and two women exiting the building, none of whom stopped to observe the Appellant's actions. Appx. Doc. 58-1, Exhibits M,N,O. There was no breach of the peace by the Appellant despite the attempt by Sergeant Wright to create facts that he thought would have implicated such a breach. Despite what Wright thought, even if what was written in the report were true, that would still not be disturbing the peace and Wright would not have had arguable probable cause to effect the arrest. There has to be some action on the part of the arrestee to incite a crowd to cause a disturbance. That did not occur in this case.

The District Court based its ruling in part that the Appellant's behavior the month before would allow a reasonably prudent officer to believe that the Appellant would further escalate the situation. The court stated on page 21 of its order:

> Here, Sergeant Wright witnessed Plaintiff's belligerent behavior firsthand weeks earlier. Plaintiff undisputedly used profanity and threatened to escalate the interaction with Sergeant Wright and the police on August 24, 2022 (sic). In this context the Court will not say that Sergeant Wright and Sergeant Garcia violated clearly established law when arresting Plaintiff for disorderly conduct.
> Appx. Doc. 95, pg. 21

This statement by the court is both factually and legally inaccurate. The undisputed facts show that rather than escalate the situation, the Appellant obeyed Wright's directive and was leaving the premises. Saying "I look forward to seeing you at the deposition" is perfectly lawful and not a threat of any type. The Appellant never

raised his voice and kept walking away until Sergeant Wright stopped him and placed him under arrest. Appx. Doc. 58-1, Exhibits M,N,O. There is no record evidence that Sergeant Wright, or any police officer, was concerned about any escalation of the interaction with the Appellant. It is merely speculation by the District Court. As such, the court in granting Sergeant Wright's portion of the summary judgment, did not make all reasonable inferences in favor of the Appellant as required by law.

The District Court Judge did not cite any case law, nor could counsel find any, that would support an arrest for disorderly conduct based in part on what an individual *might* do. There is nothing in the clear wording of the disorderly conduct statute that would permit the Judge to make such a finding. Moreover, a citizen cannot be arrested for future actions an officer believes he/she might take, only for the acts which that individual has in fact committed. Fear of future escalation or past belligerent behavior are not elements of the crime and cannot be used by the lower court to justify its ruling. This Court should not uphold Sergeant Wright's qualified immunity for this arrest because of an incident with the Appellant a month before, when no violation of law occurred on the date in question.

"Obviously, probable cause and arguable probable cause may differ, but it is tautological that a constitutional arrest must be based on a reasonable belief that a crime has occurred, rather than simply unwanted conduct." *Wilkerson v. Seymour*,

736 F.3d 974, 978 (11th Cir. 2013). The facts and the law make it abundantly clear that Sergeant Wright did not have a reasonable belief that a crime had occurred. The Appellant was entitled to have his Motion for Summary Judgment granted and the Appellee's denied on this issue and the District Court erred in not ruling as such.

II. Sergeant Carlos Garcia violated clearly established law and is not entitled to qualified immunity when he participated in the unlawful arrest of the Appellant for disorderly conduct on August 24, 2016.

Sergeant Garcia should have been denied qualified immunity in Count VI, the disorderly conduct arrest, for the same reasons as argued above in relation to Sergeant Wright. The record evidence shows that Sergeant Garcia was an active participant in the arrest of the Appellant, contrary to what the District Court found in its order. Sergeant Garcia did more than just rely on information from the other officers to write the arrest affidavit, he actually viewed the videos that showed the Appellant's actions immediately before his detention. Appx. Doc. 56-7, pp. 15, 28. Additionally, it was Sergeant Garcia that came up to the Appellant, after being detained by Sergeant Wright, and advised him he was under arrest for trespass.[7] Appx. Doc. 56-1, pg. 3.

Sergeant Garcia, by writing the arrest form, swore under oath that there was probable cause to arrest the Plaintiff for disorderly conduct. The arrest form is the

[7] Whether the officers had qualified immunity for the trespass arrest was never argued by the Appellees. The lower court never discussed it in its opinion, so that issue is presumed to be dropped by the Appellees and not argued in this appeal.

formal document that charges an individual with a crime. It is also one of the sworn documents that allows a judge to detain an individual under Rule 3.133(a)(3) Florida Rules of Criminal Procedure. The rule states in its pertinent part:

> In determining probable cause to detain the defendant, the judge shall apply the standard for issuance of an arrest warrant, and the finding may be based on sworn complaint, affidavit, deposition under oath, or, if necessary, on testimony under oath properly recorded.

In this Circuit, all officers who participate in an unlawful arrest may be held liable for the violation, even if they may have not physically detained the individual. *See Jordan v. Mosley*, 487 F.3d 1350, 1354 (11th Cir. 2007) ("We first note the obvious fact that Deputy Mosley neither arrested Plaintiff nor obtained the pertinent arrest warrant. In this Circuit, a non-arresting officer who instigates or causes an unlawful arrest can still be liable under the Fourth Amendment."); *Carter v. Butts Cty., Ga.,* 821 F.3d 1310, 1319 (11th Cir. 2016) ("Where an officer orders the arrest of an individual, he may be liable for a Fourth Amendment violation."); *Wilkerson v. Seymour,* at 980 ("What is made explicit in *Jones v. Cannon,* 174 F.3d 1271, 1283 n. 4 (11th Cir.1999), is that a participant in an arrest, even if not the arresting officer, may be liable if he knew the arrest lacked any constitutional basis and yet participated in some way.")

The District Court concluded that an officer who spoke to witnesses, viewed video of the incident, and then swore to those facts in an arrest affidavit (which allows the suspect to be incarcerated) was not involved in the arrest. Nothing could

be factually further from the truth. Garcia, whether he intended to or not, was an active participant in the arrest of the Appellant. He may not have placed the handcuffs on McDonough, but his role was every bit as important. *See Ratunuman v. Sanchez*, 2010 WL 11602269, at *3 (S.D. Fla. Feb. 9, 2010) (The Arrest Affidavit that Officer Atesiano signed played a role in effectuating the arrest of Ratunuman.")

Garcia's narrative in the arrest form shows that he was aware that the actual facts did not rise to the level of the crime of disorderly conduct. Even after viewing the video of the incident, he placed inaccurate details in the arrest form in order to bolster an otherwise unlawful arrest. He swore under oath that "…there were approximately 4 female pedestrians in the parking lot and several other people who were entering City Hall to attend an official city hall meeting. The pedestrians stopped to observe offender McDonough's breach of peace." Appx. Doc. 56-10, pp. 1-2. None of that is true, as evidenced by the video as part of the record in this case.

The District Court's granting of qualified immunity to Sergeant Garcia was an incorrect application of the law to the undisputed facts. The Appellee's Motion for Summary Judgment should have been denied and Appellant's granted. At a minimum, the Court should reverse and remand for a trial on the level of Sergeant Garcia's involvement in the arrest.

III. The City of Homestead is liable for the actions of its police officers on August 24, 2016, for their arrest of the Appellant for disorderly conduct without probable cause.

Count IV alleges a State tort, pursuant to Florida Statute §768.28, for a violation by the City of Homestead for the arrest of the Appellant for disorderly conduct on August 24, 2016.[8] The District Court again cites no cases which support its position that under these facts the officers had probable cause to effectuate an arrest. By including in its holding that the situation may have escalated due to the prior incidents with the officer, the court created new elements to the offense of disorderly conduct. It is not in the statute nor is there any case law to support such a finding.

In fact, under Florida case law interpreting the disorderly conduct statute, the Appellant did not commit a crime nor was there probable cause for the arrest. For instance in *Barry v. State,* 934 So.2d 656 (Fla. 2nd DCA.2006), the only evidence the State presented to justify probable cause for an arrest for disorderly conduct was that the defendant yelled obscenities at a police officer and that motorists on the street stopped to watch the incident. The court went on to hold:

> No evidence was presented that the words used were "fighting words" or words that would tend to incite an immediate breach of the peace. Further, the State presented no evidence that Barry engaged in any physical conduct toward Officer Pruitt that affected Officer Pruitt's ability to do her job or that breached the peace or otherwise incited others to act. Therefore, the State did not prove that Barry was guilty of disorderly conduct as that offense has been defined and limited.

Id. at 658.

[8] Under Florida Statute §768.28, the City of Homestead is liable for the actions of its employees, in this case the HPD.

The court additionally addressed the fact that bystanders stopped to watch.

> However, the mere fact that other people come outside or stop to watch what is going on is insufficient to support a conviction for disorderly conduct. Instead, there must be some evidence that the crowd is actually responding to the defendant's words in some way that threatens to breach the peace.

Id at 659.

Florida law requires that for words alone to be sufficient for an arrest for disorderly conduct, the arrestee's words must have incited a crowd to cause a breach of the peace. *See also Gold v. City of Miami,* ("The evidence, viewed in the light most favorable to Gold, reflects that Gold twice used profanities in a loud voice, in a public place, and in the presence of others… It is clear from the facts viewed in the light most favorable to Gold that the officers *did not have actual probable cause* (emphasis added) to arrest Gold for disorderly conduct." at 1446)

In *C.N. v. State*, 49 So. 3d 831 (Fla. 2nd DCA. 2010), C.N. was in a group of teenagers in the street around a Boys and Girls club. Officers were dispatched to the scene to break up the crowd. One officer observed C.N. shouting and using foul language. Fearing this might lead to fighting, the officers ordered everyone to leave the area. When C.N. refused, she was placed under arrest for disorderly conduct. In reversing the juvenile's conviction the court held:

> In order to prove disorderly conduct based on words alone, the State must show that the words either caused a crowd to gather, thereby resulting in safety concerns, or that the words incited a crowd to engage

> in an immediate breach of the peace. *See C.H.C. v. State,* 988 So.2d 1145, 1146–47 (Fla. 2d DCA 2008) (holding that screaming and yelling profanities at deputies, without inciting a breach of the peace, was not disorderly conduct); *see also A.S.C. v. State,* 14 So.3d 1118 (Fla. 5th DCA 2009) (stating that juvenile's loudness and profanity was not disorderly conduct when no evidence showed that the juvenile was trying to incite a crowd or that she had caused a crowd to gather and present a safety risk); *W.L. v. State,* 769 So.2d 1132 (Fla. 3d DCA 2000) (noting that it was not disorderly conduct for a juvenile to stand in a crowd of 15–20 people, yelling profanities at the police).

Id. at 832.

As in the cases cited above, the Appellant did nothing more than use words (and his finger) to show his displeasure with being trespassed from City Hall. He kept walking away from Sergeant Wright and his actions did not indicate that he intended to escalate the confrontation. No crowd gathered, the Appellant did not call for any crowd to gather, nor did he attempt to incite a disturbance of the peace. The statute and case law interpreting the statute make it abundantly clear that the Appellee's summary judgment should have been denied and the Appellant's granted.

IV. The City of Homestead is liable for the actions of its police officers on September 1, 2016, for their arrest of the Appellant for cyberstalking without probable cause.

Count VII alleges a State tort violation, pursuant to Florida Statute 786.28, for the arrest of the Appellant for cyberstalking by posting comments on a website.[9]

Cyberstalking is defined, in the pertinent parts, by Florida Statute §784.048:

[9] The Appellant was also arrested for witness tampering. The Appellees never argued the issue in their summary judgment motion and the District Court did not discuss the issue. This brief does not address that issue.

> (1) As used in this section, the term:
> (b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests.
> (d) "Cyberstalk" means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.

In defining the elements of the crime of stalking (which cyberstalking is part of), the Florida Supreme Court in *Bouters v. State*, 659 So. 2d 235 (Fla. 1995), held that:

> The conduct must be willful, malicious, and ***repeated***, and form "a course of conduct" which would "cause [ ] substantial emotional distress" in a ***reasonable person*** in the same position as the victim…Furthermore, the statute expressly provides that ***"[c]onstitutionally protected activity*** is not included within the meaning of course of conduct. (emphasis added) *Id.* at 237

.

According to the statute and *Bouters*, the words the Appellant wrote were not violative of the statute and did not give rise to an arrest based on probable cause.

"Probable cause to arrest exists when law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime." (internal citation and quotation marks omitted). *Merenda v. Tabor*, 506 F. App'x 862, 865 (11th Cir. 2013). Although that standard is lower than beyond a reasonable doubt, the proof needed to convict, it does not relieve Detective Mata of assuring that all of the elements of the crime existed before effectuating the arrest.

Initially, the comments made about Officer Monaco on LEOAffairs were constitutionally protected under the First Amendment. The Appellant's post was directed towards a public official and criticized his performance on the job. *See David v. Textor*, 189 So. 3d 871, 876 (Fla. 4th DCA 2016). ("Section 784.048 itself recognizes the First Amendment rights of individuals by concluding that a "course of conduct" for purposes of the statute does not include protected speech. §784.048(1)(b), Fla. Stat. (2014). This includes speech that may be offensive or vituperative").

Additionally, the Appellant had a legitimate purpose to post on LEOAffairs. He was criticizing Officer Monaco for not wearing a body camera and challenging him to wear one. The Appellant was also advising Officer Monaco that he was going to have a camera with him, so that if Officer Monaco lied about him again he would have the proof. When addressing a public official, like a police officer, such comments serve a legitimate purpose and are constitutionally protected.

Furthermore, the test for cyberstalking is not whether Officer Monaco felt substantial emotional distress, but whether a reasonable man under similar circumstances would suffer substantial emotional distress.

> Moreover, "[t]he 'substantial emotional distress' that is necessary to support a stalking injunction is greater than just an ordinary feeling of distress" or simple embarrassment. *Venn v. Fowlkes*, 257 So. 3d 622, 624 (Fla. 1st DCA 2018)…Case law shows that the bar for establishing that a reasonable person would suffer substantial emotional distress is set fairly high.

Craft v. Fuller, 298 So. 3d 99, 104 (Fla. 2nd DCA 2020), reh'g denied (July 13, 2020).

The Assistant State Attorneys recognized this when the decision was made not to prosecute the Appellant. There were no threats made on the website that would make a reasonable person feel substantial emotional distress. "The defendant voiced his dissatisfaction with Officer Monaco on a public forum and never made any threat to the officers." Appx. Doc. 69-2. "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black,* 538 U.S. 343, 359 (2003). No such threats were made by the Appellant on the LEO Affairs website.

Additionally, it was Officer Monaco himself who knowingly gave out his home address at a City Council meeting, making it available to all on the internet. Even if the Appellant had revealed Officer Monaco's home address, which he did not, it was constitutionally protected activity. *See Brayshaw v. City of Tallahassee, Fla*., 709 F. Supp. 2d 1244 (N.D. Fla. 2010) (declaring Florida Statute §843.17 unconstitutional).[10] A reasonable person in Officer Monaco's position could not have suffered substantial emotional distress because a link to a publicly available video, the existence of which he was personally responsible for, was posted on

[10] The statute made it unlawful to disseminate or publish the home address or phone number of a law enforcement officer.

another website. Officer Monaco knew any personal information shared at the meeting would be made available on the internet.

Finally, the comments were only made on one occasion. They were all posted within fifteen minutes of each other and as such do not meet the requirements of "repeated" acts or a continuity of purpose as required by the statute. In *Krapacs v. Bacchus*, 301 So. 3d 976 (Fla. 4th DCA 2020) the court held that Krapacs' actions of retagging Bacchus in her social media posts for four hours did not constitute repeated acts under the statute. "Krapacs' actions do not qualify as cyberstalking because they did not constitute a pattern of conduct composed of a series of acts over time evidencing a continuity of purpose. *See* § 784.048(1)(d), Fla. Stat. (2018);" *Id*. at 978. Likewise, the Appellant's posts over a fifteen-minute period legally constituted only one instance of conduct and therefore fall outside the cyberstalking statute.

The District Court again did not cite any case law to support its opinion that there was probable cause for the arrest. Instead, the decision relies on the fact that Detective Mata called the State Attorney before the arrest and Judge Mindy Glazer found probable cause at the first appearance hearing. Neither are sufficient reasons for the court's conclusion.

The liability of the City of Homestead for the officers arrest of the Appellant for cyberstalking is to be decided under Florida State law. Therefore, the only issue

for the court is whether there was probable cause for the arrest, not arguable probable cause as in a §1983 claim. The reliance by an officer on the advice of the State Attorney may be a factor in determining whether the officer is entitled to qualified immunity, but is irrelevant to the State tort issue of actual probable cause.[11]

Additionally, the record provides no indication to whom Detective Mata spoke to or what information he relayed to that individual to establish probable cause. What is in the record is the State Attorney's closeout memo written after the State decided not to file any charges. The Assistant State Attorneys concluded that the Appellant's behavior and the evidence provided did not amount to stalking because McDonough voiced his dissatisfaction with Officer Monaco on a public forum and never made any threat to the officer. The only evidence in the case to establish probable cause are the words in the post placed on LEOAffairs. It is difficult to see how the State could initially recommend an arrest and then with no further evidence developed by the Detective, decline to prosecute the case.[12]

---

[11] There is no case law to support the District Court's opinion. Even in *Poulakis v. Rogers*, 341 F. App'x 523, 532–33 (11th Cir. 2009), a case cited by the District Court supporting Sergeant Wright's qualified immunity claim when he issued the trespass order to the Appellant, this Court held "… where an officer has consulted with an attorney prior to making an arrest, we still must look at the relevant case law and the statutory text."

[12] Rule 3.140 Florida Rules of Criminal Procedure (g) requires the prosecutor to sign the charging information under oath his or her good faith in instituting the prosecution. Since the State did not file the charges, it can be assumed they did not believe there was a good faith basis to prosecute the Appellant.

The fact that Judge Glazer found probable cause is also irrelevant. "The Defendants also argue that 'a judge agreed when he signed [Ms. Johnson's] arrest warrant' that probable cause existed to arrest her. However, the Defendants have not provided any authority showing that this is relevant to the probable cause determination." *Johnson v. DeKalb Cty., Georgia*, 391 F. Supp. 3d 1224, 1253 (N.D. Ga. 2019), *appeal dismissed sub nom. Johnson v. Fulton*, 2020 WL 3865138 (11th Cir. Jan. 8, 2020).

Judge Glazer was not fully briefed, as this Court is, on the application of the facts of this case to the cyberstalking statute. There is no showing that Judge Glazer considered the constitutional implications, the legitimate purpose, nor the correct standard in evaluating substantial emotional distress. Additionally, the arrest affidavit failed to include the fact that the comments all occurred within fifteen minutes, a crucial omission in determining whether the posts were repeated acts. Judge Glazer was wrong in her probable cause determination, as evidenced by the case law cited above and the fact that the State, even after allegedly authorizing probable cause in the case, refused to file charges against the Appellant.

The District Court's order fails to justify why all of the elements of the cyberstalking stature have been met and would rise to the level of probable cause. The ruling is devoid of any explanation of how the Appellant's posts, which were not repeated acts, would apply to the statute. Further, the order gave no rationale as

to why the posts were not constitutionally protected nor why the posts did not serve a legitimate purpose. Finally, the court gave no explanation as to how Officer Monaco objectively suffered substantial emotional distress. This Court should reverse the District Court's ruling and grant the Appellant's summary judgment motion.

V. The City of Homestead is liable for depriving the Appellant of his First Amendment rights when its policy maker issued an indefinite trespass order that acted as a prior restraint on the Appellant's speech.

Count II contends that the City of Homestead violated the Appellant's First Amendment rights pursuant to *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978). On August 24, 2016, HPD Chief of Police Rolle met with other officials of the City and discussed the Appellant's removal from the Council meeting the month before. Appx. Doc. 56-8, pp. 19-24; Doc. 56-12, pg. 29. He authorized the police to issue a trespass warning to the Appellant and bar him from returning and speaking to the Council. Appx. Doc. 56-11, pp. 35-36; Doc. 56-12, pp. 31-32.

Sergeant Wright met the Appellant in the lobby of City Hall, escorted him outside and told him that he was being trespassed and prevented him from entering council chambers and speaking to the City Council. Appx. 58-1, Exhibits M,Q. There was no time limit placed on the trespass order, just that he could not regain entry until after receiving permission by writing a letter. Appx. 58-1, Exhibits M.

"…[T]o impose § 1983 liability on a municipality, a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation. *See City of Canton, Ohio,* 489 U.S. 378, 388 (1989)." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004). Under appropriate circumstances liability may be imposed on a city for a single decision made by a municipal official with final policy making authority. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The District Court held that Chief Rolle, or his delegate Sergeant Wright, had final policymaking authority and the court's finding should not be disturbed. The court, however, also ruled that the trespass warning did not deprive the Appellant of his constitutional rights. That opinion is not supported by the law and should be reversed.

A city council meeting is considered to be a limited public forum. However, when the council opens public comment to persons to speak on any topic, it becomes a traditional public forum. *See Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) ("Once a city intentionally opens it meeting to the public and permits public discourse it designates its meeting as a traditional public forum.") A city can place reasonable time, place, and manner restrictions on content-neutral speech. However, such restrictions are constitutional only if they are "…narrowly drawn to achieve a

significant governmental interest and if they allow communication through other channels." *Id.* at 1331

Brown v. City of Jacksonville, Fla., 2006 WL 385085 (M.D. Fla. Feb. 17, 2006) illustrates this concept. In *Brown*, the plaintiff was banned from speaking (and attending meetings) in front of the city council for approximately three months due to her disruptive behavior at the previous meeting. The plaintiff sought an injunction enjoining the prohibition. In granting the preliminary injunction, the court analyzed the competing interests and determined that the plaintiff's constitutional rights would be violated if an injunction was not granted.

Finding that the restriction was content-neutral, the court then evaluated the next two prongs under *Jones*. First, the court found that banning the plaintiff was not a narrowly tailored restriction.

> Banning Plaintiff from future meetings is not a restriction that is "narrowly tailored" to achieve the significant governmental interest of running the meetings efficiently, while successfully preventing her disruptive behavior. Although the City does not have to use the "most appropriate method" of restricting the Plaintiff, it should nonetheless use a directive that is more "narrowly tailored" than a sweeping ban from future meetings for months.

Brown at *4 (citing) *Jones* 888 F.2d at 1333.

Next, the court evaluated whether the restriction left the plaintiff with ample alternative channels of communications. The court found that even though she could communicate with the city council through emails or letters, "…such alternative

channels do not amount to 'ample' alternatives that would be comparable to the same degree as her own passionate deliverance of her messages in person at the meetings, to the entire council or an entire council committee meeting, at the same time." *Id* at *4. The court issued the preliminary injunction because the restrictions likely have violated the plaintiff's rights. The government was not permitted to "…prohibit future expressive activity as a result of past unlawful conduct." *Id.* at *4. This Court has held that "…where a law sets out primarily to arrest the future speech of a defendant as a result of his past conduct, it operates like a censor, and as such violates First Amendment protections against prior restraint of speech." *Polaris Amphitheater Concerts, Inc. v. City of Westerville,* 267 F.3d 503, 507 (6th Cir.2001)

Similarly, in *Walsh v. Enge*, 154 F. Supp. 3d 1113 (D. Or. 2015), the District Court was asked to decide the constitutionality of a city ordinance which allowed a Mayor or his or her designee to a exclude a person, potentially indefinitely, from attending future city council meetings simply because that person had been disruptive at previous meetings. The court issued a permanent injunction and granted declaratory relief in finding the ordinance violated the First Amendment.

In analyzing the ordinance, the court found that it was content-neutral. However, as in *Brown*, it was determined that the ordinance was not narrowly tailored to achieve the governmental interest in an orderly council meeting.

> Defendants have not pointed to any appellate court decision, nor was the Court able to locate any such decision, allowing an incident, or even

> several incidents, of actual disruption to justify the prospective exclusion of an individual from future public meetings. Defendants have a simple alternative to the prospective exclusion ordinance. They can order any disruptive individual to leave the meeting that he or she is disrupting for the duration of that meeting.

Walsh at 1132.

The court also took issue with the ordinance because it did not allow for ample alternatives of communication. The exclusion would prohibit individuals from using any facilities at City Hall, make comments at the council meeting or meeting with any official. "Thus, prolonged and prospective exclusions defeat the very purpose of the forum: to provide the opportunity for discourse on public matters." *Id.* at 1133. In refusing to uphold the broad prospective exclusion ordinance, the court stated: "But no matter how many meetings of a city council a person disrupts, he or she does not forfeit or lose the future ability to exercise constitutional rights and may not be prospectively barred from attending future meetings. Our democratic republic is not so fragile, and our First Amendment is not so weak." *Id.* at 1118.

The District Court in its order was unable to point to any cases where a ban, such as the one placed on the Appellant, has been upheld and found to be constitutional. The court does cite *Catron v. City of St. Petersburg*, 658 F.3d 1260 (11th Cir. 2011) for the proposition that a governmental entity can limit access to government buildings as long as a trespass warning provides a reasonable procedure to challenge the warning. However, in *Catron* the plaintiff was alleging a due

process violation. The plaintiff never raised a First Amendment claim and this Court did not discuss limiting access to public forums for speech purposes.

In addition, it cannot be said that Wright telling the Appellant to "write a letter" without saying to whom or what form the letter should take, would be the type of procedure contemplated in order to challenge the decision. Further, the trespass warning included the parking lot, and the Appellant was subsequently arrested for trespass while on the sidewalk. Such a broad exclusion excludes more speech than necessary to support the need to have orderly and efficient meetings, as well as the right to free travel discussed in *Catron*.

The City Council, it should be noted, amended its decorum policy in April of 2016 to specifically eliminate the provision that allowed the Mayor to bar a speaker from further audience before the Council, unless a majority of the Council permits a return. Although other provisions of the policy were also changed, it would seem the only reason that particular provision was eliminated was because the City of Homestead feared that barring a speaker would be unconstitutional.

Despite the fact that there is no record evidence of the Appellant causing disturbances at any of the other meetings he attended, Chief Rolle determined that an indefinite exclusion from speaking was the only means to enforce decorum at future Council meetings. That decision was not narrowly tailored to achieve its goal, nor did it allow the Appellant any ample alternative channels of speaking to the

Council and simultaneously with the public about issues that concerned him. As discussed in *Brown* and *Walsh* above, such an exclusion does not meet constitutional muster. The District Court should have denied the Appellee's Motion for Summary Judgment and granted the Appellant's.

VI. Sergeant Wright is not entitled to qualified immunity for violating the Appellant's First Amendment rights by issuing an indefinite trespass order preventing the Appellant from speaking to the City Council.

Count III of the Second Amended Complaint alleges a violation of the Appellant's First Amendment rights by Sergeant Wright. When the Appellant returned to speak at the City Council on August 24, 2016, he was met by Sergeant Wright, who advised him that he was being trespassed due to his comments and behavior at the previous meeting. Appx. 58-1, Exhibits M,Q. The law is clearly established that a prior restraint on speech, such as this trespass order, is unconstitutional.

The City Council meeting devotes time to public comments on any topic the speaker wishes to address. That comment period is not limited to the agenda items or a specific topic. The only limitation placed on the speaker is the three minutes he/she is allotted to address the Council. Appx. Doc. 56-8, pp 10-11; Doc. 56-1. Pg. 1. The City Council could have, if they wished, limited the comments to any topic of its choosing. By opening up the public comments to any topic, they created a designated public forum and although content neutral speech made be regulated, it

needs to be narrowly drawn and allow communication through other channels. *See Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989).

The District Court is correct that a governmental body has a significant and legitimate interest in conducting an orderly meeting. The question is whether Sergeant Wright's trespass warning to the Appellant was a reasonable and narrowly drawn restriction to achieve that goal leaving open ample alternate channels of communication.

The record in the case shows that the Appellant had spoken before at City Council meetings and there was no evidence he had ever caused any type of disturbance. The words and tone the Appellant used on July 27th after he was escorted from chambers, did not even result in Sergeant Wright or any HPD officer placing him under arrest. Upon his return on August 24th, Sergeant Wright had no reason to believe that the Appellant was going to cause any type of disturbance that evening. When he entered City Hall and was approached by Sergeant Wright, the Appellant did not cause a scene, but instead calmly followed Sergeant Wright's instructions to leave the building. Appx. Doc 58-1, Exhibit M. When he was ordered to leave City Hall premises he did so peacefully and was only stopped when Sergeant Wright placed him under arrest.[13] Appx. Doc 58-1, Exhibit Q.

[13] Although the District Court found that giving Wright the finger was a harbinger of future behavior, the Appellant never raised his voice and just told the officer he

The District Court found that this prospective exclusion was narrowly drawn because the Appellant was provided with a procedure to request readmission. The court however, cited no authority for that position. Furthermore, the only procedure in the record which would enable the Appellant to request readmission is Sergeant Wright's declaration to the Appellant that he could "write a letter." Appx. Doc 58-1, Exhibit Q.

The Appellant was not advised of the time period for which he was barred entry and prevented from addressing the City Council. He was only informed that he could not return until he received permission. He was never directed to whom he should write the letter, how the outcome would be determined, nor when he would hear back. This does not amount to a constitutional procedure.

More importantly, there is no record evidence of any procedure in the City of Homestead ordinances, codes or policies that direct how a trespassed individual is able to gain permission to speak again at the City Council meetings.[14] Since the City specifically eliminated from its decorum policy the provision that allowed the Mayor to bar speakers as well as the procedure for gaining readmittance in order to address the City Council, Sergeant Wright simply created a procedure where none

---

would see him at the deposition and he was leaving. There was no one watching his encounter with Wright and the Appellant did not cause a disturbance.

[14] The fact that the Appellant came back and spoke at the December meeting without writing a letter and being advised that he was permitted to return, actually proves the absence of any lawful procedure.

existed. Under these circumstances, Sergeants Wright's "procedure" is not a lawful nor constitutional means of narrowly drawing a restriction as it failed to provide ample alternate channels of communication and constituted a prior restraint.

As in *Walsh* and *Brown*, Sergeant Wright could have made it clear to the Appellant that he faced removal from the City Council chambers or even arrest should he cause another disturbance. Although courts should not be second guessing a governmental agency in the manner in which they control their meetings, the method chosen still has to be constitutional. It should have been clear to Wright that the indeterminate restriction placed on the Appellant was not a narrow restriction to overcome the bar against prior restraint on speech.

Content neutral restrictions must also leave open ample alternative channels for communication. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The monthly City Council meetings are conducted in front of the entire membership of the Council, the City Attorney, City Manager, other officers and representatives of the City of Homestead and members public and/or media. Additionally, the proceedings are recorded and available on the Homestead City website for viewing at any time. By prospectively banning the Appellant from appearing in front of the City Council, Sergeant Wright left no alternative methods for the Appellant to address the City Council, other ranking officials of the City, or members of the public in person.

The District Court, in granting Wright qualified immunity, also found that the public does not have the right to visit City Hall under all circumstances and at all times, i.e., the City has a right to limit access to its property. As a general proposition that is true, however the cases cited by the court do not support that position in light of the facts of this case. *Catron v. City of St. Petersburg*, 658 F.3d 1260 (11th Cir. 2011), dealt with a trespass ordinance that permitted authorities to issue a temporary trespass warning for specific city land if the trespass recipient had violated city or state law. The case did not involve the First Amendment, but rather the right to travel and due process. This Court found that the warning recipient was denied due process (and the right to travel) when there was not a sufficient procedure set up for the recipient to contest the warning.

Bloedorn v. Grube, 631 F.3d 1218 (11th Cir. 2011), is an example of a restriction that this Court found to be constitutional. The Plaintiff sued to enjoin a public university from enforcing its policies regulating the access of outside, non-sponsored speakers to the campus and the permitting scheme regulating the conduct of speakers. This Court denied the injunction as the time, place and manner restrictions were reasonably tailored to serve significant governmental interests. Bloedorn wanted to speak without abiding by the university's procedures.

That is not the case here. The Appellant did not insist on speaking at the City Council chambers when it was not open to public comment, or even during non-

meeting times. The City Council meetings were open to the public for free speech during specified times, in a specified manner and in a specified place. At those times everyone is invited to attend and address the Council.[15]

Lastly, the District Court relied on *Poulakis v. Rogers*, 341 F. App'x 523 (11th Cir. 2009) to hold that even if the trespass warning was not narrowly tailored, Sergeant Wright may be entitled to qualified immunity if he reasonably relied on the advice of the State Attorney. The court has misapplied the reasoning of *Poulakis* to the facts of this case. *Poulakis* was a Fourth Amendment case wherein this Court determined that the officer's consultation with the State Attorney weighed heavily in finding that the officer was entitled to qualified immunity for the *arrest* of the plaintiff.

However, the trespass order issued by Sergeant Wright was not meant to effectuate the Appellant's arrest that day. He was going to be permitted to leave the City Hall premises and in fact did leave after being advised of the order.[16] The intention of the order was to prohibit the Appellant from speaking before the City Council on August 24, 2016 and the indeterminate future, thereby depriving the Appellant of his First Amendment rights. There is no case law that counsel could

[15] The District Court also cited *Peary v. City of Miami*, 977 F. 3d 1061 (11th Cir. 2020). However, that case was decided four years after Wright's actions in this case.
[16] The Appellant was arrested for trespass, but only after he was arrested for the disorderly conduct. The case was dismissed by the State Attorney and the Appellees have not pursued the legality of that arrest.

find that supports the granting of qualified immunity when an officer might rely on a State Attorney's opinion to deprive an individual of their First Amendment rights.[17] *Poulakis* does not apply to these circumstances.

Even if the Court finds that the reasoning in *Poulakis* does apply to a First Amendment claim, there is very little record evidence of the discussions between HPD and the Miami-Dade State Attorney's Office. The evidence shows that Captain Raymond DeJohn spoke to an unknown individual at the State Attorney's Office to seek advice as to whether the City could trespass the Appellant. Captain DeJohn testified at his deposition that he spoke to that individual and asked if the HPD could trespass someone from City Hall who had caused an issue there. The response he received was yes, as long as the police felt justified. Appx. Doc 69-1, pp. 11-14. There was no discussion concerning the First Amendment and how that would affect the Appellant's rights nor were details of the prior incident provided to the State Attorney. Captain DeJohn was not directed to any state statute nor other legal authority to permit this prior restraint. Appx. Doc 69-1, pp. 11-14. In the end, the HPD never received anything in writing from the State nor was the conversation memorialized in any manner.

[17] The State Attorney does assist the police in determining if there is probable cause for an arrest and ultimately has the legal authority to determine whether to charge an individual with a crime. It remains unclear what power or expertise the State Attorney has in recommending to the police whether or not to deprive a citizen of his/her First Amendment rights.

The advice that Captain DeJohn received is not the detailed legal advice the Court should expect in order to grant Sergeant Wright entitlement to qualified immunity. Regardless, an attorney's advice cannot transform the officer's patently unlawful activity into objectively reasonable conduct justifying a prior restraint. *See Poulakis* at 532.

An officer, such as Sergeant Wright, is not entitled to the qualified immunity defense "…when the preexisting general constitutional rule applies 'with obvious clarity to the specific conduct in question,' and it must have been "obvious" to a reasonable police officer that the pertinent conduct given the circumstances must have been unconstitutional at the time." (internal citations omitted). *Vinyard v. Wilson*, 311 F.3d 1340, 1352 (11th Cir. 2002).

Sergeant Wright was on notice that it was clearly established law that if a governmental agency is going to place restrictions on speech, those restrictions must be narrowly tailored and allow for ample alternate means of communication. Sergeant Wright's trespass order that restricted the Appellant's speech before it occurred was not the narrow tailoring required by law. Additionally, there were no ample alternate avenues made available to the Appellant that would allow his opinions to be heard by the City Council, other City officials or members of the public who attend the Council meetings. The Court erred in granting the Sergeant Wright's summary judgment and should have granted the Appellant's.

CONCLUSION

The District Court was asked to rule on each party's motion for summary judgment. The Appellant contends the court erred on six of the seven counts in the Second Amended Complaint by misapplying the law and/or facts and failing to make all reasonable inferences in favor of the Appellant when required. The Appellant has shown that as a matter of law he is entitled to summary judgment on Counts II through VII. The Appellees as a matter of law have not carried their burden. This Court should reverse the lower court's ruling and grant the Appellant's Motion for Summary Judgment. If the Court finds that there are material disputed facts, then it should reverse and remand for a jury to decide those issues.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 12,385 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting feature of Microsoft Word.

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

Dated: June 13, 2022

/s/Alan Greenstein
Alan Greenstein

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: */s/ Alan Greenstein*
Alan Greenstein

SERVICE LIST

Alan Greenstein, Esq.
Alan J. Greenstein, P.A.
8121 S.W. 138th St.
Palmetto Bay, Fl. 33158
Email: agreenstein004@hotmail.com
Attorney for the Appellant

Matthew H. Mandel, Esq.
Anne K. Reilly, Esq.
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, FL 33301
mmandel@wsh-law.com (primary)

areilly@wsh-law.com (primary)
Attorneys for the Appellees

Edward G. Guedes
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
2800 Ponce de Leon Blvd.
Coral Gables, Fl. 33134
eguedes@wsh-law.com
Attorney for the Appellees