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 REPLY BRIEF

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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

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INTRODUCTION

The Appellant, James Eric McDonough, maintained in his initial brief that the District Court erred in granting the Appellees' Motion for Summary Judgment and denying his motion. Garland Wright and Carlos Garcia are not entitled to qualified immunity as there was clearly established law that put the officers on notice that their actions towards Dr. McDonough were unlawful. Additionally, the City was liable for the arrests of Dr. McDonough as there was no probable cause for the arrest for either crime, disorderly conduct, or cyberstalking. Finally, under *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978), the City was liable for the policy decision of Chief Alexander Rolle in ordering Dr. McDonough trespassed from City Hall.

The Appellees' response should not persuade this Court to affirm the District Court's ruling. In reviewing the District Court's granting of the Appellees' Motion for Summary Judgment, this Court is required to view the record in the light most favorable to Dr. McDonough. *See Merenda v. Tabor*, 506 F. App'x 862, 864 (11th Cir. 2013). The District Court's order seems to have taken the facts in the light most favorable to the Appellees.

Dr. McDonough's Motion for Summary Judgment should have been granted, even viewing the record the light most favorable to the Appellees. The *material* facts conclusively show McDonough's entitlement to relief. This Court should

remand with instructions to grant the Appellant's motion. At a minimum, this Court should remand to allow a jury to determine the facts and damages on all counts.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY AS TO THE FEDERAL CLAIMS (COUNTS III, V AND VI).

A. Garland Wright violated James Eric McDonough's First Amendment Rights (Count III).

The Appellee makes two arguments in opposition to Dr. McDonough's position that Sergeant Wright is not entitled to qualified immunity. First, that the Appellant claimed there was no evidence that he ever caused a disturbance and second, that he failed to show any binding authority that Sergeant Wright violated clearly established law.

The Appellant's initial brief has made it clear that before July 27, 2016 there was no record evidence of Dr. McDonough causing any disturbances at the Council meetings despite frequently attending and speaking at the meetings. The issue before the Court is not whether Dr. McDonough could have been removed from City Hall on July 27th, but whether the indefinite trespass warning that followed one verbal disruption was a constitutional, narrowly drawn restriction.[1] At the time the

[1] The argument occurred after Dr. McDonough spoke and occurred outside of the Council chambers.

trespass warning was issued, it was for an indefinite period of time despite the fact that Dr. McDonough eventually returned to speak. There was no timetable on when, or if, Dr. McDonough would be allowed to return to speak. Appendix ("Appx") Doc 58-1, Exhibit Q. He was not told to whom he should write nor when it would be heard. The warning was not narrowly drawn and was unconstitutional.

In a footnote, Sergeant Wright points out that Dr. McDonough was not trespassed from City Council meetings, but rather City Hall where the City has the authority to restrict admission. First of all, Dr. McDonough would not be able to attend City Council meetings unless he was permitted to enter City Hall. Secondly, the cases cited by the Appellee are inapplicable. In *Sheets v. City of Punta Gorda*, 415 F. Supp. 1115 (M.D. Fla. 2019), the plaintiff violated an ordinance by recording people without their permission, even after some objected. For violating the ordinance he was banned from City Hall. Dr. McDonough had not violated any ordinance or law. His "violation" involved a loud argument after he was removed from Council chambers.[2]

Contrary to the Appellee's assertion, Dr. McDonough cited binding authority in his initial brief, both from the Eleventh Circuit and the United States Supreme Court, that demonstrated that the trespass warning violated clearly established law. For example, *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989), held that when a

[2] *Sheets* is District Court opinion and decided in 2019 after this incident in 2016.

City Council opened up its meetings to any topic, it was no longer a limited public forum, but rather a public forum. Although content neutral speech may be regulated, those regulations need to be narrowly drawn and allow communication through other channels. *Jones* itself cited to United States Supreme Court opinions *Airport Comm'rs. of Los Angeles v. Jews for Jesus,* 482 U.S. 569, (1987) and *Perry Educ. Ass'n. v. Perry Local Educators' Assn.,* 460 U.S. 37 (1983), for the same holding.

Additionally, the Appellant cited to *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) which held that

> …even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. (internal citations omitted). At 791.

All of the cases cited by the Appellant put Sergeant Wright on notice that the trespass order banning Dr. McDonough from Council meetings was not narrowly tailored, nor did it leave open alternative channels of communication.[3]

[3] As discussed in the Appellant's initial brief, writing letters, sending emails, or calling Councilman are not reasonable alternative channels of communication in light of how unique the Council meeting is. All of the Council members are there, the Mayor and attorneys are present, as well as the police and members of the public. It is also on video and preserved by the City of Homestead for anyone to view at a later time.

Although it may be true in the abstract, as the Appellee points out, that it is difficult to overcome qualified immunity in a First Amendment case, the precedents relied upon, and their conclusions do not apply to the present case. *Gaines v. Wardynski*, 871 F.3d 1203 (11th Cir. 2017), involved a teacher who was denied a promotion due to a critical article she wrote about the Board of Education. *Dartland v. Metropolitan Dade Cty.*, 866 F.2d 1321 (11th Cir. 1989), concerned the County Consumer Advocate who was fired for being publicly critical of the County Manager. Neither case dealt with a prior restraint on speech nor the appropriate test to limit speech in a public forum.

Dr. McDonough does not dispute that the Homestead police have the authority, under the appropriate circumstances, to issue trespass warnings.[4] This is not one of those situations. In particular, it should be noted that Sergeant Wright, contrary to the Appellee's answer brief, was applying the old decorum policy that was replaced in 2016. The new policy eliminated the provision that allowed a

[4] The cases cited by the District Court and defended by the Appellee, *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011) and *Catron v. City of St. Petersburg*, 658 F.3d 1260 (11th Cir. 2011), do not apply to this circumstance as discussed in the Appellant's initial brief. Although in *Catron* the Plaintiff's did raise a First Amendment overbreadth issue, (counsel was incorrect to state otherwise) this Court dismissed that count. The Court based its ruling on the due process findings not on the First Amendment.

disruptive individual to be banned from further audience until permission is received from the City Council. Appx. Doc 56-6, pp. 6,7.[5]

Finally, Sergeant Wright insists that he had arguable probable cause to issue the trespass warning. He claims he is entitled to qualified immunity under *Poulakis v. Rogers*, 341 F. App'x 523 (11th Cir. 2009), because he relied on the State Attorney's advice in issuing the warning. Under Fourth Amendment law, an officer is entitled to qualified immunity if in part, he relies on the advice of the State Attorney in making the determination whether probable cause exists to make an arrest. This trespass warning infringed on Dr. McDonough's First Amendment rights and the Appellee has failed to cite any authority that would extend *Poulakis* to a First Amendment case. There is no "arguable probable cause" standard for the First Amendment.

Furthermore, the purpose of this trespass warning was not to arrest Dr. McDonough, but rather to exclude him from the premises. An arrest would occur only if he returned without permission. Additionally, there is no showing that Sergeant Wright or any police officer contacted the State Attorney and discussed the First Amendment ramifications of the trespass warning. The Appellee has cited no cases that would permit a court to grant qualified immunity to an officer who relied

[5] Apparently, the District Court also posited that fact incorrectly when it justified the trespass warning because it was consistent with the Rules of Decorum. Order Doc 95 pg. 17

in part on the advice of the State Attorney regarding a First Amendment violation. Therefore, Sergeant Wright should be denied qualified immunity and the Appellant's Motion for Summary Judgment should be granted.

B. Garland Wright violated James Eric McDonough's Fourth Amendment Rights (Count V).

The Appellee defends his grant of qualified immunity for the disorderly conduct arrest notwithstanding the fact that Dr. McDonough was: 1) following Sergeant Wright's directions to leave the lobby of City Hall; 2) following Sergeant Wright's directions to leave City Hall premises; 3) only saying "bye-bye" and "see you at the deposition" and then flipping him "the bird" as he was walking away; and 4) still walking away when Sergeant Wright told him he was under arrest. Appx. Doc 58-1, Exhibits M, N, O, Q. Sergeant Wright argues that under those facts the arrest is lawful because he *thought* Dr. McDonough might escalate the situation and become disorderly due to a verbal encounter with Dr. McDonough twenty-eight (28) days earlier.[6] The Appellee has failed to present this Court with caselaw from any court in the country to support that legal proposition. The past interactions between Sergeant Wright and Dr. McDonough are by statute and precedent, irrelevant.

[6] The Appellee is correct that an individual can be arrested for attempting a crime. But even an attempt is a crime that requires some action. However, an individual cannot be arrested for the main crime because an officer thinks he might complete its sometime in the future.

Additionally, the undisputed facts in the record show there was no danger of escalation by Dr. McDonough. The videos clearly indicate that Dr. McDonough was walking away and leaving the premises until stopped by Sergeant Wright. Appx. Doc 58-1, Exhibits M, N, O, Q.

The Appellant, in his initial brief, pointed to a number of cases that would put a reasonable officer in Sergeant Wright's position on notice that he did not have even arguable probable cause to arrest Dr. McDonough. Among the cases was *Gold v. City of Miami,* 121 F.3d 1442 (11th Cir. 1997), which apparently the Appellee still does not recognize was clearly established law in 2016.[7] In *Gold,* the Plaintiff complained to the police about someone using a handicapped spot. He stated out loud, "police don't do shit." A plainclothes officer in line said, "I think this guy has a problem." Gold repeated that he just didn't think that "…police don't do shit." A couple in line, who heard this commented that they couldn't "… believe they [the police] are doing this." Gold went over and spoke to the couple and then police. He was then arrested for disorderly conduct.

Although this Court held that there were no cases which clearly established that Gold's actions did not constitute disorderly conduct, the opinion continued: "We

[7] In *Alston v. Swarbrick*, 954 F.3d 1312, 1319 (11th Cir. 2020), this Court reaffirmed that by 2011, it was clearly established that words alone cannot support probable cause for disorderly conduct—including profanity regarding police officers. (*Citing Gold v. City of Miami*)

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. *Id.* at 1446.

So now (post *Gold* from 1997), an officer is on notice that he/she would not have probable cause to arrest under similar circumstances. Sergeant Wright should have known that Dr. McDonough's actions, who never raised his voice and only "flipped the bird", were less aggressive in tone and decibels then Gold's. Appx. Doc 58-1, Exhibits M, N, O, Q. No members of the public saw or heard the discussion between Sergeant Wright and Dr. McDonough. Even if they did, the words were not meant to incite a breach of the peace.[8]

This Court is not required to accept Sergeant Wright's description of the facts in a determination as to whether there was arguable probable cause to make an arrest. The Appellee cites *Garcyznski v. Bradshaw*, 573 F.3d 1158, 1167 (11th Cir. 2009), which dealt with the use of excessive force, for the proposition that courts should look at the situation from the perspective of a reasonable officer. However, that does

[8] Dr. McDonough denies saying "fuck you" or touching his genitals. The videos as part of the record confirm that fact. However, even if that were true, they are not material facts and would still not have given Sergeant Wright arguable probable cause to arrest. At a minimum, if the Court feels they are material facts, they are disputed, and a jury should be the final arbiter.

not mean the court must accept the officer's version of the truth. As the court in *Pagano v. Pekrol*, WL 12933749, at *6 (S.D. Fla. July 13, 2020) stated:

> Defendants argue, that for purposes of determining whether probable cause existed, the Court must view the facts from Pekrol's perspective. While that is true, it does not mean that the Court must take Pekrol's version of the facts as true. If the Court were to do that, it would amount to weighing the evidence, which it cannot do on summary judgment.

The Appellee cites *L.J.M. v. State*, 541 So.2d 1321 (Fla. 1st DCA1989), to justify Dr. McDonough's arrest. In that case the defendant approached the police officer to complain about an arrest the night before. He yelled at the officer in a loud and rude manner and even after the officer tried to ignore his remarks he cursed at the officer saying, "Man, you pussy-assed mother fucker." A group of people were watching as this confrontation occurred. The court held that under these circumstances, the words were intended to incite the officer or others to violence. *Id.* at 1322,1323.

The dissent in *Gold* opined that *L.J.M.* did not apply because, as in Dr. McDonough's case, "…there is no evidence in this record that would permit an officer to reasonably conclude that Gold's statements were intended to incite the police officers or anyone else to violence." *Gold* at 982. *See* also *Miller v. State,* 667 So. 2d 325, 328 (Fla. 1st DCA 1995) ("Although appellant's voice was loud and his language may have been offensive, there is nothing in the record to indicate that his conduct incited others to breach the peace or posed an imminent danger to

others.") *K.Y.E. v. State,* 557 So.2d 956 (Fla. 1st DCA 1990), (Defendant's conviction was overturned when he was continually singing "fuck the police" in public.)[9]

The Appellee also points to two Eleventh Circuit cases to support the granting of qualified immunity to Sergeant Wright. Neither case is analogous to Dr. McDonough's arrest. *Brown v. City of Huntsville, Ala.,* 608 F.3d 724, 735 (11th Cir. 2010), involved an arrest for a defendant who refused the police officer's directive to turn down his music. It should be noted however, Alabama law defines disorderly conduct, in part, as someone who makes unreasonable noise, which is not the definition in Florida. Additionally, Dr. McDonough did not refuse to obey any lawful order of Sergeant Wright.

In *Epstein v. Toys-R-Us Delaware, Inc.,* 277 F. Supp. 2d 1266 (S.D. Fla. 2003), *aff'd sub nom. Epstein v. Toys-R-Us Delaware*, 116 F. App'x 241 (11th Cir. 2004), the Plaintiff interrupted the officer's investigation on a number of occasions and failed to obey the officer's lawful request. Despite the ruling, the court did hold that "[w]hile "mere words" or epithets are not sufficient to establish probable cause for a violation of this section, conduct which constitutes more than "mere words" or epithets is actionable." *Id.* at 1272. Dr. McDonough just used "mere words" and

[9] Both *Miller* and *K.Y.E.* were decided after the opinion in *L.J.M*.

gave the officer "the bird". There was no conduct beyond that which could establish arguable probable cause.

Sergeant Wright was on notice that the actions of Dr. McDonough did not amount to disorderly conduct. The District Court failed to follow the law in rendering its order that granted Sergeant Wright qualified immunity. Therefore, this Court should reverse that ruling, grant the Appellant's motion for summary judgment or remand for trial a jury's determination of liability and damages.

C. Carlos Garcia violated James Eric McDonough's Fourth Amendment Rights (Count VI).

The Appellee's analysis of Carlos Garcia's role in the arrest of Dr. McDonough is also incorrect. Although Dr. McDonough was detained by Sergeant Wright, the Fourth Amendment analysis does not end there. In this case there was a two-step process to effectuate the arrest of Dr. McDonough. Since both trespass and disorderly conduct are misdemeanors, once Dr. McDonough was detained, either Sergeant Wright or Sergeant Garcia could have given him a promise to appear pursuant to Rule 3.125 Florida Rules of Criminal Procedure. This would have avoided the necessity of further arrest procedures, including booking Dr. McDonough into the Miami-Dade County Jail system.

Once however, a decision was made to further detain Dr. McDonough, Sergeant Garcia's writing and swearing to the arrest affidavit became an essential part of the arrest. The U.S. Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103, 114

(1975) held "…that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Rule 3.133(a)(3) Florida Rules of Criminal Procedure provides the framework for that determination by requiring, among other documents, a sworn affidavit in order to deprive an individual of his/her liberty. Dr. McDonough could not be held in custody without Sergeant Garcia's sworn arrest form.

Contrary to the Appellee's contention, the Appellant's theory as to the liability of Sergeant Garcia is not based on a failure to intervene. Sergeant Garcia participated in and was indispensable to the arrest. Sergeant Garcia did far more than the officer in *Ratunuman v. Sanchez*, 2010 WL 11602269 (S.D. Fla. Feb. 9, 2010), where the court held the officer could be liable for simply filling out the arrest affidavit.[10] Sergeant Garcia spoke to witnesses and viewed the video provided by the City of Homestead. Appx. Doc 56-7, pp. 15, 28. Although the Appellee is correct that there is no sound in the video, the three views from different perspectives show the *entire* interaction between Dr. McDonough and Sergeant Wright. Appx. Doc 58-1, Exhibits M, N, O. There is no possibility that any reasonable officer would view any of the actions of Dr. McDonough as inciting a breach of the peace.[11]

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[10] As in the facts in *Ratunuman*, Sergeant Garcia wrote and swore to the arrest affidavit after Dr. McDonough was detained by Sergeant Wright.

[11] It does not matter if there was no sound. As mentioned above, even if Dr. McDonough did say "fuck you", it is still not a crime as he did not incite anyone to react to his speech nor were members of the public observing.

Additionally, Sergeant Garcia cannot rely on the fellow officer rule. First of all, he viewed the video of the entire incident and saw what happened. Secondly, Sergeant Wright's version of the incident was insufficient to establish probable cause for the crime. See *C.H.C. v. State*, 988 So. 2d 1145, 1147 (Fla. 2nd DCA 2008). ("Further, the State cannot rely on the "fellow officer rule" as justification for the detention because there is no record evidence that another officer on the scene had the reasonable suspicion necessary to justify the detention.")

Contrary to the Appellee's position, Dr. McDonough was not seized twice, but rather both officers were equal participants in arresting him. The arrest was unlawful and the District Court erred in granting Sergeant Garcia qualified immunity. The Court should reverse the lower court and grant the Appellant's motion for summary judgment.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT PROBABLE CAUSE DEFEATED THE STATE LAW CLAIMS AGAINST THE CITY (COUNTS IV AND VII).

A. The Homestead Police Department arrested Dr. McDonough without probable cause on August 24, 2016 (Count IV).

The City's analysis as to actual probable cause for disorderly conduct is flawed and misleading. They argue two main points in opposition to the Appellant's initial brief. First, that the cases cited do not support Dr. McDonough's position and second, his conduct consisted of more than speech.

Although *Barry v. State,* 934 So.2d 656 (Fla. 2nd DCA 2006) and the other cases relied upon were reversals after convictions, they were overturned because there was insufficient evidence to prove the crime. The holdings then become precedent for courts to determine whether probable cause exists to make an arrest in a similar case. As a matter of fact, this Court has even cited *Barry* as authority in determining whether probable cause for an arrest existed. See *Petithomme v. Cty. of Miami-Dade*, 511 F. App'x 966, 972,973 (11th Cir. 2013); *Alston v. Swarbrick*, 954 F.3d 1312, 1318 (11th Cir. 2020) (citing *Barry* in support of denying qualified immunity to the officers).

As the Appellant has made clear in the section above dealing with the officers' qualified immunity, Dr. McDonough did nothing more than use words before peacefully walking away from Sergeant Wright. The Appellee keeps insisting that Dr. McDonough made a lewd gesture despite the video evidence to the contrary.[12] The cases that the City cites are distinguishable on their facts and inapplicable to Dr. McDonough's arrest.

In *Delaney v. State*, 489 So. 2d 891 (Fla. 1st DCA 1986) the defendant was loud and abusive while continually interrupting the officer who was attempting to conduct an investigation. The defendant responded to the officer's attempts to

[12] Even if he appeared to touch the outside of his clothes in the genitalia area, it is not a material fact and would still not support a finding of probable cause to arrest for disorderly conduct.

subdue him by calling him a "fucking Yankee," He was arrested for disorderly conduct. *C.J.R. v. State*, 429 So. 2d 753 (Fla. 1st DCA 1983), involved a juvenile who was cursing at a police officer and preventing the officer from operating his breathalyzer machine. Finally, in *C.L.B. v. State*, 689 So. 2d 1171 (Fla. 2nd DCA 1997), the delinquency adjudication for disorderly conduct was upheld where the defendant's words and actions actually hindered the officers ability to effectuate an arrest. The juvenile repeatedly came so close to the officer that officer had to push him back and warn him to stay away.

Contrast those cases with *L.A.T. v. State,* 650 So.2d 214 (Fla. 3d DCA 1995), in which a finding of delinquency for disorderly conduct was reversed where the child had yelled and screamed obscenities at police, while a crowd gathered to watch. Dr. McDonough's words were far less egregious than in *L.A.T.* and certainly in the cases cited by the Appellee. Dr. McDonough did not interfere with Sergeant Wright's issuance of the trespass warning. No crowd gathered to observe nor did Dr. McDonough attempt to summon a crowd on his behalf. He spoke to Sergeant Wright, flipped him "the bird" and walked away. There was no probable cause to arrest Dr. McDonough and the Court should reverse the District Court and grant the Appellant's Motion for Summary Judgment as to this count.

B The Homestead Police Department arrested Dr. McDonough without probable cause on September 1, 2016 (Count VII).

The posting on the website LEOAffairs by Dr. McDonough was not violative of the cyberstalking statute, Florida Statute §784.048. The City in its brief gave a number of reasons why this Court should affirm the lower court, however its arguments are not supported by the facts or the law.

Initially, the City relies on *Jeter v. McKeithen*, 2015 WL 3747690, at *5, (N.D. Fla. June 15, 2015), to support the theory that the posts meet the threshold of cyberstalking. However, in *Jeter* the issue was whether the officer was entitled to qualified immunity for the arrest of the plaintiff. On page *6, the court specifically did not reach the issue of actual probable cause. "I need not determine whether Romans had actual probable cause to make the arrest, as that would needlessly require me to decide the correct interpretation of the statute." The issue in this count is whether the City had probable cause to arrest, not whether Detective Mata is entitled to qualified immunity.[13]

The City continues to argue that the finding of probable cause is supported by the fact that Detective Mata spoke to the Miami-Dade State Attorney before the arrest and Judge Mindy Glazer found probable cause at the initial bond hearing. However, the City has not provided any caselaw that holds that those facts are

[13] The fact that the Appellant did not challenge the lower court's dismissal of the count alleging false arrest against Detective Mata individually, is irrelevant. There were many reasons for that decision and it should play no part in this Court's ruling.

relevant in a determination of probable cause.[14] The City is attempting to apply the qualified immunity analysis from *Poulakis v. Rogers*, 341 F. App'x 523 (11th Cir. 2009) to a probable cause determination under Florida State law. The issue in this count of the complaint is not whether a reasonable officer would have arrested Dr. McDonough, but whether there was actual probable cause. The Court must make its own independent judgment regardless of the State Attorney's or Judge Glazer's opinion.[15]

The post itself was a legitimate comment on the Officer Monaco's public position concerning body worn cameras. It was constitutionally protected despite some comments on Monaco's character and truthfulness. *See David v. Textor*, 189 So. 3d 871 (Fla. 4th DCA 2016). ("Section 784.048 "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"). Furthermore, none of the words in the post can be considered fighting words or threats. *See Virginia v. Black,* 538 U.S. 343, 359 (2003). ("True threats encompass those statements where

[14] The State Attorney chose not to prosecute the case as they determined Dr. McDonough's behavior did not amount to stalking. Appx. Doc. 69-2, pg. 2.
[15] The appellant presented in his initial brief, *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), which held that a Judge's prior determination of probable cause is not relevant.

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.")

The City claims Officer Monaco suffered substantial emotional distress, yet offers no record evidence other than his self-serving declaration. The City maintains that element is present because Officer Monaco, upon seeing the post, reported it to the police. However, for any cyberstalking crime to be charged, it would require the complainant to file a report with the police. Obviously, that fact alone does not mean that every victim who files a report with the police has suffered substantial emotional distress. It is not sufficient to support a finding of probable cause.

The City, as part of its argument, alleges that there is no record evidence of Officer Monaco making his address available to all on the internet. In his affidavit, however, Dr. McDonough clearly states that there is a Youtube video that shows Officer Monaco speaking at a Homestead City Council meeting, where he gives his home address. Appx. Doc. 56-1, pg. 3, line 23 (b). Dr. McDonough also refers to that Youtube video to call attention to Officer Monaco's criticism of Kim Hill, an activist. He points out that Monaco may have been on the clock and working for the City when he addressed the Council. Those are legitimate and constitutionally protected comments under the cyberstalking statute.

Finally, the City attempts to distinguish *Krapacs v. Bacchus*, 301 So. 3d 976 (Fla. 4th DCA 2020) by arguing that the tags in that case could be immediately

"untagged", whereas the comments Dr. McDonough posted are permanent. However, that was not a relevant fact in the holding in the case. The court in dismissing Bacchus' petition for a cyberstalking injunction, held that Krapacs' action of retagging was not a "course of conduct" as required by the statute. "Krapacs' act of retagging Bacchus in her social media posts for four hours constitutes one instance of qualifying conduct under the statute." *Id.* at 979. Similarly, Dr. McDonough's posts were continuous and occurred within fifteen (15) minutes. It is only one instance of alleged conduct and since two are required by statute, the posts cannot be considered a course of conduct. The City has cited no cases to the contrary.

As the posts were constitutionally protected and not a course of conduct, Detective Mata did not have probable cause to arrest the Appellant for cyberstalking. Therefore, the Court should reverse the District Court and grant Dr. McDonough's motion for summary judgment or remand for trial on liability and damages.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY AS TO THE *MONELL* CLAIM (COUNT II).

The City has offered two reasons for this Court to affirm the District Court granting the Appellee's motion for summary judgment. First, there was no constitutional violation and second, Dr. McDonough failed to establish a final policymaker claim. The analysis by the City is incorrect.

A. Appellant has shown there was a constitutional violation.

The Appellee has failed to provide any caselaw to this Court that would support the trespass ban placed on Dr. McDonough. In attempting to distinguish *Brown v. City of Jacksonville*, *Fla.*, 2006 WL 385085 (M.D. Fla. Feb. 17, 2006), the City focuses on the fact that Brown was banned for seven meetings while Dr. McDonough was not banned for a specific number of meetings. In fact, at the time the ban was issued, it was for an indefinite period of time, as Dr. McDonough was not told when he would be allowed to return. Regardless, that difference is constitutionally irrelevant.

Noticeably, the City does not even attempt to distinguish or discuss *Walsh v. Enge*, 154 F. Supp. 3d 1113 (D. Or. 2015), as that case appears to be directly analogous to this case. Obviously, neither *Brown* nor *Walsh* are binding precedent that this Court must follow. However, the reasoning applied in those cases should be persuasive in evaluating Dr. McDonough's claims. These are the only cases presented by either party that are directly on point to the City's trespass warning. They clearly hold that the trespass warning imposed on Dr. McDonough, for however long a time period, was unconstitutional.

To support the warning, the City cites *Charudattan v. Darnell*, 510 F. Supp. 3d 1101 (N.D. Fla.), *aff'd*, 834 F. App'x 477 (11th Cir. 2020), where posts by the plaintiff on the Sheriff's Facebook page were deleted and he was then banned from

making further comments on the page. The court found his behavior to be disruptive when he *continually* violated the content policy of the Facebook page in question.[16]

To the contrary, Dr. McDonough did not violate any of Council's content rules as the public comments section was open to a speaker on any topic. The *Charudattan* court pointed out that the plaintiff still had alternative channels of communication in that he could have created a different Facebook page and still post on the Sheriff's Facebook page. The City submits that similarly, there were alternatives that Dr. McDonough could have availed himself of, such as emails, letters, or phone calls to the appropriate officials. But as the court said in *Brown* "…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." *Brown* at *4.

B. Appellant established a final policymaker claim.

Pursuant to *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), liability may be imposed on a municipality for a single decision made by an officer with final policy making authority. Chief Alexander Rolle was such an official and his

[16] Although, Dr. McDonough does not dispute that a disruptive speaker can be removed from a meeting, the issue is whether that individual can then be banned from speaking at subsequent meetings and not have it be violative of his First Amendment rights.

decision to order Dr. McDonough trespassed was an unconstitutional policy. This was not, as the Appellee argues, an individual officer making a decision to enforce the law. This was a policy set down by the Chief after the City officials met and discussed what should happen were Dr. McDonough to return to speak at the Council meeting. The Chief, as final policy maker, determined that McDonough should be denied entrance. This was just not simply enforcing a Florida statute, but rather creating a policy on how to punish this individual.

Chief Rolle as policy maker, knew or should have known that the trespass warning would infringe on Dr. McDonough's constitutional rights. To punish Dr. McDonough for his behavior at the prior meeting, Rolle determined that he should be banned from City Hall and prohibited from speaking to the Council on August 24th and beyond. This was not a decision to arrest, but rather a policy to prohibit Dr. McDonough from speaking in front of the City Council.[17] The Appellant has shown that the policy was the moving force behind the constitutional violation.

The District Court's decision as to the claim pursuant to *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978) should be reversed and Dr. McDonough's motion granted.

[17] Dr. McDonough was not arrested when he first encountered Sergeant Wright, but only later as he was walking away.

CONCLUSION

For the reasons stated above, this Court should reverse the lower court's order in its entirety and grant Dr. McDonough's motion for summary judgment.[18] In the alternative, this Court should remand for a jury to determine the facts, liability and damages, if any.

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 5,821 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: August 31, 2022

/s/Alan Greenstein
Alan Greenstein

[18] Except for Count I, as the District Court's order on that count is not part of this appeal.

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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*
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