In the United States Court of Appeals
For the Eleventh Circuit

CASE NO. 22-11421-J

JAMES ERIC MCDONOUGH,

Appellant,

v.

CARLOS GARCIA, GARLAND WRIGHT AND THE CITY OF HOMESTEAD,

Appellees.

ANSWER BRIEF OF APPELLEES, CARLOS GARCIA, GARLAND WRIGHT AND THE CITY OF HOMESTEAD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-CV-21986-FAM

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McDonough v. City of Homestead
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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

A. Interested Persons

Appellees, the City of Homestead, Carlos Garcia and Garland Wright, respectfully submit this list of persons or entities that may have an interest in the outcome of this review:

Appellant (and its currently known principals or other affiliated persons)

1. James Eric McDonough.

Appellees

2. City of Homestead.
3. Carlos Garcia.
4. Garland Wright.

Trial Judge, Attorneys, and Law Firms

5. Hon. Federico A. Moreno (|District Judge).
6. Weiss Serota Helfman Cole & Bierman, P.L. (Counsel for Appellees, City of Homestead, Carlos Garcia and Garland Wright).
7. Edward G. Guedes, Esq. (Counsel for Appellees, City of Homestead, Carlos Garcia and Garland Wright).

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
(Continued)

8. Matthew H. Mandel, Esq. (Counsel for Appellees, City of Homestead, Carlos Garcia and Garland Wright).
9. Anne R. Flanigan, Esq. Counsel for Appellees, City of Homestead, Carlos Garcia and Garland Wright).
10. Alan Greenstein, Esq. (Counsel for Appellant, James Eric McDonough).
11. Alan Greenstein, P.A. (Counsel for Appellant, James Eric McDonough).

B. Corporate Disclosure Statement

Appellee, City of Homestead, is a municipal corporation of the State of Florida, and as a result, has no parent company, subsidiary, or affiliate company that has issued shares to the public.

/s/ *Anne R. Flanigan*
Anne R. Flanigan

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with Eleventh Circuit Rule 28-1, Appellees submit that the issues are adequately set forth in the record below and in the briefs of the parties and the decision-making process would not be significantly aided by oral argument.

ABBREVIATIONS AND TERMS

For purposes of this answer brief, the following abbreviations and terms will be used:

1. The initial brief will be referenced as "I.B. __"

2. Appellee, City of Homestead, Florida, will be referred to as the "City."

3. Appellee, Carlos Garcia will be referred to as "Sgt. Garcia."

4. Appellee, Garland Wright will be referred to as "Captain Wright."

5. The summary judgment order (ECF No. 95) at issue in this appeal will be cited as "Order __."

6. The remaining district court record will be cited as "ECF No. __."

STATEMENT OF JURISDICTION

The district court had federal-question jurisdiction over Appellant's claims arising under 42 U.S.C. § 1983 and supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over his state law claims against the City.

This Court has jurisdiction to review the district court's final order of dismissal with prejudice, pursuant to 28 U.S.C. § 1291. The final order dismissing the action was rendered March 30, 2022 (ECF No. 96), and the Notice of Appeal was timely filed on April 28, 2022 (ECF No. 100).

STATEMENT OF THE ISSUES

Appellees take exception only to Issue Nos. 3 and 5[1] in Appellant's Initial Brief to the extent that Appellant misleadingly indicates the trespass warning was "indefinite." Appellees contend the trespass warning issued to Appellant was not indefinite, as he was instructed to write a letter to return. ECF No. 58, Plaintiff's Exhibit Q, 0:31-0:40.[2]

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[1] Appellant's Statement of Issues on Appeal omits an issue number 4.

[2] ECF No. 58 is a conventionally-filed thumb drive containing four video files (Exhibits M, N, O, and P).

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS.

Appellant initiated this action in the Miami-Dade Circuit Court on March 22, 2019, in which he alleged nine causes of action under both state law and 42 U.S.C. § 1983. His action was initially asserted against Appellees, as well as City police officer David Mata ("Det. Mata") and retired City police officer John Monaco. Appellees and Det. Mata timely removed the action on the basis of federal question. ECF No. 1. The district court dismissed defendant, John Monaco *sua sponte*, following Appellant's failure to timely serve him. ECF No. 17.

Appellees and Det. Mata moved to dismiss the initial complaint, and following a hearing on the motion, the district court granted the motion with leave to amend the pleading. ECF No. 22. Upon the filing of the first amended complaint, Appellees and Det. Mata filed a second motion to dismiss. ECF No. 29. The district court granted the motion in part, dismissing seven of Appellant's fourteen causes of action. ECF No. 37. Notably, the district court determined that Det. Mata was entitled to qualified immunity as to the First and Fourth Amendment claims against him, which arose from Appellant's September 1, 2016 arrest. ECF No. 37, at 27-29. Appellant does not challenge that ruling here.

Appellant then amended his pleading a third time, again asserting section 1983 claims against Appellees, as well as state law false arrest claims against the City. ECF No. 38. Specifically, he asserted the following claims: a First Amendment claim against Captain Wright based on events occurring on July 27, 2016 (Count I); a First Amendment claim against the City (Count II) and Captain

Wright (Count III) based on events occurring on August 24, 2016; two state law false arrest claims against the City—one for Appellant's August 24, 2016 arrest (Count IV) and the other for the arrest on September 1, 2016 (Count VII); and Fourth Amendment claims for unlawful seizure against Captain Wright (Count V) and Sgt. Garcia (Count VI), also based on Appellant's August 24, 2016 arrest. *Id*.

Following discovery, Appellant and Appellees filed cross-motions for summary judgment. ECF Nos. 55, 65. On March 31, 2022, the district court granted Appellees' motion in full, denied Appellant's motion, and entered final judgment in favor of the Appellees. *See* Order, ECF Nos, 95, 96. Appellant filed a timely notice appealing the summary judgment order and final judgment (with the exception of the district court's ruling as to Count I, a First Amendment claim against Captain Wright). ECF No. 100.

II. STATEMENT OF THE FACTS.

A. The precipitating events of July 27, 2016.

During City Council meetings, there is a public comment portion during which members of the public may address the Council for up to three minutes. ECF No. 56-6; ECF No. 64, ¶ 2. The public comment portion of each meeting is governed by rules of decorum, the validity of which Appellant did not challenge below. ECF No. 56-6; see generally, ECF No. 38. Since January 2015, Appellant has regularly attended City Council meetings and, between 2015 and 2017, has address the City Council approximately 12 to 16 times (and continues to do so). ECF No. 64-2, 36:8-38:16.

On July 27, 2016, Appellant spoke at a City Council meeting during the public comment portion of the meeting. ECF No. 94.[3] At that meeting, Captain Wright served as Sergeant-at-Arms and was, therefore, responsible for the enforcement of the City's Rules of Decorum, including the removal of disruptive or unruly individuals. ECF No 64-2, 73:3-7; ECF No. 56-6. At the conclusion of Appellant's statements, he ended with the following statement directed to Councilman Maldonado (as well as a physical gesture towards him):

> The last point I'd like to hit off with is, Mr. Maldonado, you know I'd appreciate if you got something to say to me, you say it to my face. You don't have to talk about it behind my back in public and talk to other people. I'd really appreciate that.

ECF No. 94, 0:20-2:50.

In Captain Wright's experience as a law enforcement officer, which includes sixteen years with the City (including time with the Crime Suppression Team) and four years as a corrections officer overseeing prisoners in custody for violent threats and acts, he perceived Appellant's challenge to Councilman Maldonado as a threat or challenge for a physical confrontation. ECF No. 64-4, ¶¶ 2-7. Captain Wright has personally observed or investigated violent confrontations that were immediately preceded by a challenge for a statement "to be made to [one's] face." *Id.*, ¶ 5. In this particular instance, based on Appellant's tone, gestures, and

[3] ECF No. 94 is a conventionally-filed thumb drive containing one cell-phone video (recorded by Appellant). This thumb drive was re-filed at the request of the district court and is the same video previously filed conventionally at ECF No. 62.

statement, Captain Wright perceived his comment as a direct threat or physical challenge to towards Councilman Maldonado and a violation of the Rules of Decorum. ECF No. 56-12, 19:12-20:2, 22:11-17; ECF No. 56-6; ECF No. 64-4, ¶ 7. Accordingly, Captain Wright approached Appellant at the podium and asked him to leave the meeting, just as Appellant was finishing his comments and stepping away from the podium. ECF No. 94, 0:20-2:50; ECF No. 64-4, ¶¶ 8-9.

Captain Wright then escorted out of the Council Chamber, while Appellant filmed on his cellphone and shouted, "I am going to sue the shit out of you dumb ass." ECF No. 94, 3:08-3:13. Several individuals sitting in the Council Chamber can be seen turning around to watch McDonough as he yelled at Captain Wright while exiting. *Id.*; ECF No. 56-12, 71:1-72:15. Appellant also shouted, "Now we got Homestead police officers again violating the First Amendment rights because they are fucking idiots and they don't know shit. Absolutely ridiculous." ECF No. 94, 3:13-30. Captain Wright did not issue a trespass warning to Appellant on July 27, 2016. *See generally*, ECF No. 94; ECF No. 56-12, 26:11-13. Appellant's comments and subsequent removal were captured on video (both via the City's public recording system and through Appellant's own cell phone video), which the district court reviewed at the summary judgment phase. ECF No. 58, Exh. P; ECF No. 62; ECF No. 94*; see also* Order, 3.

B. The August 24, 2016, trespass warning and arrest.

Following Appellant's conduct when departing the July 27, 2016 City Council meeting, Captain DeJohn, a member of the City's police command staff,

inquired with the Miami-Dade State Attorney's Office ("SAO") whether an officer may issue a trespass warning to an individual when that person attempts to return to the premises and after conduct meriting the warning has already occurred. ECF No. 64-6, Interrogatory Answers 14-15. Captain DeJohn relayed Appellant's behavior at the July 27, 2016 City Council meeting to the SAO, who advised that the City could issue a trespass warning after the fact. *Id*. Section 17-4 of the City Code of Ordinances makes trespassing or entering City property without the express or implied consent of the City unlawful. ECF No. 64-5. Additionally, police officers have the authority "to preserve order and maintain the peace and dignity of the [C]ity, and to make arrests of offenders against the ordinances and [the City Code,]" without prior approval or ratification of any department heads. ECF No. 64-7.

After Captain DeJohn's consultation with the SAO, the decision was made, based on Appellant's behavior on July 27, 2016, to issue a trespass warning to him upon his return to City Hall. ECF No. 64-6, Interrogatory Answers 14-15; ECF No. 56-12, 28:22-30:16, 73:1-74:1. This decision was based on his perceived threat to Councilman Maldonado and his actions (which included disruptive behavior and cursing) while exiting the City Council Chamber. *Id*. After the decision was made to trespass Appellant, Chief Rolle was informed of the decision, prior to the August 24, 2016 City Council Meeting, that Appellant was going to be trespassed based upon his behavior at the July 27, 2016 meeting and after consultation with the SAO. ECF No. 56-12, 28:22-29:23, 73:1-74:1; ECF No. 56-8, 22:2-24:16.

Appellant returned to City Hall on August 24, 2016. ECF No. 64-2, 149:2-5. As he approached the City Hall building, he began recording on his cell phone. ECF No. 64-2, 150:22-25; ECF No. 58, Exh. Q, 0:00-0:30. When Appellant entered City Hall, he was approached by Captain Wright, who directed Appellant outside. ECF No. 64-2, 155:2-6; ECF No. 58, Exh. Q, 0:00-0:30. Once outside, Captain Wright verbally issued Appellant a trespass warning for City Hall, based on his behavior at the July 27, 2016 City Council meeting and in reliance on the advice of the SAO. ECF No. 64-2, 155:22-25; ECF No. 56-12, 36:3-5, 73:19-74:13, ECF No. 58, Exh. Q, 0:31-0:40. Captain Wright also informed Appellant that he could "get permission to come back" by writing a letter.[4] ECF No. 58, Exh. Q, 0:41-0:47. At no point while he was speaking with Captain Wright was Appellant threatened with arrest or other adverse action if he were to come back to City Hall. *Id.*

Appellant video recorded the interaction with Captain Wright, from the time he approached City Hall until he began walking away from Captain Wright. ECF No. 58, Exh. Q. As Appellant walked away from Captain Wright, he shouted, "I'm leaving buddy, bye-bye" and gave him the middle finger. ECF No. 64-2, 160:21-24; ECF No. 58, Exh. Q, 0:50-1:07. Captain Wright also observed Appellant appear to stop and grab his genital area, while giving Captain Wright the finger. ECF No. 56-12, 50:20-23. Captain Wright also heard Appellant say, "Fuck you."

[4] Appellant never wrote a letter to obtain permission to return, but nonetheless resumed attending City Council meetings in December 2016. ECF No. 64-3, 241:7-242:7.

Id., at 51:13-17. At this same time, Councilman John Burgess was walking into City Hall, while two women were exiting. ECF No. 64-3, 22:14-23; 212:2-3. Although Appellant disputed below whether he said "fuck you" or grabbed his genitalia, Appellant did not dispute that—from Captain Wright's perspective—it may have appeared that Appellant stopped and grabbed his genitalia. ECF No. 64-3, 214:8-17.

Based on Captain Wright's observations and the totality of the circumstances, Captain Wright believed that Appellant's behavior was corrupting the public morals and public decency in front of City Hall and affecting the peace of those around him, namely, people attending the City Council meeting. ECF No. 56-12, 54:9-13, 55:4-19. Accordingly, Captain Wright made the determination to arrest Appellant for disorderly conduct. ECF No. 56-12, 54:7-13. Captain Wright then advised Appellant to stop and place his hands behind his back. ECF No. 64-2, 165:25-166:2. Officer John Monaco, who was already at City Hall, placed Appellant in handcuffs, and Sgt. Eric Rayez transported him to the Homestead Police Department. ECF No. 64-2, 177:6-16, 181:3-8; ECF No. 56-7, 15:5-9; ECF No. 56-12, 56:6-7.

At the time Appellant came into contact with Sgt. Garcia (who was inside City Hall when the arrest took place), Appellant had already been arrested and was in custody. ECF No. 64-2, 179:24-180:1, 180:13-22, 182:5-8; ECF No. 56-7, 7:16-9:4. Sgt. Garcia did not participate in placing Appellant under arrest, and Appellant admitted that Sgt. Garcia never even touched him. ECF No. 64-2, 180:13-22,

181:6-8, ECF No. 56-7, 14:8-11. Sgt. Garcia did state to Appellant, after he was already in custody, that Appellant was also under arrest for trespass. ECF No. 64-2, 179:3-16. Sgt. Garcia authored the August 24, 2016 arrest report, as he was then the more junior officer on scene. ECF No. 56-7, 15:9-13, 31:1-4. However, Sgt. Garcia did not witness the entirety of the events on August 24, 2016, and relied on information relayed by Captain Wright and Officer Monaco to complete the arrest reports. ECF No. 64-2, 177:7-9, 179:17-180:1; ECF No. 56-7, 12:8-14, 15:9-19.

C. The September 1, 2016 arrest.

After Appellant's arrest on August 24, 2016, he posted multiple messages regarding Officer Monaco on a policy blog website called "leoaffairs.com." ECF No. 64-3, 244:3-20. Appellant's posts about Officer Monaco including the following:

> Step up to the plate, big boy. Coward down and run like a sliptail we are expecting you to be.
>
> Also, I will be blasting your address, so thanks for providing that.

ECF No. 64-3, 248:15-22, 250:4-11; ECF No. 64-8, at 3.

As a result of these online posts, Officer Monaco became concerned for the safety of himself and his family and reported Appellant's comments to the City's Internal Affairs Department. ECF No. 64-9, 15:16-19. Det. Mata conducted an investigation regarding Officer Monaco's complaints, which included subpoenas to leoaffairs.com to confirm Appellant's authorship; controlled calls between an

undercover officer and Appellant about Officer Monaco; and conversations with the SAO. ECF No. 64-8, at 7; ECF No. 64-9, 30:2-24

Specifically, prior to Appellant's September 1, 2016 arrest, Det. Mata spoke with Miami-Dade Assistant State Attorney Hedrick and advised him of the information learned during the course of his investigation. ECF No. 64-8, at 7; ECF No. 64-9, 30:2-6. Based on that information, ASA Hedrick advised Det. Mata that probable cause existed to arrest Appellant. ECF No. 64-8, at 7; ECF No. 64-9, 30:2-6. Accordingly, Appellant was arrested on September 1, 2016 for cyberstalking. ECF No. 64-8. On September 2, 2016, Miami-Dade Circuit Court Judge Mindy Glazer also determined during Appellant's bond hearing that probable cause existed for his arrest for cyberstalking. ECF No. 64-10, 11:16-22.

III. STATEMENT OF THE STANDARD OF REVIEW.

This Court reviews *de novo* the granting of a summary judgment, viewing all facts in the light most favorable to the non-moving party. *See Pelaez v. Gov't Emps. Ins. Co.*, 13 F.4th 1243, 1249 (11th Cir. 2021).[5]

SUMMARY OF ARGUMENT

The judgment below should be affirmed for multiple reasons. *First*, Captain Wright is entitled to qualified immunity for issuing the trespass warning and subsequently arresting Appellant on August 24, 2016. Similarly, Sgt. Garcia is also entitled to qualified immunity relating to Appellant's August 24, 2016 arrest.

[5] Appellant did not below, nor does he here, assert that any factual dispute precluded summary judgment in favor of Appellees.

Captain Wright had arguable probable cause to both issue the trespass warning and to subsequently arrest Appellant, who was already in custody at the time Sgt. Garcia arrived on scene (fatal to the Fourth Amendment claim against him). Neither officer, moreover, violated clearly established law. *Second*, the record reflects that the City's officers had probable cause to arrest Appellant on both August 24 and September 1, 2016, meriting summary judgment as to the state law claims against the City. *Third*, the district court correctly determined that no underlying constitutional violation occurred, thus foreclosing Appellant's *Monell* claim against the City based on the trespass warning and its purported effect on his First Amendment rights. Alternatively, affirmance is warranted because any purported constitutional violation arising from the trespass warning did not result from an official policy, custom or practice of the City.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY AS TO THE FEDERAL CLAIMS (COUNTS III, V AND VI).[6]

A. The qualified immunity standard.

"Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Hope v. Pelzer*, 536 U.S. 730, 752 (2002) (internal

[6] The district court found that Captain Wright was entitled to qualified immunity as to Count I, a claim arising from Appellant's removal from the July 27, 2016 City Council meeting. Mr. McDonough is not challenging that determination on appeal. *See* I.B. 10 n.3.

quotation marks omitted). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation…." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002).

To be entitled to qualified immunity, the defendant must first show that he was acting within the scope of his discretionary authority when the alleged wrongful acts occurred. *Id*. Once the defendant meets this burden, the burden shifts to the plaintiff to establish both that (1) a constitutional right was violated, and (2) the constitutional right was clearly established at the time the official acted. *Id*. Clearly established law "should not be defined at a 'high level of generality,'" but "must be 'particularized' to the facts of the case." *White v. Pauley*, 137 S. Ct. 548, 551-52 (2017) (quoting *Ashcroft v. al-Kidd*, 63 U.S. 731, 742 (2011) and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). If the plaintiff cannot establish either element, qualified immunity is appropriate. *Pearson v. Callahan*, 555 U.S. 223, 226 (2009).

In this case, it is undisputed (and Appellant does not contest otherwise) that the officers were acting within the scope of their discretionary authority during the alleged interactions with him. *See Lee*, 284 F.3d at 1194. Thus, Appellant must show that the Officers violated clearly established law.

"In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 827 n.4 (11th Cir. 1997) (citing

Hamilton v. Cannon, 80 F.3d 1525, 1532 n. 7 (11th Cir. 1996)). Accordingly, Appellant must point to a precedent from the U.S. Supreme Court, this Court, or the Florida Supreme Court "where an officer acting under similar circumstances was held to have violated the [First], Fourth[, or Fourteenth] Amendment." *White*, 137 S. Ct. at 552. Moreover, the question of clearly established law "turns on the law at the time of the incident," [and] "the district court must consider the law 'in light of the specific context of the case, not as a broad general proposition….'" *Merricks v. Adkisson*, 785 F.3d 553, 559 (11th Cir. 2015) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Appellant, therefore, must identify on-point precedent prior to the incidents in question, which he has not done either below or here.. Therefore, the Captain Wright and Sgt. Garcia are entitled to qualified immunity as to the claims against them.

B. The District Court correctly determined that Captain Wright did not violate clearly established law by issuing a trespass to Appellant on August 24, 2016, and is therefore entitled to qualified immunity as to Count III.

As discussed, Section III.B, *infra*, Appellant does not dispute that City Hall and City Council meetings are limited public forums. *See* I.B. 51; *Bloedorn v. Grube*, 631 F.3d 1218, 13280 (11th Cir. 2011) (stating property is not an open public forum simply because it is owned by the government). Appellant also does not (and cannot) dispute the reason Captain Wright issued the trespass warning: his comments *and his behavior* at the prior City Council meeting *after* he concluded his comments, including his cursing in Council Chambers and outside in

the lobby.[7] I.B. 40; ECF No. 64-6, Interrogatory Answers 14-15; ECF No. 56-12, 28:22-30:16, 73:1-74:1; ECF No. 94, 3:08-3:30. Rather, Appellant argues that Captain Wright is not entitled to qualified immunity because the trespass warning was a prior restraint on Appellant's speech. This argument fails, as Appellant failed to meet his burden below (and continues to do so here) to show that Captain Wright violated a clearly established right at the time of the alleged violation.

First, like his argument as to the *Monell* claim against the City (I.B. 41), Appellant asserts "there was no evidence he had ever caused any type of disturbance [at a City Council meetings]." This is simply a misstatement of the record, and Appellant cannot dispute his behavior, which is clearly captured on video. Appellant threatened a councilman during his public comments and violated the Rules of Decorum. ECF No. 56-12, 19:12-20:2, 22:11-17; ECF No. 56-6; ECF No. 64-4, ¶ 7. Then, as Captain Wright escorted Appellant out of the Council Chamber, Appellant shouted, "I am going to sue the shit out of you dumb ass." ECF No. 94, 3:08-3:13. Several individuals sitting in the Council Chambers can be seen on the video turning around to watch McDonough as he yelled at Captain

[7] This warning did not trespass Appellant from City Council meetings; it was a trespass warning for City Hall. ECF No. 64-2, 155:22-25; ECF No. 56-12, 36:3-5, 73:19-74:13, ECF No. 58, Exh. Q, 0:31-0:40; *see Dyer v. Atlanta Indep. Sch. Sys.*, 426 F. Supp. 3d 1350, 1362 (N.D. Ga. 2019), *aff'd,* 852 F. App'x 397 (11th Cir. 2021) (acknowledging that access to public property may be restricted); *Sheets v. City of Punta Gorda, Fla.*, 415 F. Supp. 3d 1115, 1128 (M.D. Fla. 2019) ("Put simply, neither [the plaintiff] nor any other person has an absolute right to visit City Hall[,]" and finding the plaintiff's one-year ban from the city hall was reasonable in time and geographic scope).

Wright while exiting. *Id.*; ECF No. 56-12, 71:1-72:15. Appellant also shouted and cursed, "Now we got Homestead police officers again violating the First Amendment rights because they are fucking idiots and they don't know shit. Absolutely ridiculous." ECF No. 94, 3:13-30. Appellant offers no argument that this disruptive conduct *after* he was done speaking was protected by the First Amendment. Significantly, Appellant does ***not*** challenge the district court's determination that Captain Wright is entitled to qualified immunity as to the purported First Amendment violation in Count I, when Captain Wright ordered Appellant to leave the July 27, 2016 City Council meeting. *See* I.B. 3 n. 10.

Second, Appellant fails to cite any binding authority that Captain Wright's trespass warning violated clearly established law. He cites no U.S. Supreme Court, Eleventh Circuit or Florida Supreme Court precedent supporting that Captain Wright violated clearly established law "in light of the specific context of the case[.]" *Norris v. Hicks*, No. 20-11460, 2021 WL 1783114, at *5 (11th Cir. May 5, 2021) (defining clearly established law for the qualified immunity analysis). Moreover, this Court has explicitly noted, "It is particularly difficult to overcome the qualified immunity defenses in the First Amendment context." *Gaines v. Wardynski*, 871 F.3d 1203, 1210 (11th Cir. 2017); *see also Dartland v. Metropolitan Dade Cty.*, 866 F.2d 1321, 1323 (11th Cir. 1989) (noting that only "the extraordinary case" will survive qualified immunity in the First Amendment context).

"The term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *Weaver v. Bonner*, 309 F.3d 1312, 1323 (11th Cir. 2002) (emphasis in original). Appellant cites no precedent in which a prior restraint theory has been applied to a First Amendment claim against a government official *individually*. Moreover, Appellant claims—without support—that Captain Wright left no alternative methods for him to address the City Council, other ranking officials of the City, or members of the public in person. Appellant, though, was *not* banned from communicating with City Council members or City officials via email, telephone, or other communication methods; he was simply trespassed from City Hall *and* informed how he could regain access. ECF No. 64-6, Interrogatory Answer 14-15; ECF No. 56-12, 28:22-30:16, 73:1-74:1; ECF No. 58, Exh. Q, 0:41-0:47; *Cf. Sheets*, 415 F. Supp. 3d at 1128 (finding the plaintiff's one-year trespass ban from city hall was reasonable in time and geographic scope).

Indeed, Appellant does not dispute that Captain Wright, as a law enforcement officer, had the authority to issue a trespass warning under both the Florida statutes and the City's Code of Ordinances. *See* § 810.08, Fla. Stat.; § 17-4, City Code of Ordinances. As Appellant correctly points out, the City Code does not have a procedure to challenge a trespass (nor do the Florida Statutes). *See id.*; I.B. 42. Thus, nothing in codified law would have placed Captain Wright on notice that Appellant even needed to be given a procedure to regain admission to City

Hall, though Captain Wright did supply one.[8] *See, e.g., Cooper v. Dillon*, 402 F.3d 1208, 1220 (11th Cir. 2005) (finding official was entitled to qualified immunity because the unlawfulness of the statute which he was enforcing had not been clearly established).

Appellant's attempt to distinguish the district court's reliance on *Catron* and *Bloedorn* fails. His argument not only misstates the facts of *Catron*, but also is an obfuscation of Appellant's lack of clearly established law. Specifically, Appellant claims that *Catron* "did not involve the First Amendment[.]" I.B. 44. This statement is wrong, as *Catron* explicitly addressed a First Amendment overbreadth challenge to a trespass ordinance. This Court held that the plaintiffs failed to state a claim "for the extraordinarily rare overbreadth invalidation" they sought. 658 F.3d at 1270. As for *Bloedorn*, the district court cited the decision simply for the proposition that the First Amendment "does not guarantee access to property just because it is owned by the government[,]" which Appellant concedes. Order, at 18 (citing 631 F.3d at 1230).

Finally, although *Poulakis v. Rogers*, 341 F. App'x 523 (11th Cir. 2009), addressed qualified immunity in the context of the Fourth Amendment, Appellant

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[8] To the extent Appellant challenges the adequacy of the trespass warning on appeal here, this argument is a red herring. Such a challenge is more appropriately characterized as a procedural due process claim, which Appellant did not raise below. For example, in *Catron v. City of St. Petersburg*, upon which Appellant heavily relies (*see* I.B. 38-39, 44), the challenge to a trespass ordinance's procedures to contest a trespass warning was raised as a procedural due process challenge, not a First Amendment claim. 658 F.3d 1260, 1268-69 (11th Cir. 2011).

posits no authority or even a legitimate rationale for why the reasoning of *Poulakis* is not also applicable to qualified immunity in the First Amendment context. I.B. 45-47. As quoted in the district court's order, "As a practical matter, it is altogether consistent with the totality of the circumstances analysis to consider pre-arrest consultation and advice of a district attorney as being one circumstance contributing to the objective reasonableness of an officer's conduct." Order, at 19 (quoting *Poulakis*, 341 F. App'x at 533)). Indeed, the rationale of *Poulakis* in the context of qualified immunity is clear and easily applied here: police officers should be encouraged to obtain legal advice that may prevent unconstitutional actions, whether it be a trespass warning after the conduct had already occurred (as here) or an actual arrest.

Appellant's argument that the record lacked sufficient evidence that Captain Wright reasonably relied on the SAO's advice also ignores the record evidence. The parties engaged in extensive discovery below, and the district court was presented with the deposition transcripts of former City Manager George Gretsas, Captain DeJohn, and Captain Wright (who was deposed multiple times), as well as Defendants' Interrogatory Answers, all of which addressed the SAO's advice. *See* ECF Nos. 56-2, 65-4, 56-8, 56-11, 56-12, 64-6, 69-1. Captain DeJohn testified that he presented Appellant's actions and behavior on July 27, 2016 to the SAO. ECF No. 69-1, 10:12-20. The SAO confirmed that a basis existed to issue a trespass warning to Appellant, based on Plaintiff's behavior after he was done speaking at the July 27, 2016 City Council Meeting, and this information was relayed to

Captain Wright. ECF No. 64-6, Interrogatory Answers 14-15; ECF No. 56-8 24:10-25:2. Captain Wright's personal knowledge of Appellant's behavior on July 27, 2016, coupled with the support from the SAO's advice that a trespass warning can be issued after the fact based on said events, Captain Wright had arguable probable cause, at the very least, to believe a trespass warning was merited on August 24, 2016. Nonetheless, regardless of the sufficiency of the evidence regarding the SAO's advice or extending *Poulakis* to the First Amendment context, the district court's finding that Captain Wright is entitled to qualified immunity as to Count III should be affirmed. Appellant has not offered any case law reflecting that Captain Wright knew or should have known that the trespass warning violated clearly established law under the First Amendment, and thus failed to carry his burden to defeat Captain Wright's qualified immunity.

C. The District Court correctly determined that Captain Wright did not violate clearly established law by arresting Appellant on August 24, 2016, and therefore was entitled to qualified immunity as to Count V.

(1) The arguable probable cause standard.

In asserting his Fourth Amendment claim stemming from his arrest on August 24, 2016, Appellant had (but failed to meet) the burden of establishing the absence of probable cause to succeed on a 1983 claim. *Rankin v. Evans*, 133 F.3d 1425, 1436 (11th Cir. 1998). Under the qualified immunity standard, the record need only reflect that the officers had *arguable* probable cause. *Lee*, 284 F.3d at 1995 (stating "arguable probable cause" is "all that is required for qualified

immunity to be applicable to an arresting officer"). "Arguable probable cause does not require an arresting officer to prove every element of a crime or to obtain a confession before making an arrest, which would negate the concept of probable cause and transform arresting officers into prosecutors." *Scarbrough v. Myles*, 245 F.3d 1299, 1302-03 (11 Cir. 2001).

Rather, the question is whether "reasonable officers in the same circumstances and possessing the same knowledge as the defendants *could have* believed that probable cause existed." *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) (emphasis added). This standard recognizes that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and in such cases those officials should not be held personally liable." *Id.* at 579. "Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity" because "the qualified immunity standard is broad enough to cover some mistaken judgment," shielding "all but the plainly incompetent or those who knowingly violate the law" from liability. *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997) (citations and quotations omitted).

Appellant's brief incorrectly argues that Captain Wright did not have even arguable probable cause to arrest him for disorderly conduct. I.B. 13-21. Appellant ignores, however, the well-settled perspective from which this Court views the qualified immunity analysis: "[t]he only perspective that counts is that of a

reasonable officer on the scene at the time the events unfolded." *Garcyznski v. Bradshaw*, 573 F.3d 1158, 1167 (11th Cir. 2009).

Appellant's contention, then, that the district court erred because an individual can be arrested only for "acts which that individual has in fact committed" is a misstatement of the law of qualified immunity, implying that all elements of a crime must have, in fact, occurred for a valid arrest. I.B. 21. Indeed, attempted criminal activity falls within the umbrella of actions for which an officer may arrest an individual. *See Rankin*, 133 F.3d at 1435 (noting qualified immunity includes the reasonable belief than an individual had committed *or was about to commit a crime*). "No officer has a duty to prove every element of a crime before making an arrest." *Scarbrough*, 245 F.3d at 1302–03. Contrary to Appellant's contentions, "[p]olice officers are not expected to be lawyers or prosecutors." *Id.* at 1303 n.8.

(2) There was (at least) arguable probable cause to arrest Appellant on August 24, 2016.

The undisputed record reflects that there was arguable (if not actual) probable cause for disorderly conduct, based on the totality of the circumstances known to Captain Wright on August 24, 2016 (which necessarily includes his past experience with Appellant). At the time Appellant was arrested, citizens (including a councilmember) were entering and exiting City Hall. ECF No. 64-3, 22:14-23; 211:24-212:3. As Appellant walked away from Captain Wright, he shouted, "I'm leaving buddy, bye-bye" and gave him the middle finger. ECF No. 64-2, 160:21-24; ECF No. 58, Exh. Q, 0:50-1:07. Appellant, from Captain Wright's vantage

point, appeared to stop and grab his genital area, while giving Captain Wright the finger. ECF No. 56-12, 50:20-23. Captain Wright also heard Appellant say, "fuck you." *Id.* at 51:13-17. Although Appellant disputes that he actually grabbed his genitals or verbally cursed, Appellant does not dispute that—from Captain Wright's perspective—it may have appeared that Appellant stopped and grabbed his genitalia. ECF No. 64-3, 214:8-17.

Given Appellant's concession of what Captain Wright could have perceived at the time—Appellant yelling, giving the middle finger, and grabbing his genitals while citizens entered and exited City Hall—Captain Wright reasonably believed that Appellant was acting in a disorderly manner, in violation of section 877.03, Florida Statutes. Appellant cannot point to clearly established law that a reasonable officer would not have had at least *arguable* probable cause to arrest him, based on the facts known to Captain Wright.

Indeed, in *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997), where the plaintiff "twice used profanities in a loud voice, in a public place, and in the presence of others," *id.* at 1446, this Court emphasized: "Given that what constitutes legally proscribed disorderly conduct is subject to great subjective interpretation of specific facts—for example, the words used, the tone used, the decibels used, and the reaction of onlookers—we are constrained to conclude that a reasonable officer in the same circumstances and possessing the same knowledge as the officers in this case could have reasonably believed that probable cause existed to arrest Gold for disorderly conduct." *Id. See also Brown v. City of*

Huntsville, Ala., 608 F.3d 724, 736 (11th Cir. 2010) (finding officer entitled to qualified immunity where the arrestee refused his lawful orders to turn down music emanating from the arrestee's car); *Epstein v. Toys-R-Us Delaware, Inc.*, 277 F. Supp. 2d 1266, 1273 (S.D. Fla. 2003), *aff'd*, 116 F. App'x 241 (11th Cir. 2004) (finding probable cause where plaintiff's words and conduct evidenced that he refused to obey the lawful requests of police officers, and interrupted and interfered with their investigation of the matter).

In addition, contrary to Appellant's position, there is no authority that holds that Captain Wright was required to ignore or disregard his past interactions with Appellant or his personal knowledge regarding Appellant's demeanor. Specifically, the district court stated:

> Here, [Captain] Wright had witnessed [Appellant]'s belligerent behavior firsthand weeks earlier. [Appellant] undisputedly used profanity and threated to escalate the interaction with [Captain] Wright and the police on August 24, 20[16]. In this context, the Court will not say that [Captain] Wright and Sergeant Garcia violated clearly established law when arresting [Appellant] for disorderly conduct.

Order, 21.

The facts and holding of *L.J.M. v. State*, 541 So. 3d 1321 (Fla. Dist. Ct. App. 1989)—notably decided after applying *State v. Saunders*, 339 So. 2d 641 (Fla. 1976) (the case upon which Appellant so heavily relies, I.B. 15)—are instructive here. In *L.J.M.*, a Florida appellate court upheld a conviction for disorderly conduct—finding not just arguable probable cause, but actual probable cause—based on facts similar to those here:

> Officers Goldrich and Blackburn [] were standing at the side of the street talking to a group of people when appellant approached and addressed certain remarks to officer Goldrich concerning his arrest of appellant the night before. Appellant's statements were said to be loud and rude, and "everybody was watching him as he yelled at Officer Goldrich." Officer Goldrich tried to ignore the remarks, saying "We'll see you in court." Then appellant shouted in a loud voice to officer Goldrich, "Man, you pussy-assed mother fucker." At that point, officer Goldrich placed appellant under arrest and charged him with disorderly conduct under section 877.03.
>
> We fully agree with the circuit judge's finding that under the circumstances shown by this record the words uttered to officer Goldrich were words that by their utterance tended to incite an immediate breach of peace and were "fighting words" within the meaning ascribed to the statute in *State v. Saunders*. Therefore, it was well within the discretion of the judge below, sitting as the trier of fact, to find that appellant uttered the above-quoted words with an intent to incite the police officer and perhaps others to violence. We do not believe that the utterance of these words under these circumstances falls within the area of free speech protected by the first amendment of the federal constitution. If this country is to preserve in its citizens any sense of discipline and respect for others in our society, the first amendment simply cannot be construed to condone this type of conduct. The appealed judgment is, therefore, affirmed.

Id. at 1322-23.

Like the officers in *L.J.M.*, Captain Wright here had past interactions with Appellant, who sought essentially to bait Captain Wright with offensive and lewd conduct and escalate the situation (including showing up with a camera and "live streaming" his antagonistic interaction with Captain Wright). ECF No. 64-3, 200:1-18. Appellant's conduct here clearly fell within the range of conduct that a "reasonable officer in the same circumstances and possessing the same

knowledge" as Captain Wright *could have believed* constituted disorderly under section 877.03. *Von Stein*, 904 F.2d at 579.

The cases cited by Appellant in his initial brief are each distinguishable. I.B. 15-17. In *Saunders*, the Florida Supreme Court described the conduct at issue as merely "enthusiastically" selling newspapers. 339 So. 2d at 643. Here, Appellant was far from acting merely "enthusiastically." In *Merenda v. Tabor*, the district court, in addressing the Georgia disorderly conduct statute, specifically noted that the record reflected that the officer intended "to arrest the [p]laintiff because of what he said[,]" which were curse words directed to the officer and not heard by anyone else. No. 5:10-CV-493 MTT, 2012 WL 1598134, at *1 (M.D. Ga. May 7, 2012), *aff'd in part, appeal dismissed in part*, 506 F. App'x 862 (11th Cir. 2013). Unlike here, the *Merenda* officer had no prior knowledge of the plaintiff's conduct and demeanor, and there was no other action that formed the basis for the plaintiff's arrest. Lastly, *Petithomme v. Miami-Dade Cty.*, 511 F. App'x 966 (11th Cir. 2013), involved an upset arrestee screaming obscenities and, moreover, was determined at the motion to dismiss stage, not on a fully-developed summary judgment record. *Id.* at 969. The record here, on the other hand, reflects that Appellant (and certainly from Captain Wright's perspective) did more than just "flip the bird" or say "fuck you."

Given Appellant's concession of what Captain Wright could have perceived at the time—yelling, giving the middle finger, grabbing his genitals while citizens entered and exited City Hall (ECF No. 64-3, 214:8-17)—it was

reasonable for Captain Wright to have believed that Appellant was acting disorderly, in violation of section 877.03, Florida Statutes. Appellant has not pointed to clearly established law that a reasonable officer would not have had at least arguable probable cause to arrest Appellant, based on the facts known to Captain Wright.

And while the law may have been clearly established at the time of the arrest that *words alone* may not support probable cause for disorderly conduct, the undisputed record reflects that Appellant was not arrested based on "words alone." Since this Court decided *Gold*, other cases have affirmed a finding of qualified immunity based on disorderly conduct arrests for conduct less troublesome than Appellant's here. *See Brown*, 608 F.3d at 736 (finding officer entitled to qualified immunity where the arrestee refused his lawful orders to turn down music emanating from the arrestee's car); *Epstein*, 116 F. App'x at 241 (affirming probable cause finding where plaintiff's words and conduct reflected a refusal to obey law enforcement's requests).

Appellant's selective recitation of the underlying facts fails to take into account the totality of the circumstances known to Captain Wright prior to the August 24, 2016 arrest. The district court, moreover, correctly noted that this Court recognizes "what constitutes legally proscribed disorderly conduct is *subject to great subjective interpretation of specific facts*—for example, the words used, the tone used, the decibels used, and the reaction of onlookers[.]" Order, 21 (quoting *Gold*, 121 F.3d at 1446) (emphasis added).

Captain Wright's knowledge of Appellant's aggressive conduct at the prior City Council meeting—including acts resulting in Appellant's expulsion—coupled with Captain Wright's perceived observations of Appellant's conduct in response to the trespass warning on City property (as another City Council meeting was beginning), clearly falls within the scope of not only arguable probable cause, but *actual* probable cause for Appellant's August 24, 2016 arrest. The district court's order as to Captain Wright's qualified immunity should, therefore, be affirmed.

D. The District Court correctly determined that Sgt. Garcia did not violate clearly established law arising from Appellant's arrest on August 24, 2016, and is entitled to qualified immunity as to Count VI.

For the reasons set forth above, *supra* at Section I.C.2, the district court's order should also be affirmed as to Sgt. Garcia (Count VI) because at least arguable probable cause supported Appellant's arrest based on the totality of the circumstances. The district court's additional basis for finding that Sgt. Garcia is entitled to qualified immunity—that he was not the arresting officer—should likewise be affirmed. Order, 22 ("The Eleventh Circuit held that an officer who does not participate in the actual arrest or who was not in the chain of command supervising the arresting officer cannot be liable for false arrest under 1983." (quoting *Diaz v. Miami-Dade Cty.*, 424 F. Supp. 3d 1345, 1357 (S.D. Fla. 2019), *aff'd*, 849 F. App'x 787 (11th Cir. 2021)).

Appellant does not dispute that Sgt. Garcia was not a supervising officer at the time of the arrest. Rather, Appellant argues that Sgt. Garcia had a greater role

than merely writing the arrest affidavit and was, therefore, an active participant in the arrest. I.B. 22-24. This argument fails for two reasons.

First, the record is undisputed that Appellant was *already* under arrest at the time Sgt. Garcia arrived on scene. ECF No. 64-2, 179:24-180:1, 180:13-22, 182:5-8. A person is seized within the meaning of the Fourth Amendment "when the officer, by means of physical force or show of authority, terminates or retrains [that person's] freedom of movement." *Brendlin v. California*, 511 U.S. 249, 254 (2007). Indeed, once a person is "seized" within the meaning of the Fourth Amendment, he cannot be seized a second time within the same arrest. *Smith v. Mygatt*, No. 1:14-CV-1818-TWT, 2015 WL 9239825, at *1 (N.D. Ga. Dec. 17, 2015) (noting there can be no seizure where the plaintiff was already in custody). Appellant cannot state a claim against Sgt. Garcia for an unlawful seizure when he was already seized under the Fourth Amendment.

Second, and notwithstanding that he was already in custody (which alone is fatal to Appellant's claim), Appellant fixates on the fact that Sgt. Garcia, in addition to obtaining information from Captain Wright and Officer Monaco, reviewed surveillance footage in preparing the arrest affidavit and, therefore, should have known probable cause did not support the arrest. I.B. 24. Appellant's argument is, essentially, a failure to intervene theory—which he did not plead below. Appellant omits, however, that the surveillance footage *does not capture the entirety of the events* leading to Appellant's arrest, nor does the video have sound. *See* ECF No. 58, Exh. M, N, O. Thus, contrary to Appellant's argument,

nothing in the surveillance videos contradicts Captain Wright or Officer Monaco's account of Appellant's conduct and surrounding events leading to his arrest, and nothing supports his argument that Sgt. Garcia should have known the arrest was not supported by probable cause.

The decisions upon which Appellant relies to challenge the district court's finding as to Sgt. Garcia (I.B. 23-24) are factually distinguishable. In *Jordan v. Mosley*, 487 F.3d 1350 (11th Cir. 2007), the subject officer (unlike Sgt. Garcia) was the complainant that procured the plaintiff's arrest because the plaintiff allegedly broke equipment on the officer's personal property. *Id.* at 1353-54. And in *Carter v. Butts Cty., Ga.*, 821 F.3d 1310, 1316-18 (11th Cir. 2016), the officer, similar to the one in *Jordan*, was the former owner of a home that was foreclosed upon and ordered the arrest of the individuals cleaning out the home on behalf of the bank. No comparable facts exist here.

Moreover, the facts in *Ratunuman v. Sanchez*, 2010 WL 11602269 (S.D. Fla. Feb. 9, 2010), which was decided at the motion to dismiss stage, are also inapposite. There, the allegations in the complaint were that the subject officer signed the arrest affidavit written by another, unknown officer and despite being totally unacquainted with any of the attestations. *Id.* at *1. Here, on the other hand, Sgt. Garcia authored the arrest affidavit *after* Appellant was already in custody and based on information Sgt. Garcia had a basis to reasonably rely upon, *i.e.*, information from his fellow officers, which the surveillance video did not contradict. ECF No. 56-7, 15:9-13, 31:1-4; ECF No. 58, Exh. M, N, & O; *see also*

Diaz, 424 F. Supp. 3d at 1357 (discussing the "fellow officer rule," allowing an officer to rely on information supplied by other officers for probable cause).

Finally, Appellant cites *Wilkerson v. Seymour*, 736 F.3d 974 (11th Cir. 2013), where this Court actually affirmed qualified immunity for an officer who, like Sgt. Garcia here, arrived on scene only after the plaintiff was under arrest. Unlike here, that officer was sued on a failure to intervene theory. Nonetheless, that officer "was entitled to rely on the account of the arrest provided by [the arresting officer] and fill in any gaps in the account with reasonable inferences premised on [the arresting officer] acting in a constitutional manner and in good faith." *Id.* at 980.

Appellant cannot identify a basis for Sgt. Garcia to disbelieve or discredit the reports of his fellow officers. Nonetheless, the undisputed fact that Appellant was already under arrest at the time of Sgt. Garcia's arrival on scene in and of itself merits affirming the district court's ruling.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT PROBABLE CAUSE DEFEATED THE STATE LAW FALSE ARREST CLAIMS AGAINST THE CITY (COUNTS IV AND VII).

A. The state law false arrest/imprisonment framework.

Under Florida law, "probably cause if an affirmative defense to a false arrest claim." *Mailly v. Jenne*, 867 So. 2d 1250, 1251 (Fla. Dist. Ct. App. 2004). Probable cause exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person accused is guilty of the offense

charged. *Id.* at 1251. "Probable cause must be judged by the facts that existed at the time of the arrest, not evidence subsequently learned or provided to the prosecution." *Miami-Dade Cty. v. Asad*, 78 So. 3d 660, 669–70 (Fla. Dist. Ct. App. 2012); *Fla. Game & Freshwater Fish Comm'n v. Dockery,* 676 So. 2d 471, 474 (Fla. Dist. Ct. App. 1996) ("Hindsight should not be used to determine whether a prior arrest or search was made with probable cause. Events that occur subsequent to the arrest cannot remove the probable cause that existed at the time of the arrest.").

Finally, much like the arguable probable cause analysis in Fourth Amendment claims, in a state law false arrest claim, "the validity of an arrest does not turn on the offense announced by the officer at the time; if there is a valid charge for which a person could have been arrested, probable cause exists." *Daniel v. Village of Royal Palm Beach,* 889 So. 2d 988, 991 (Fla. Dist. Ct. App. 2004).

B. Probable cause supported Appellant's August 24, 2016 arrest for purposes of the state law false imprisonment claim (Count IV).

Appellant argues that the district court erred by finding, as to Count IV, that the City had probable cause to arrest him on August 24, 2016, for disorderly conduct. I.B. 24-27. The record, however, does not support Appellant's position, and the case law upon which he relies is inapplicable. The undisputed facts clearly reflect probable cause supported his arrest, and summary judgment in favor of the City on Count IV should be affirmed.

The case law Appellant cites relates to the evidentiary burden necessary to sustain a *conviction* for disorderly conduct, *not probable cause to arrest*. *See Barry v. State*, 934 So. 2d 656 (Fla. Dist. Ct. App. 2006) (stating the evidence presented by the State was "insufficient to support a conviction for disorderly conduct"); *C.N. v. State*, 49 So. 3d 831 (Fla. Dist. Ct. App. 2010) (holding the evidence did not support the disorderly conduct conviction); *C.H.C v. State*, 988 So. 3d 1145 (Fla. Dist. Ct. App. 2008) (same); *A.S.C. v. State*, 14 So. 3d 1118 (Fla. Dist. Ct. App. 2009) (same); *W.L. v. State*, 769 So. 2d 1132 (Fla. Dist. Ct. App. 2000) (same). In fact, probable cause for the underlying arrest is not even analyzed, considered, or otherwise referenced in any of these cases.

Under Florida law, probable cause requires that an arrest "be objectively reasonable based on the totality of the circumstances." *Lee*, 284 F.3d at 1195 (applying Florida law). "Although probable cause requires more than suspicion, it 'does not require convincing proof,' [citation omitted], and 'need not reach the [same] standard of conclusiveness and probability as the facts necessary to support a conviction.'" *Id.* (quoting *State v. Scott*, 641 So. 2d 517, 519 (Fla. Dist. Ct. App. 1994)). Appellant's argument ignores the demarcation between the probable cause and beyond a reasonable doubt standards.

On the other hand, Florida courts recognize that where an arrestee's conduct consists of more than arguably "protected" speech—as here—probable cause to arrest for disorderly conduct *does* exist. *See, e.g.*, *Delaney v. State*, 489 So. 2d 891, 892 (Fla. Dist. Ct. App. 1986) (finding arrest for disorderly conduct was

supported by probable cause where appellant was not only loud and abusive toward the officer but ignored his requests). This Court in *Gold,* which Appellant also cites, explicitly recognized that the "fact intensive nature of the constitutional inquiry accounts for the varying views in the Florida appellate courts of what constitutes legally proscribed disorderly conduct." 121 F.3d at 1446); *see also C.J.R. v. State*, 429 So. 2d 253 (Fla. Dist. Ct. App. 1983) (finding the arrestee was not engaged in First Amendment speech when he yelled at the officer "F*** this sh** . . . , you mother f****r" and upholding the disorderly conduct conviction); *C.L.B.*, 689 So. 2d at 1172 (holding that defendant's nonverbal acts, which included repeatedly approaching police officer, in combination with his speech, violated section 877.03).

The undisputed record here reflects Appellant was disruptive at the prior City Council meeting and violated the Rules of Decorum—resulting in his proper (and now unchallenged) removal by Captain Wright on July 27, 2016. Order, 12-16. And Appellant did not dispute below that from Captain Wright's perspective, Appellant was engaged in lewd conduct on public property as at least three individuals entered and exited City Hall. ECF No. 64-3, 22:14-23; 211:24-212:3, 214:8-17; ECF No. 58, Exh. Q; ECF No. 56-12, 50:20-23, 51:13-17. Accordingly, the record reflects that Appellant was not arrested for his words alone. As the district court correctly concluded: "Given the prior interaction between [Captain] Wright and [Appellant], [Appellant's] cursing, [Appellant's] multiple threats to sue [Captain] Wright, and [Appellant's] demeanor, which showed a desire to escalate

the altercation, … [Captain] Wright had probable cause to arrest [Appellant] for disorderly conduct on August 24, 2016." Order, 26.

As in *White v. State*, in which the arrestee "went almost into a fit" when bailing his father out at the police station, Appellant's "conduct would have been equally disorderly had he merely recited 'Mary Had a Little Lamb' in the same tone and under similar circumstances." 330 So. 2d 3, 7 (Fla. 1976). The district court did not err by finding probable cause supported Appellant's arrest, and the Court should affirm as to Count IV.

C. Probable cause supported Appellant's September 1, 2016 arrest thus warranting summary judgment for the City on the state law false imprisonment claim (Count VII).

Officer Monaco reported Appellant's online postings about him to the City's internal affairs department. ECF No. 64-9, 15:16-19. These posts, which Appellant admits he authored, including calling Officer Monaco a "coward," threatened "retaliation" against Officer Monaco, and stated that Appellant intended to "blast" Officer Monaco's home address online. ECF No. 64-3, 248:15-22, 250:4-11; ECF No. 64-8, at 3. As a result of Appellant's online comments about him, Officer Monaco became concerned for the safety of his family and himself. ECF No. 64-9, 15:16-19. Detective Mata conducted an investigation regarding Officer Monaco's complaints, which included subpoenas to the police blog where the comments appeared, in order to confirm Appellant's authorship; controlled calls with Appellant; and conversations with the SAO. ECF No. 64-8, at 7; ECF No. 64-9, 30:2-6. An officer is entitled to rely on a victim's statement, where there are no

indication that reliance on the statement is unreasonable, in making an arrest. *Barr v. Gee*, 437 F. App'x 865, 877 (11th Cir. 2011). Notably, in *Barr*, the Eleventh Circuit affirmed a finding of probable cause where the arresting office relied on the victim's statement alone. *Id.*

Here, however, there is greater evidence and information than in *Barr* to support a finding of probable cause. For example, Appellant admits that he made multiple leoaffairs.com postings, including the threat to "blast" Officer Monaco's home address. ECF No. 64-3, 248:15-22, 250:4-11; ECF No. 64-8, at 3. Officer Monaco became concerned for his safety and the safety of his family, as a result. ECF No. 64-9, 15:16-19. Under section 784.084(d)(1), Florida Statutes, cyberstalking is defined as words communicated to a person "causing substantial emotional distress to that person and serving no legitimate purpose." § 784.084(d)(1), Fla. Stat. Appellant's multiple comments directed to Officer Monaco, as well as the effect these comments had on the officer, clearly meet the threshold elements of cyberstalking. *See, e.g., Jeter v. McKeithen*, No. 5:14-CV-189-MW-EMT, 2015 WL 3747690, at *5 (N.D. Fla. June 15, 2015) (finding probable cause existed to arrest the plaintiff, who twice posted bullying comments online directed at specific individual).

Additionally, Detective Mata relied on the SAO's confirmation that probable cause existed prior to making the September 1, 2016 arrest. ECF No. 64-8, at 7; ECF No. 64-9, 30:2-6. Even Miami-Dade County Circuit Court Judge Mindy Glazer determined during Plaintiff's bond hearing that probable cause existed to

arrest Appellant for cyberstalking.[9] ECF No. 64-10, 11:16-22. Appellant has not and cannot point to any unreliable or untrustworthy information upon which the ASA, Judge Glazer, or Detective Mata relied in making their probable cause determinations. Indeed, he did not dispute any of the facts supporting his September 1, 2016 arrest on the record below. *Cf.* ECF No. 64, ¶¶ 51-58, *with* ECF No. 69, ¶¶ 51-58.

The arguments he raises now to overturn the district court's well-reasoned order, moreover, are misplaced. First, Appellant's claim that the online posts fall under constitutionally protected speech, once again, is self-serving. I.B. 29. Appellant did much more than merely "criticize" a public official's job performance, specifically, for not wearing a body camera, and his characterization of his leoaffairs.com posts is selective and incomplete. Merely criticizing a public official on a public forum is not even close to what Appellant *concedes* he said to Officer Monaco. Rather, Appellant called Officer Monaco a "coward" (several times), a "liar," a "twat," and a "slip tail." While some aspects of Appellant's posts may be constitutional speech, the personal attacks on Officer Monaco's character and veracity clearly serve no legitimate purpose. In fact, "insulting or 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the Constitution.

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[9] Moreover, that Judge Glazer determined probable cause existed for cyberstalking, but not witness tampering, is of no moment to the probable cause analysis because the validity of an arrest does not turn on the offense announced at the time. *Daniel*, 889 So. 2d at 991.

Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *United States v. Eckhardt*, 468 F.3d 938, 945 (11th Cir. 2006) (holding the statement, "Hey Sue, why don't you take one of them f*ckin' school buses . . . and use it like a vibrator" was not covered by the First Amendment); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (recognizing certain categories of expression, such as defamation, are not within the area of constitutionally protected speech).

Appellant's claim that Officer Monaco knowingly made his home address available "to all on the internet" is unsupported by the record evidence. I.B. 30. Rather, the evidence shows that Appellant intentionally posted a video link containing Officer Monaco's home address in an effort to direct the public at large to this officer's home. ECF No. 64-3, 248:15-22, 250:4-11; ECF No. 64-8, at 3. Appellant, of course, has not offered any explanation or legitimate purpose for saying that he would be "blasting" the home address of the officer who arrested Appellant (and towards whom Appellant obviously holds significant animus). I.B. 27-34. The obvious conclusion is that Appellant sought to harm Officer Monaco by inviting third parties to his home address.

Further, Appellant's claim that a "reasonable person in Officer Monaco's position could not have suffered substantial emotional distress" is again self-serving and ignores the record evidence. I.B. 30-31. The undisputed facts reflect that Officer Monaco (the officer who arrested Appellant just days prior to the postings in which he was targeted) was not only aware of the repeated postings, but became so concerned that, for the safety of himself and his family, he reported it to

the police department. ECF No. 64-9, 15:16-19. Nothing in the record disputes that Officer Monaco experienced substantial emotional distress for the safety of his family and himself, and Appellant offered no evidence below that Officer Monaco's reaction to Appellant's threats was disingenuous or unreasonable. *See generally* ECF Nos. 56, 69; *see also Barr*, 437 F. App'x at 877 (affirming dismissal of claims because victim's statements supported finding of probable cause, absent allegations to indicate reliance on the statement was unreasonable).

Unlike in *Krapacs v. Bacchus*, 301 So. 3d 976 (Fla. Dist. Ct. App.2020), this is not a situation in which Officer Monaco was "tagged" in real time over a finite period of time. Rather, McDonough wrote multiple posts directed towards Officer Monaco, and anyone, including Officer Monaco, when viewing the website, would have seen a litany of separate posts directed towards Officer Monaco. ECF No. 64-3, 248:15-22, 250:4-11; ECF No. 64-8, at 3. Further, unlike *Krapacs*, where the individual being "tagged" could "untag" themselves, Appellant's repeated posts addressing Officer Monaco remained online *permanently*. Accordingly, to the reader (and in this case, to Officer Monaco), how quickly in succession the posts were created is immaterial—the reader saw *repeated* (specifically, eight posts, *see* ECF No. 64-8) comments and threats.

Appellant incorrectly claims that "the record provides no indication to whom Det. Mata spoke [] or what information he relayed to that individual to establish probable cause." I.B. 32. Once again, this assertion ignores the record evidence, which *does* indicate to whom Det. Mata spoke prior to the September 1, 2016

arrest, and what information was relayed. ECF No. 64-8, at 7; ECF No. 64-9, 30:2-6. Specifically, as reflected in the Offense-Incident Report, Det. Mata spoke with ASA Hedrick and, as stated in Det. Mata's deposition, he relayed the underlying information regarding the leoaffairs.com posts and what Officer Monaco reported to him. ECF No. 64-8, at 7; ECF No. 64-9, 30:2-6.[10]

Finally, as previously noted, Appellant does not challenge the district court's determination that arguable probable cause supported Det. Mata's decision to arrest Appellant for cyberstalking. The undisputed record below reflected that Officer Monaco suffered substantial emotional distress—as any reasonable individual would—after viewing Appellant's repeated posts directed towards him threatening to "blast" his address (essentially, inciting individuals to harass Officer Monaco at home), which both the SAO and a Miami-Dade criminal court judge determined were sufficient probable cause to arrest Appellant for cyberstalking. ECF No. 64-8; ECF No. 64-9, 15:16-19; ECF No. 64-10, 11:16-22. The district court therefore correctly ruled that probable cause supported the September 1, 2016 arrest, and summary judgment in favor of the City as to this claim should be affirmed.

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[10] Mr. McDonough' reliance on the SAO's close-out memo—authored *after* Mr. McDonough's arrest—to dispute the district court's finding of probable cause is misplaced. I.B. 32. "Hindsight should not be used to determine whether a prior arrest or search was made with probable cause. Events that occur subsequent to the arrest cannot remove the probable cause that existed at the time of the arrest." *Dockery*, 676 So. 2d at 454.

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

A. The strict limitation on municipal liability under 42 U.S.C. § 1983.

The Supreme Court has placed strict limitations on municipal liability under section 1983. *Grech v. Clayton Cty.*, 335 F.3d 1326, 1329 (11th Cir. 2003). A plaintiff must demonstrate: (1) that his constitutional rights were violated, (2) that the City had a custom or policy that constituted deliberate indifference to those constitutional rights, and (3) that the policy or custom caused the violation. *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004).

Even if a sufficient municipal policy, custom or practice is established, a plaintiff still has the substantial burden to demonstrate that the policy, custom or practice was the "moving force," or "driving force" behind the plaintiff's constitutional injury. *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 405 (1997). The Supreme Court has required that "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Id*. "This high standard of proof is intentionally onerous for plaintiffs; imposing liability on a municipality without proof that a specific policy caused a particular violation would equate to subjecting the municipality to respondeat superior liability – a result never intended by section 1983." *Gold*, 121 F.3d at 1351 n. 10.

Under a final policymaker theory, "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."

Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986). To establish liability under the final policymaker theory of municipal liability, "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *City of St. Louis v. Praprotnik*, 485 U.S. at 123 (1988) (emphasis in original). Stated differently, a municipality can be held liable on the "basis of ratification when a subordinate public official makes an unconstitutional decision and when that decision is then adopted by someone who does have final policymaking authority." *Matthews v. Columbia Cty.*, 294 F.3d 1294, 1297 (11th Cir. 2002)). A plaintiff "must identify those officials who speak with final policymaking authority for that local governmental entity concerning the act alleged to have caused the particular constitutional violation in issue." *Grech*, 335 F.3d at 1330 (citing omitted).

B. The evidence fails to support a "final policymaker" claim against the City.

The district court first determined that Chief Rolle was the City's final policymaker as to the police department and that the Chief delegated the discretionary decision to issue a trespass warning to Captain Wright. Order, 24. Nonetheless, the district court pretermitted its policymaker analysis by concluding there was no violation of Appellant's First Amendment rights. Order, 24-25. Summary judgment should be affirmed in favor of the City because: (1) there was no underlying constitutional violation for the reasons set forth by the district court (Order, 24-25; and (2) the trespass warning, the alleged unconstitutional act here,

was a discretionary decision by Captain Wright, which does not rise to the level of "final policy."[11]

(1) There was no constitutional violation.

The district court correctly determined that the final policymaker claim failed because there was no underlying deprivation of rights. Order, 24. The law is clear that the First Amendment "does not guarantee access to property just because it is owned by the government." *Bloedorn*, 631 F.3d at 1230. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 799-800 (1985). "The Government, like any private landowner, may preserve the property under its control for the use to which it is lawfully dedicated." *Sentinel Comm'ns Co. v. Watts*, 936 F.2d 1189, 1200–01 (11th Cir. 1991) (internal quotation marks omitted). Thus, by way of example, "the Government has the

[11] Additionally, where a final policymaker delegates policy-making authority to a subordinate, the final policymaker must ratify not only the decision itself, but also the unconstitutional basis for it." *Matthews v. Columbia Cty.*, 294 F.3d 1294, 1297-98 (11th Cir. 2002) (emphasis added). Neither Appellant nor the district court addressed this element of a final policymaker claim below, and Appellant does not do so on appeal. Nonetheless, the record is devoid of evidence that Chief Rolle knew or should have known that the trespass warning issued to Appellant had any unconstitutional motive or bias (as it did not). This is an additional alternative basis to affirm summary judgment in favor of the City as to the *Monell* claim.

right to exercise control over access to the [government] workplace in order to avoid interruptions to the performance of the duties of its employees." *Id.* at 805-06.

Although the trespass warning was for City Hall, the district court below did not address the question of whether City Hall, itself, is a non-public or limited public forum. Appellant, moreover, does not challenge the limitation to access City Hall (and did not do so below), but rather the limitation on his access to the public comment portion of City Council meetings (held within City Hall). I.B. 34-40. Perhaps recognizing this more limited challenge, the district court went directly to the question of whether the trespass warning "was narrowly tailored to serve the significant governmental interest of conducting orderly meetings[,]" applying the highest level of First Amendment scrutiny.[12] Order, 24-25.

This Court has recognized, "under scrutiny more exacting than that applied in the limited public forum context, that a person may be excluded from a public forum when the person is disruptive." *Charudattan v. Darnell*, 510 F. Supp. 3d 1101, 1112 (N.D. Fla.), *aff'd*, 834 F. App'x 477 (11th Cir. 2020) (finding policy blocking users who repeatedly violate content policy on the county sheriff's Facebook page was reasonable under the First Amendment). "[T]he City can exclude trespassers and people causing disruptions with a geographic- and time-limited trespass warning without violating a protected liberty interest." *Sheets*, 415

[12] Notably, this Court has found that a City Council meeting is a limited public forum. *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 802 (11th Cir. 2004).

F. Supp. 3d at 1127 (denying the plaintiff's motion for preliminary injunction after he was issued a year-long trespass warning from city hall).

Under a final policymaker *Monell* claim, a plaintiff "must identify those officials who speak with final policymaking authority for that local governmental entity concerning the act alleged to have caused the particular constitutional violation [at] issue." *Grech*, 335 F.3d at 1330. In reality, Appellant has challenged law enforcement's authority conferred by Florida statutes to trespass an individual—a policy created by the Florida legislature—not any single final policymaking decision of Chief Rolle (or even Captain Wright). Notably, Appellant does not dispute Captain Wright's authority, as a law enforcement officer, to issue a trespass warning under state law. *See* § 810.08, Fla. Stat.

Florida's trespass law does not mandate procedures to appeal a warning. Arguably, then, and because Appellant did not assert a procedural due process claim below (*see supra* at n.8), Captain Wright was not required to provide Appellant with a mechanism by which to regain access to City Hall. In any event, Captain Wright *did* provide Appellant with a method to challenge the trespass warning, and his repeated assertion throughout his brief that the warning was "indefinite" is simply an incorrect statement of the record.[13] To the contrary, when Appellant inquired as how he could again access City Hall, Captain Wright

[13] This assertion is belied by the fact that Appellant *did* attend multiple City Council meetings post-trespass. ECF No. 64-2, 36:8-38:16.

informed him to write a letter, which Appellant never did. ECF No. 58, Exh. Q, 0:41-0:47.[14]

In this regard, Appellant's trespass warning was narrower than the ban at issue in *Brown v. City of Jacksonville, Fla.*, No. 3:06-CV-122-J-20MMH, 2006 WL 385085 (M.D. Fla. Feb. 17, 2006), in which the city banned a speaker from attending city council meetings for three months (or a total of seven meetings). *Id.* at *5. Unlike in *Brown*, Appellant was not banned for a specific number of City Council Meetings. Rather, he was trespassed from City Hall and given instructions on how to regain access, which he undisputedly did not do. ECF No. 58, Exh. Q, 0:41-0:47. Thus, there is no evidence in the record that the trespass warning was "indefinite." The trespass warning here is also narrower than the one in *Sheets*, in which the district court found that the plaintiff failed to demonstrate a likelihood of success on the merits of his First Amendment and procedural due process claims following a year-long trespass warning from city hall. 415 F. Supp. 3d at 1127.

Appellant's assertion that "there was no evidence he had ever caused any type of disturbance [at a City Council meetings]" is a misstatement of the record. I.B. 39. The record reflects that, as Appellant was exiting the Council Chambers on July 27, 2016, he shouted to Captain Wright while attempting to film him, "I am

[14] Appellant's passing reference to the City's decorum policy (I.B. 39) is, again, a red herring. Appellant did not challenge the validity of the City's Rules of Decorum below. Moreover, his posited "reasons" for the amendments to the City's decorum policy is rank speculation, unsupported by the record.

going to sue the shit out of you dumb ass." ECF No. 94, 3:08-3:13. Several individuals sitting in the Council Chamber reacted to this exchange. *Id.*; ECF No. 56-12, 71:1-72:15. [15] Appellant also loudly stated outside City Council chambers (but still inside City Hall), "Now we got Homestead police officers again violating the First Amendment rights because they are fucking idiots and they don't know shit. Absolutely ridiculous." ECF No. 94, 3:13-30. Appellant's behavior clearly merited a trespass warning, at the very least.

Appellant's claims of deprivation of means by which to communicate with the City officials or the public is belied by the multiple alternative mechanisms evidently available to him (emails, letters, phone calls, etc.). Appellant, however, did not even bother to write to the City (as suggested to him) to regain access to City Hall. In the end, the record reflects Appellant suffered no lingering harm because he returned to the City Council meetings and spoke during public comment without incident in December 2016. ECF No. 64-2, 241:7-242:7. He further did not dispute that he continues to attend City Council meetings and address the public to this day. *Id.*, at 252:25-244:2. Because Appellant has not shown that the district court erred in finding that the trespass warning was narrowly tailored to serve the City's significant governmental interest in

[15] Appellant, after all, has not challenged, the district court's conclusion that Captain Wright was entitled to qualified immunity as to the First Amendment claim arising from Appellant's removal from the July 27, 2016 City Council meeting.

conducting orderly meetings, and therefore, no constitutional deprivation occurred, the district court's ruling on Count II should be affirmed.

(2) Appellant cannot establish a final policymaker claim based on a subordinate's discretionary decision, namely, the issuance of a trespass warning.

The record reflects an alternative basis on which to affirm the district court as to the final policymaker claim. *Brown v. Johnson*, 387 F.3d 1344, 1361 (11th Cir. 2004) (permitting the Court to affirm "on any ground that finds support in the record," even if the district court did not rely on it). Appellant (and to a certain extent, the district court[16]) conflate an individual officer's decision to enforce the law (whether it be a state statute or municipal code or rules of decorum) with a "final policymaking" decision by the City. Such an analysis would, essentially, turn every arrest or trespass warning issued by a City officer into a "final policymaking" decision, thereby improperly expanding *Monell* liability beyond its "strict limitations on municipal liability." *Grech*, 335 F.3d at 1329.

Indeed, for this very reason, the Supreme Court has recognized that a single, unlawful seizure does not rise to the level of "official policy." *Praprotnik*, 485 U.S. at 123 ("At the other end of the spectrum, we have held that an unjustified shooting by a police officer cannot, without more, be thought to result of official policy.")

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16 Indeed, although the district court found no underlying, constitutional deprivation occurred even though Chief Rolle delegated whether to trespass Appellant to Captain Wright, the threshold question should have been whether this single, trespass warning at issue constituted "policy" in the first place. It does not.

(citations omitted). Thus, because the record supports an alternative basis on which to affirm the district court, the Court may consider the alternative argument that Captain Wright's discretionary decision does not give rise to municipal "final policy."

"[S]pecial difficulties can arise when it is contended that a municipal policymaker has delegated his policymaking authority to another official[,]" like the district court appears to have concluded here. *Id*., 126. "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability." *Id*.; *Pembaur*, 475 U.S. at 479-80 ("The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.") (emphasis in original). Here, the final policymaker claim fails because the alleged, unconstitutional act was within Captain Wright's discretionary authority, conferred by Florida statute. And even if Chief Rolle could be said to have delegated to Captain Wright the decision to issue a trespass against Appellant, what was delegated not the authority to set policy for the City. Appellant cannot identify a municipal "policy" rising from a single, trespass warning, and therefore, summary judgment should be affirmed in favor of the City.

CONCLUSION

For the foregoing reasons, the final judgment below and the district court's order granting Appellees' summary judgment motion and denying Appellant's summary judgment motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses Times New Roman 14-point typeface and contains 12,692 words.

/s/ *Anne R. Flanigan*
Anne R. Flanigan

CERTIFICATE OF SERVICE

I, Anne R. Flanigan, counsel for Appellees and a member of the Bar of this Court, certified that, on August 15, 2022, a copy of the foregoing answer brief was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ *Anne R. Flanigan*
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