

21 NOV -3 PM 1:53

CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]
DEPUTY CLERK

DEPT. OF DEFENSE

20

20

20

202

20

22

Defendants

1

2. Defendants being: City of Austin, Inc, Austin Police Department and the following City of Austin Public Servant Employees: Corporal Christopher Carlisle badge #3368, Corporal Troy Wismar badge #3968, Officer Patrick Walsh badge #7345, Officer Kyu Sue An badge #unknown, Officer Sarah Foster badge #unknown, Greg McCormack City of Austin, and others parties to be named later through the proper discovery of evidence, all individually and all defendants in their official capacities. Address to City of Austin Law Department is at 301 E 2nd Street, Austin, Texas 78701. Austin Police Department is at 715 E. 8th Street, Austin, Texas 78701.

3. This incident and complaint happened in Austin, Travis County, Texas, which this Court has legal jurisdiction over as this Court also resides here. Also as the 5th Federal Court Circuit encompasses all of Texas, Louisiana and Mississippi. These are Constitutional issues, that are novel and important to all Citizens. Therefore I request the Western District Court of the U.S.A. in Austin, to try my Civil Complaint involving 1st, 4th, 14th, 8th Constitutional Amendments violations under section U.S.C. 42 1983 as well as section 1985 Conspiracy of Parties. As multiple agents of Municipal and Corporate government conspired to deprive me of my rights and they were all involved in this crime against myself and essentially the rights afforded to all the Citizens and the Free Press.

4. On or about November 5th 2019, in the City of Austin, Travis County, Texas, U.S.A.. Under this Court's functional jurisdiction, Corporals Carlisle, Wismar, and several officers were joined by the FrontSteps manager, Greg McCormack to conspire together to deprive people of their rights. Several people were in front of the Salvation Army there to protest brutal sweeps and theft by 'The State' to deprive unhoused poor people from their rights to seek emergency shelter, to sleep in a tent they own, to own property and essential survival gear, ids, medications, etc, to sit down, to rest, to survive and their international human rights as well. Also these defendant individuals and their agencies have a pattern and practice of violating poor unhoused people's rights, property rights, 4th amendment rights, many of the City's victims are black, brown or disabled. Many victims of the City of Austin are also veterans. At my arrest Corporal Christopher Carlisle badge #3368 came to my tent where I was inside, filming the police and he said that I was being charged and arrested for my political beliefs and views, basically for protesting, filming and defending the rights of unhoused and marginalized, gentrified poor people living on the streets in Austin. His words thus informing me that I was then an indigent political prisoner in the 5th Circuit in Austin, Travis County, Texas, United States of America. This is what the War on the Poor looks like on the streets of Austin to those of us that are fighting for freedom, safety, housing

and our inalienable rights. To defend the Constitutions and to defend the intent of a government that serves the people.

After Corporal Carlisle told me that I was falsely arrested for the class C misdemeanor of “camping.” I was also filming the police and did not consent to any search or seizure of my property or work product, as I am also a member of the Challenger Street Newspaper, a reporter and videographer for about 10 years now.

On November 18th, 2019 the case was dismissed on it’s merits by the Community Court. On prima fascia evidence that did not support the charge.

Since that time I have been falsely arrested in retaliation for filming the Austin Police department several times, so many times I have lost count. The cases are consistently reviewed by the City’s prosecutors, the County prosecutors and dismissed on their merits as no prima fascia evidence supports the charges. I am innocent of all charges, but the police know you can beat the rap, but you can’t beat the (retaliatory) ride. This practice of false arrests to deprive Citizens of their rights should be stopped immediately. These cases of retaliation show a clear pattern and practice of conspiracy to deprive me of my rights to be in a tent, to film the Austin Police Department at work in public, and to protest the City’s lack of real housing options for the unhoused poor of Austin, who suffer needlessly on the

streets while the City of Austin's general budget is over \$4.2 Billion and the City has vacant lands, thousands of acres, hundreds of buildings, trillions in assets. Yet the City does barely anything to secure permanent, supportive, key-first, safe and decent housing for our unhoused Citizen friends and neighbors on the streets. There is no shortage of budget, no shortage of housing or spaces in buildings in Austin. There is simply hoarding, disinformation, deliberate non-transparency, greed, hatred and denial by the City of Austin and its leadership. Housing is the solution. Simply put. And the only legal means of moving people out of sight for the comfort of wealthier individuals.

I read the Officer's complaint and Corporal Carlisle states on that form that he told me to go to Emma Long Park and McKinney State Park. I do not believe he said that. He said he offered me space in the ARCH homeless shelter. I have never stayed at the ARCH shelter and that suggestion is offensive, the ARCH shelter has a reputation on the streets as being abusive, unclean, unsafe and policed heavily by Austin Police Department. McKinney State Park is secluded, no services or even a convenience store or grocery store. They only allow you to stay a short time, they do not want unhoused people there, they cost money that I do not have. So neither was a helpful, viable, safe, solution. And I have no recollection of him saying those things to me as well. I believe this is a falsehood on a charging document by Corporal Carlisle. I'm not sure why he felt that was appropriate to put on his

complaint. Or why police officers lie on documents and under oath to protect their position when they know they are in the wrong and the charges are retaliatory. I would like Corporal Carlisle to produce video of him saying that to me. As proof. Hopefully soon in discovery of evidence in this case.

I believe that I have filed a complaint with the Police Oversight Office or the Office of Police Monitor. Nothing was done. I have no access to their files, they consider it “APD protected personnel records.” I hope to attain more information from discovery about their failures to hold the police accountable and transparent to the public. As is their charge and oath. I have filed multiple police complaints with the City and the Internal Affairs at APD. Most all the cases were ignored, dismissed, or administratively closed without good cause.

I believe that Officer Patrick Walsh badge #7345 was the officer that falsely arrested me under color of law and violated my rights and freedoms.

Greg McCormack, presently with the City of Austin, but at the time of this incident he was on site talking to police, prior to my false arrest, about how to remove and arrest me to deprive me of my rights. He was working for the ARCH homeless shelter at the time and was involved in clearing out all the people camped outside waiting for housing and some for shelter, under project Guided Path, by the

City of Austin, Inc.. Citizens there were all refused shelter or housing, delayed or told to wait it out. Greg McCormack not only conspired to deprive me of my rights, he also conspired against other unhoused marginalized and poor people on Austin's streets and was in charge of the abusive, unsafe, unclean ARCH shelter as the director of FrontSteps corporation.

5. Julian Reyes, a pro se plaintiff, and am seeking full damages in the amount of \$1,000,000 U.S.A. dollars for all losses, of lost time, stolen freedoms and rights, and for the Constitutional and other violations specified below and in other later amendments to this complaint, as more information becomes available and through discover of evidence to come. And censure, punishments and charges for the responsible parties, including restorative justice to create a safer, more servicing government in Austin. I also seek injunctions to protect Citizens' rights whether unhoused on the streets of Austin or members of the Press to protect us from future targeting, stalking, retaliation, false arrest, deprivation of rights, harassment, and threats by the Austin Police Department, City of Austin, inc., and their agents, acting alone or in groups, most especially those involved in filming police interactions in public or defending their homes from theft under color of law by 'The State.' Reyes is also seeking reformatory justice, remedy, and mediation on the issues of training, injustice, patterns and practice of police abuses that led up

to this egregious incident by Austin Police Department, the City of Austin, et al. and Greg McCormack.

In fact I was just arrested for a class c, fine only, misdemeanor this Sunday October 24th, 2021, for my free speech on a public sidewalk. And this is one of about 10 so arrests by Austin Police agents, acting together, to deprive me of my rights to free speech and free press, transparency of government, accountability of police, and due process rights. My cameras have been seized and the Austin Police Officer, Detective Stitler is still refusing to give me back my primary work equipment and evidence to defend myself in court, even though it has been about 10 days since the unlawful seizure of these items. I cannot do the work of the free press here in Austin without my work tools and work product. The Police know that, I have informed them, they are not budging, they are asserting their right to abuse, retaliate, deprive, and seize my cameras, video and megaphone. There has been a clear pattern of deprivation of rights in a similar manner in all the cases against me for the last 8 or so years.

So as you see the City and it's police are continually keeping me busy in court defending my rights and my person from unlawful and unnecessary retaliatory imprisonment and punishment for clearly and well established constitutional rights. This time and energy keeps me from working on this case

and talking to more lawyers for assistance with this case. I believe that the federal civil courts are the venue for seeking justice and protections of law for all people in this matter. See *Glick v Cunliffe* and *Turner v Driver* as well as others to be listed later.

As a matter of fact I currently have 8 or 9 open retaliatory, police abuse, arrests in 2 courts in Austin, some in Travis County Criminal Court 9, Judge Kim Williams is aware of the police retaliation in my cases. As I have informed her several times in court. And I have 2 more false arrest cases for first amendment exercise in the City of Austin Municipal Court system and its subordinate the Downtown Austin Community Court. All are misdemeanor arrests for filming the police depriving poor people of their rights except this Sunday's arrest which was for protesting for homes for the unhoused people of Austin and for corporate funding of housing, gentrification as the cost of rent is way too high in Austin for the common person who lives here without fat stacks of cash to live here anymore. Myself and others became unhoused due to rent, evictions and chronic illness, without a safety net. So I was arrested again Sunday for my free speech and the case is still new and pending. In the current covid state of procedures and backlog in the courts it could be 2 more years of time spent waiting and working these cases. That alone is too much for me. I do have pro bono indigency criminal defense attorneys. But they do not know how to connect me with Civil Rights

attorneys yet, although we have been trying to contact several to date. So the punishment for free speech and filming by the Austin Police Department and their agents is ongoing, constant, formidable and time consuming. A clear pattern and practice of targeting, abuse and deprivations of rights and conserving to do so. That is why I filed this complaint case, as no other means of accountability of justice worked including calling the District Attorney's Office, Civil Rights Division. This court has the responsibility for justice and access to law in this case. And also this Court has the jurisdiction in this case. I am overwhelmed and have fallen ill with pneumonia recently but am healing as best I can.

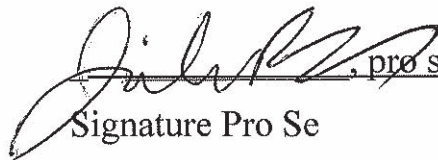
My main constitutional question right now is does the government, including the Justice Department and Courts, serve the People or do we serve you? As in the Police and government has an intense surveillance state whereby thousands or more cameras can film us in public and other spaces, without fear of litigation, retaliation, or false arrest. Yet when I film the Austin police, when there is something questionable under law that they are doing, under color of law, do the Citizens have the right to film the police without fear of retaliation, deprivation of rights, conspiracy of parties, false arrest, abuse, harassment and interference? I think this is a key question that I would like to have answered in this case, by this court. Is transparency and accountability the

law? Or are they just meaningless words in 2021, post George Floyd and Mike Ramos, and so many more victims in the U.S.A..

If a hearing would be necessary, I pray for that opportunity to show and state my case. Also I cannot keep up with this case by myself until I have the help, abilities and access of legal advice or counsel. **Oral Argument Requested.** No rights waived, all rights reserved.

SIGNED this 3rd day of November, 2021.

Respectfully submitted,

 pro se
Signature Pro Se

Mr. Julian Reyes
512 785-1749
10900 Research Blvd
Suite 160c Box 147
Austin, Texas, U.S.A. 78759
justicenowpeople@protonmail.com

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Julian Reyes
Travis

(b) County of Residence of First Listed Plaintiff

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Pro Se

City of Austin, Inc, APO,
Wismar, Carlisle, Walsh, et al

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

1:21CV0992

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☒ PTF ☒ DEF Incorporated or Principal Place of Business In This State ☐ 4 ☐ 4
- Citizen of Another State ☐ 2 ☐ 2 Incorporated and Principal Place of Business In Another State ☐ 5 ☐ 5
- Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 Foreign Nation ☐ 6 ☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury ☐ 362 Personal Injury - Medical Malpractice	PERSONAL INJURY ☐ 365 Personal Injury - Product Liability ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Management Relations ☐ 740 Railway Labor Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Employee Retirement Income Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 465 Other Immigration Actions	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 835 Patent - Abbreviated New Drug Application ☐ 840 Trademark ☐ 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 375 False Claims Act ☐ 376 Qui Tam (31 USC 3729(a)) ☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit (15 USC 1681 or 1692) ☐ 485 Telephone Consumer Protection Act ☐ 490 Cable/Sat TV ☐ 850 Securities/Commodities/Exchange ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 893 Environmental Matters ☐ 895 Freedom of Information Act ☐ 896 Arbitration ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☒ 440 Other Civil Rights ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 448 Education	PRISONER PETITIONS Habeas Corpus: ☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty Other: ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition ☐ 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 USC 1983, 1985, 19, 4th, 14th, & 8th amendments

Brief description of cause:

False Arrest for camping misdemeanor Class C

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

\$1,000,000

CHECK YES only if demanded in complaint:

JURY DEMAND:

☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

11-2-2021

SIGNATURE OF ATTORNEY OF RECORD

Pro Se

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff,

V.

**CITY OF AUSTIN, INC., AUSTIN
POLICE DEPARTMENT, TROY
WISMAR, CHRISTOPHER
CARLISLE, PATRICK WALSH, KYU
SUK AN, SARAH FOSTER, GREG
MCCORMACK, JOHN DOES,
individually and in their official
capacities
*Defendant.***



CIVIL ACTION NO. 1:21-CV-0992-LY

DEFENDANTS' RULE 12(B)(1) & (6) MOTION TO DISMISS

TO THE HONORABLE JUDGE LEE YEAKEL:

The City of Austin, Officers Troy Wismar, Christopher Carlisle, Patrick Walsh, Kyu Suk An, Sarah Foster, and Front Steps former Executive Director Greg McCormack file Defendants; Rule 12(b)(6) Motion to Dismiss in response to Plaintiff's Complaint [Doc. No 1].

I. Introduction

Just before the expiration of the two-year statute of limitations, Plaintiff brings this civil rights action against the City of Austin [sic] INC, multiple listed police officers, and the former executive director of a private non-profit asserting that his rights were violated pursuant to 42 USC §§ 1983 and 1985 and violations of his First, Fourth, Eighth and Fourteenth Amendment rights with regard to his alleged arrest on or about November 5, 2019 and a subsequent arrest on or about October 24, 2021. Plaintiff has filed to plead a cognizable claim for relief against any of the named officers and individuals or City. The federal pleading requirements apply to pro se litigants and

the threshold pleading standards require factual allegations regarding each material element necessary to sustain recovery under an actionable legal theory. Because Plaintiff has failed to do so, the claims against all named parties must be dismissed.

II. Motion to Dismiss

Rule 12(b)(6) asks a court to dismiss a complaint for failure to state a claim upon which relief can be granted.” *Fed. Rules. Civ. Proc.* Rule 12(b)(6). The U.S. Supreme Court has adopted a two-step approach to determine if a claim should be dismissed under Rule 12(b)(6). *Iqbal*, 556 at 663, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). First, though generally a court should accept the veracity of well pleaded facts and view them in a light most favorable to the plaintiff, this tenet is inapplicable to allegations that are “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Id.* Second, a complaint can survive a motion to dismiss only if it states a factually plausible claim for relief. *Id.* A claim is facially plausible if the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678. And a complaint must identify factual and legal grounds which could entitle a plaintiff to relief against each defendant sued. *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (emphasis added).

Furthermore, the allegations in a complaint must raise a right to relief that is more than speculative, assuming that the allegations are true. *Twombly*, 550 U.S. at 555. The well pleaded facts must allow the court to infer the possibility of the defendant’s misconduct and show that the plaintiff is entitled to relief. *Iqbal*, at 678. In deciding a motion to dismiss under Rule 12(b)(6), a court generally accepts as true all factual allegations contained within the complaint. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). However, the court’s evaluation of pleading sufficiency requires the court to distinguish **pleading**

allegations within a complaint that contain factual content from **mere assertions** that do not. A list of generalized legal standards, without providing substantive factual matter supporting them, does not state a claim. *See Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 387 (5th Cir. 2001). The Court should not “strain to find inferences favorable to the plaintiffs” or “accept conclusory allegations, unwarranted deductions, or legal conclusions.” *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (quoting *Southland Sec. Corp. v. Inspire Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004).

III. **Argument & Authorities**

A. Plaintiff fails to state a Claim against the City of Austin¹

A City may be liable for constitutional violations under § 1983, but there is no *respondeat superior* liability. *See Monell v. Dep’t of Social Services of City of New York*, 436 U.S. 658, 690-694 (1978). A municipality is only liable for “acts directly attributed to it through some official action or imprimatur.” *Peterson v. City of Forth Worth*, 588 F.3d 838, 847 (5th Cir. 2009). Generally, this requires a Plaintiff to show “the deprivation of a federally protected right caused by action taken pursuant to an official municipal policy.” *Valle v. City of Houston*, 613 F.3d 536, 541(5th Cir. 2010). Plaintiff’s pleading does not reference or specify a specific official policy practice or custom, an alleged policy maker or whether any such policy was the moving force behind any of the alleged violations of his rights. Without those basic requirements, the claims against the City fail under the federal pleadings standards and must be dismissed.

In the absence of an express policy, a plaintiff is permitted to show a “persistent,

¹ Plaintiff also names the Austin Police Department as a party. The Austin Police Department is not a separate legal entity that is subject to suit. Rather, it is a department within the City. Because the police department is a non-jural entity, it also must be dismissed. *See Darby v. Pasadena Police Dep’t.*, 939 F.2d 311, 313-14 (Fifth Cir. 1991).

widespread practice of City officials or employees, which, although not authorized by official policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy.” *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001)(quoting *Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984(*en banc*)). However, even in such instances identified as a pattern or practice, the Plaintiff must plead more than a series of isolated incidents. *See Burge v. St. Tammy Parish*, 336 F.3d 363, 370 (5th Cir. 2003). Plaintiff’s pleading also fails to assert a pattern and practice cause of action against the City. Although Plaintiff conclusively states that the defendants have a pattern and practice of “violating poor unhoused people’s rights,” (Doc. No. 1, page 3), he again makes no factual references beyond two specific individual arrests and vague references to additional municipal court citations that are the subject of his complaint. Without more, his pleadings fail to state a cause of action against the City.

B. The Officers are entitled to official/qualified immunity.

Plaintiff names five officers and additional doe officers in his vaguely-worded complaint. Two officers: Sarah Foster and Kyu Suk are not mentioned beyond the caption. Plaintiff lobs vague and conclusory allegations against the remaining three officers that appear related to his November 2019 citation for violating the City’s camping ban. The named Officers are entitled to official/qualified immunity from individual capacity claims, if any. Immunity requires a heightened pleading standard wherein plaintiff must state facts with particularity, not conclusory allegations. *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). “Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011). The plaintiff has the burden to negate the assertion of qualified immunity once raised.

When an individual alleges a claim for wrongful arrest, qualified immunity shields defendant officers from suit if a “ ‘reasonable officer could have believed [the arrest at issue] to be lawful, in light of clearly established law and the information the [arresting] officer possessed.’ *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Plaintiff did not plead sufficient facts to establish that the facts and circumstances within the citing officers’ knowledge during the November 5, 2019, incident where he was cited for a Class C Misdemeanor Camping Ban violation, were insufficient to establish probable cause. In fact, Plaintiff acknowledges the basis for the probable cause complaint: that he was arrested for the class C misdemeanor of camping and was told to move to alternative locations of Emma Long Park, McKinney State Park or seek a spot at the Arch. The basis for Plaintiff’s false arrest allegations seem to be that he doesn’t believe that was the reason for the citation, and the true reason was his filming the police. However, conclusory statements without more, cannot serve as the basis for a valid complaint under 1983 and certainly are insufficient to overcome the named Officers’ entitlement to qualified immunity.² Without more, Plaintiff’s claims against Officers Carlisle and Walsh must fail.

Plaintiff has failed to state a claim against Officers Kyu Suk, Sarah Foster and Sergeant Troy Wismar. The first two officers are not mentioned in the body of the Complaint and the only reference to Sergeant Wismar is that he was joined by front steps manager to conspire to deprive people of their rights. (Doc. No. 1, page 3). Read most generously to the plaintiff, he may have alleged a claim for bystander liability or conspiracy against the Officers. As explained below, such a claim fails.

² Plaintiff’s additional allegations related to October 2021 are equally deficient. The conclusory allegation of a wrongful arrest on a public sidewalk, without more does not support the well-established pleading standards let alone a complaint that can overcome qualified immunity.

Bystander liability may be established where an officer (1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act. *Kitchen v. Dallas County*, 759 F.3d 468, 480 (5th Cir. 2014). Here, Plaintiff does not plead sufficient facts to establish the officer's involvement in the incident. Further, he pleads no constitutional violation for which the officers had a duty to intervene. Without more, the Officers should be dismissed.

C. Greg McCormack Is Not a State Actor and Must be Dismissed.

Plaintiff names Greg McCormack as one of several defendants and describes his role as both the "director of FrontSteps corporation" (Doc. No. 1, Page 7) and "working for the ARCH homeless shelter at the time...." (Doc. No. 1, page 6). State action is a prerequisite to sustaining a legal claim under § 1983. *See Miss. Women's Med. Clinic v. McMillian*, 866 F.2d 788, 792-93 (5th Cir. 1989). To show state action, Plaintiff must show an official custom policy or practice of the City or that the actions of FrontSteps' employees, although private, are actions "fairly attributable to the City" and therefore State actors. *See Lugar v. Edmonston Oil*, 457 U.S. 922 937 (1982). acts under color of state law and therefore a state actor.

Here, Plaintiff's only attempts to connect McCormack to the City are his description that he was on site talking to the police about how to remove and arrest him. (Doc. No. 1, page 6). Separately, he connects McCormack with work performed on behalf of the Arch homeless shelter in clearing out people who were camped outside the shelter. Such statements do not point to a policy of the City. Further, they do not identify the requisite control or authority that would amount to State action that could be attributed to McCormack. Without more, the claims against McCormack must be dismissed.

D. Section 1985 Conspiracy is not properly pled.

Section 1985 prohibits conspiracies to deprive an individual of equal protection or equal privileges and immunities under the law on the basis of race. *Griffin v. Breckenridge*, 403 U.S. 88, 102–03 (1971). While Plaintiff vaguely references a conspiracy (Doc. No. 1, p. 4), he has not alleged any facts to support a racially discriminatory conspiracy (indeed Plaintiff does not even identify his race or the race of the Defendants). Therefore, Plaintiff’s section 1985 claim should be dismissed.

E. Plaintiff’s claim of an Eighth Amendment Violation are Misplaced.

Plaintiff alleges that his Civil Complaint involve “8th Constitutional Amendment.” (Doc. No. 1, page 2). As a general rule, a pretrial detainee’s rights are analyzed under the Due Process Clause rather than the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535, N. 6 (1979). Here, Plaintiff makes no factual allegations in support of his conclusory legal claim of Eighth Amendment. Further, there is no cause of action under the Eighth Amendment based upon his status as a pretrial detainee. To the extent Plaintiff’s Complaint includes an Eighth Amendment claim, it should be dismissed.

IV.
Conclusion and Prayer for Relief

Defendants request that the Court grant this Motion to Dismiss Plaintiff’s claims and parties identified above pursuant to FRCP 12(b)(6). Defendants further request such other and further relief to which they may show to be justly entitled, at law and in equity.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

/s/ Meghan L. Riley
MEGHAN L. RILEY
State Bar No. 24049373
City of Austin
P. O. Box 1546
Austin, Texas 78767-1546
meghan.riley@austintexas.gov
Telephone (512) 974-2458
Facsimile (512) 974-1311

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 24th day of January 2022.

Via U.S. First-Class Mail & Certified Mail:

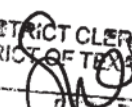
Julian Reyes
Pro Se
10900 Research Blvd.
Suite 160c Box 147
Austin, Texas, 78759
justicenowpeople@protonmail.com

PLAINTIFF, PRO SE

/s/ Meghan L. Riley
MEGHAN L. RILEY

FILED

FEB - 8 2022

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY 

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,
PLAINTIFF,

V.

CITY OF AUSTIN ET AL.,
DEFENDANTS.

§
§
§
§
§
§
§

CAUSE NO. 1:21-CV-992-LY

ORDER

IT IS HEREBY ORDERED that all pending and future discovery motions as well as all other nondispositive motions in this case are **REFERRED** to United States Magistrate Judge Susan Hightower for resolution pursuant to 28 U.S.C. § 636(b)(1)(A), Federal Rule of Civil Procedure 72, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended.

IT IS FURTHER ORDERED that all pending and future dispositive motions are **REFERRED** to United States Magistrate Judge Susan Hightower for Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended.

SIGNED this 8th day of February, 2022.


LEE YEAKEL
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff

V.

**CITY OF AUSTIN, INC.; AUSTIN
POLICE DEPARTMENT; and TROY
WISMAR, CHRISTOPHER
CARLISLE, PATRICK WALSH,
KYU SUK AN, SARAH FOSTER,
GREG MCCORMACK, and JOHN
DOES, individually and in their official
capacities,**

Defendants

Case No. 1:21-CV-00992-LY-SH

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Defendants' Rule 12(b)(1) & (6) Motion to Dismiss, filed January 24, 2022 (Dkt. 8), is now before the Court. On February 8, 2022, the District Court referred all pending and future motions in this case to the undersigned Magistrate Judge, pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. Dkt. 9.

I. Background

Plaintiff Julian Reyes, acting *pro se*, brings this civil rights action under 42 U.S.C. § 1983. Reyes is a reporter and videographer for the Challenger Street Newspaper operated by homeless individuals in Austin, Texas. Complaint, Dkt. 1 at 4. Reyes alleges that officers with the Austin Police Department (“APD”) repeatedly have wrongfully arrested him in retaliation for filming their interactions with unhoused people.

Reyes alleges that on November 5, 2019, APD Corporal Christopher Carlisle, Sergeant Troy Wismar, and “several officers” conspired together with Greg McCormack, who then worked for the Austin Resource Center for the Homeless (“ARCH”),¹ “to deprive people of their rights” during a protest in front of the Salvation Army. *Id.* Reyes alleges that he was inside his tent filming the police when Carlisle came to his tent and “said that I was being charged and arrested for my political beliefs and views, basically for protesting, filming and defending the rights of unhoused and marginalized, gentrified poor people living on the streets of Austin.” *Id.* Reyes alleges that McCormack “was on site talking to the police, prior to my false arrest, about how to remove and arrest me to deprive me of my rights.” *Id.* at 6. He further alleges that APD Officer Patrick Walsh wrongfully arrested him for committing the misdemeanor offense of violating the City’s camping ban. *Id.* at 4, 6.

Reyes alleges that the camping charge was dismissed on the merits on November 18, 2019. *Id.* at 4. He further alleges that: “Since that time I have been falsely arrested in retaliation for filming the Austin Police department several times, so many times I have lost count.” *Id.*

On October 24, 2021, Reyes alleges, he was arrested on a Class C misdemeanor “for my free speech on a public sidewalk.” *Id.* at 8. He alleges that his cameras, which are his “primary work equipment and evidence to defend myself in court,” were seized by APD. *Id.* Reyes further alleges that his 2021 arrest “is one of about 10 [or] so arrests by Austin Police agents, acting together, to deprive me of my rights to free speech and free press, transparency of government, accountability of police, and due process rights.” *Id.* He avers that “I currently have 8 or 9 open retaliatory, police abuse, arrests in 2 courts in Austin.” *Id.* at 9. All but one, Reyes alleges, “are misdemeanor arrests for filming the police depriving poor people of their rights.” *Id.*

¹ Reyes alleges McCormack was director of Front Steps, which manages the ARCH shelter. Dkt. 1 at 7.

On November 3, 2021, Reyes filed this lawsuit, alleging that his repeated arrests violated his rights under First, Fourth, Eighth, and Fourteenth Amendments to the United States Constitution.² *Id.* at 2. Reyes also asserts a claim for conspiracy under 42 U.S.C. § 1985. He alleges that APD has a “practice of false arrests to deprive Citizens of their rights,” including the First Amendment right “to film the Austin Police Department at work in public.” Dkt. 1 at 4. He further alleges that this practice culminated in his multiple false arrests, rendering the City liable for the individual APD officers’ actions under Section 1983. *Id.*

Defendants the City of Austin (the “City”), Greg McCormack, and APD Officers Troy Wismar, Christopher Carlisle, Patrick Walsh, Kyu Suk An, and Sarah Foster move to dismiss Reyes’ claims for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).³ Reyes did not respond to Defendants’ motion.

II. Legal Standards

A. Rule 12(b)(6)

Rule 12(b)(6) allows a party to move to dismiss an action for failure to state a claim on which relief can be granted. In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court accepts “all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citation omitted). The Supreme Court has explained that a complaint must contain sufficient factual matter “to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

² Although Plaintiff included an Eighth Amendment violation his Section 1983 claim, the Court construes his claim under the Fourteenth Amendment. *See Esquivel v. Eastburn*, No. SA-20-CV-00377-OLG, 2021 WL 1667132, at *6 (W.D. Tex. Apr. 28, 2021) (construing pretrial detainee’s Eighth Amendment claims under Fourteenth Amendment).

³ Defendants cite Rule 12(b)(1) in the title of their motion but seek dismissal under Rule 12(b)(6) only. Also, the Austin Police Department is not subject to suit because it is not a separate legal entity from the City of Austin. *Taylor v. Anderson*, No. A-13-CV-464-LY, 2014 WL 547032, at *5 n.3 (W.D. Tex. Feb. 10, 2014) (citing *Darby v. Pasadena Police Dep’t*, 939 F.2d 311, 313-14 (5th Cir. 1991)).

(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Twombly, 550 U.S. at 555 (cleaned up). In determining whether a plaintiff’s claims survive a Rule 12(b)(6) motion to dismiss, the factual information to which the court addresses its inquiry is generally limited to (1) the facts set forth in the complaint, (2) documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201. *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019).

B. Section 1983

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

To state a claim under Section 1983, a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States, and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013). Claims under Section 1983 may be brought against persons in their individual or official capacity, or against a governmental entity. *Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009). It is well established that a municipality or a local governmental unit is not liable

under Section 1983 on the theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). “A municipality is almost never liable for an isolated unconstitutional act on the part of an employee; it is liable only for acts directly attributable to it through some official action or imprimatur.” *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (internal quotation marks omitted). A municipality is liable under Section 1983 for its officers and employees’ actions when they are executing an official policy or custom. *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001).

III. Analysis

Reyes did not file a response to Defendants’ Motion to Dismiss. Nonetheless, the Court addresses the merits of the motion, as the Fifth Circuit Court of Appeals has not approved the automatic grant of dispositive motions. *Johnson v. Pettiford*, 442 F.3d 917, 918-19 (5th Cir. 2006).

A. Municipal Liability

To establish municipal liability under Section 1983, a plaintiff must plead facts that plausibly establish (1) an official policy (2) promulgated by a policymaker (3) that was the “moving force” behind the violation of the constitutional right. *Piotrowski*, 237 F.3d at 578. The City contends that Reyes has failed to adequately plead all three of these elements. Specifically, Defendants argue that Reyes has not sufficiently alleged that any APD policy, practice, or custom caused a violation of his constitutional rights, identified an alleged policymaker, or shown that a City policy was the moving force behind his constitutional violation.

1. Official Policy

An official policy can include written policy statements, ordinances, or regulations, as well as a widespread practice that is “so common and well-settled as to constitute a custom that fairly represents municipal policy.” *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984). A policy or custom is official when it results from the decision or acquiescence of the municipal

officer or body with final policymaking authority over the subject matter of the offending policy. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

Municipal liability claims based on a local government’s customs generally require that the plaintiff demonstrate a pattern of conduct, because “one act is not itself a custom.” *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002). “A pattern requires similarity and specificity; ‘[p]rior indications cannot simply be for any and all bad or unwise acts, but rather must point to the specific violation in question.’” *Peterson*, 588 F.3d at 851 (quoting *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005)). A pattern also requires sufficiently numerous prior incidents, not isolated instances. *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989).

A “First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions.” *Turner v. Lt. Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *see also Kokesh v. Curlee*, 14 F.4th 382, 393 (5th Cir. 2021) (stating that recording state trooper “is a protected activity under the First Amendment”). Reyes alleges that the City has a widespread practice or custom in which police officers falsely arrest people to prevent them from exercising their First Amendment right to record police activities. Dkt. 1 at 4.

In his Complaint, Reyes alleges facts regarding multiple instances in which he was purportedly arrested by APD while filming police activity. Reyes identifies two separate arrests and alleges that “about 10 [or] so” additional arrests occurred under similar circumstances. *Id.* at 3, 8.

Once again, at the motion to dismiss stage of a proceeding, the Court must assume that all allegations in the complaint are true. *Twombly*, 550 U.S. at 555. The Court finds that Reyes has made specific factual allegations allowing a reasonable inference that the City had a policy, practice, or custom of arresting individuals to prevent them from filming police activities.

Therefore, his pleadings are sufficient to state a viable claim under Section 1983. *See, e.g., Sanchez v. Gomez*, 283 F. Supp. 3d 524, 536 (W.D. Tex. 2017) (denying motion to dismiss where plaintiffs alleged nine instances of use of excessive force against mentally ill victims in four years), *appeal dismissed*, 2018 WL 1989633 (5th Cir. Feb. 22, 2018); *Barr v. City of San Antonio*, No. SA-06-CA-0261-XR, 2006 WL 2322861, at *4 (W.D. Tex. July 25, 2006) (finding allegations of four prior lawsuits against city concerning unlawful arrest and excessive force sufficient to state a “policy or custom” claim under Section 1983).

2. Policymaker

Defendants further argue that Reyes’ Section 1983 claim fails because he does not reference any alleged policymaker in his Complaint. The Fifth Circuit Court of Appeals has specifically rejected this contention, holding that the identity of the policymaker is a question of state law, not fact, and therefore courts should not grant motions to dismiss for failing to plead the specific identity of the policymaker. *Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016) (“[T]he specific identity of the policymaker is a legal question that need not be pled; the complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable.”); *see also Balle v. Nueces Cnty.*, 952 F.3d 552, 559 (5th Cir. 2017) (reversing dismissal of claim against county because plaintiff was not required to plead identity of policymaker).

3. Nexus

To satisfy the third element and show that a policy was the “moving force” behind the constitutional violation under Section 1983, there must be “a direct causal link” between the policy and the violation, not merely a “but for” coupling between cause and effect. *Peterson*, 588 F.3d at 848. Reyes alleges that, because of the City’s custom of arresting those who film police activities, APD officers wrongfully arrested him on multiple occasions, which resulted in his constitutional

injury. He specifically alleges that all but one of his misdemeanor arrests are “for filming the police depriving poor people of their rights” and not for any actual violation of the law. Dkt. 1 at 9. The facts alleged in Reyes’ Complaint state a plausible claim that the City’s policy was the “moving force” behind the alleged violations of his constitutional rights under the First, Fourth, and Fourteenth Amendments.

For the foregoing reasons, the undersigned Magistrate Judge recommends that the District Court deny Defendants’ Motion to Dismiss Reyes’ Section 1983 claim against the City of Austin.

B. Individual Defendants

Reyes also asserts Section 1983 claims against several APD officers and McCormack, a private citizen. Defendants argue that the APD officers are entitled to qualified immunity, and that Reyes fails to state a claim against McCormack.

1. Officers Sarah Foster and Kyu Suk An

Reyes names APD Officers Sarah Foster and Kyu Suk An as defendants, but alleges no facts against either officer in his Complaint. Dkt. 1 at 2. “To be liable under § 1983, [an officer] must have been personally involved in the alleged constitutional deprivation or have engaged in wrongful conduct that is causally connected to the constitutional violation.” *Turner*, 848 F.3d at 695-96; *see also Watson v. Interstate Fire & Cas. Co.*, 611 F.2d 120, 123 (5th Cir. 1980) (stating that “vicarious liability cannot be the basis for recovery” under Section 1983 and that “[l]iability may be found only if there is personal involvement of the officer being sued”). Reyes’ claims against these two defendants fail as a matter of law because he pleads no allegations that they were personally involved in or causally connected to his allegedly wrongful arrests. *See Turner*, 848 F.3d at 696 (stating that plaintiff failed to allege officer violated Fourth Amendment rights where he did not allege that police officer had any personal involvement in his arrest). Accordingly, the claims against Officers Sarah Foster and Kyu Suk An should be dismissed.

2. Corporal Christopher Carlisle, Officer Patrick Walsh, Sergeant Troy Wismar, and John Doe Officers

Defendants argue that the remaining APD officers are entitled to qualified immunity from Reyes' individual capacity claims. Qualified immunity extends to government officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity shields from liability 'all but the plainly incompetent or those who knowingly violate the law.'" *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). An official who violates a federal right is entitled to qualified immunity if his or her actions were objectively reasonable. *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993). Therefore, "qualified immunity represents the norm." *Harlow*, 457 U.S. at 807.

Once a defendant invokes qualified immunity, the burden shifts to the plaintiff to show that the defense is not available. *Kovacich v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010). To rebut the qualified immunity defense, a plaintiff must show that (1) the allegations make out a violation, and (2) the violation was "clearly established" at the time of the defendant's conduct. *Id.* To do so, the plaintiff "must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012).

Because he did not respond to Defendants' grounds for dismissal of his Section 1983 claims based on qualified immunity, Reyes has failed to meet his burden to negate Defendants' qualified immunity defense. See *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (stating that plaintiff has burden to negate qualified immunity defense once properly raised); *S.C. v. Round Rock Indep. Sch. Dist.*, No. A-19-CV-1177-SH, 2020 WL 1446857, at *8 (W.D. Tex. Mar. 25,

2020) (finding that plaintiffs did not meet burden to negate defense when they failed to respond to defendant's grounds for dismissal based on qualified immunity). Accordingly, the undersigned Magistrate Judge recommends that Reyes' claims against Carlisle, Walsh, Wismar, and the John Doe Officers be dismissed for failure to state a claim.

3. Greg McCormack

For a private citizen to be held liable under Section 1983, the plaintiff must allege that the citizen conspired with or acted in concert with state actors. *Childers v. San Saba Cnty.*, No. A-14-CV-916-LY-ML, 2015 WL 13694667, at *14 (W.D. Tex. Nov. 30, 2015) (citing *Mylett v. Jeane*, 879 F.2d 1272, 1275 (5th Cir. 1989)). The plaintiff must allege (1) an agreement between the private and public defendants to commit an illegal act, and (2) a deprivation of constitutional rights. *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994). "Allegations that are merely conclusory, without reference to specific facts, will not suffice." *Priester v. Lowndes Cnty.*, 354 F.3d 414, 420 (5th Cir. 2004).

Defendants argue that Reyes' Section 1983 claim against McCormack fails because Reyes has alleged neither that McCormack was a state actor nor facts showing that McCormack entered a conspiracy with the City to deprive Reyes of his constitutional rights. Reyes alleges that McCormack, then working for the ARCH homeless shelter, "was involved in clearing out all the people camped outside" the shelter and talked to APD officers about removing Reyes immediately before his arrest on November 5, 2019. Dkt. 1 at 6. Accordingly, Reyes can pursue a Section 1983 against McCormack only if he can show a conspiracy between McCormack and the City.

Reyes has not alleged facts showing the existence of an agreement between McCormack and any state actor to commit an illegal act. He makes only a conclusory allegation that McCormack "conspired to deprive [him] of [his] civil rights." *Id.* at 7. This is insufficient to state a claim. *See Priester*, 354 F.3d at 421 (holding that dismissal of Section 1983 claim was appropriate because

plaintiff did not allege an agreement between defendants to commit an illegal act or specific facts to show an agreement). The Court recommends that Reyes' Section 1983 claim against McCormack be dismissed.

C. Civil Conspiracy under Section 1985

Finally, Defendants assert that Reyes has failed to allege facts to support a civil conspiracy claim under Section 1985. The Court agrees that Reyes has not stated such a claim. Assuming that Reyes asserts his claim under Section 1985(3), he does not allege that he was arrested because of his race. *See Lockett v. New Orleans City*, 607 F.3d 992, 1002 (5th Cir. 2010) (stating that "the conspiracy must also have a racially based animus"). Therefore, Plaintiff's Section 1985 claim should be dismissed.

IV. Recommendations

Based on the foregoing, the undersigned Magistrate Judge **RECOMMENDS** that the District Court **GRANT IN PART AND DENY IN PART** Defendants' Motion to Dismiss (Dkt. 8) under Rule 12(b)(6).

The Court **RECOMMENDS** that the District Court **GRANT** the Motion and **DISMISS** with prejudice Plaintiff's claims against Greg McCormack and APD Officers Troy Wismar, Christopher Carlisle, Patrick Walsh, Kyu Suk An, and Sarah Foster, and **DENY** Defendants' Motion as to Plaintiff's Section 1983 claims against the City of Austin.

Should the District Court adopt this Report and Recommendation, Plaintiff's only remaining cause of action will be his Section 1983 claim against the City of Austin.

V. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v.*

United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on March 15, 2022.



SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,	§	
PLAINTIFF,	§	
	§	
V.	§	CAUSE NO. 1:21-CV-992-LY
	§	
CITY OF AUSTIN ET AL.,	§	
DEFENDANTS.	§	

ORDER ON REPORT AND RECOMMENDATION

Before the court is the above-referenced cause. On January 24, 2022, Defendants City of Austin, Troy Wismar, Christopher Carlisle, Patrick Walsh, Kyu Suk An, Sarah Foster, and Greg McCormack filed a Rule 12(b)(1) & (6) Motion to Dismiss (Doc. #8), which was referred to a United States Magistrate Judge for Report and Recommendation. *See* 28 U.S.C. § 636(b); FED. R. CIV. P. 72; Loc. R. W.D. Tex. App’x C, R. 1(d). The magistrate judge rendered a Report and Recommendation on March 15, 2022 (Doc. #10), recommending that the court grant in part and deny in part Defendants’ motion to dismiss. Specifically, the magistrate judge recommends that the court dismiss Plaintiff Julian Reyes’s claims against the individual defendants and deny the motion to dismiss with respect to Reyes’s civil-rights claims against the City of Austin. *See* 42 U.S.C. § 1983 (“Section 1983”).

A party may serve and file specific written objections to the proposed findings and recommendations of a magistrate judge within 14 days after being served with a copy of the report and recommendation and thereby secure *de novo* review by the district court. *See* 28 U.S.C. § 636(b); FED. R. CIV. P. 72(b). A party’s failure to timely file written objections to the proposed findings, conclusions, and recommendation in a report and recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed

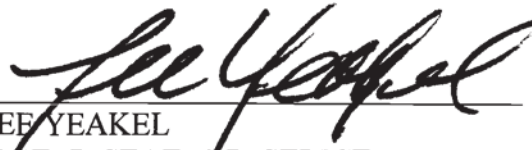
factual findings and legal conclusions accepted by the district court. *See Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

On March 31, 2022, Reyes filed a Motion for Stay (Doc. #12), which the court construed as a motion for extension to file objections to the Report and Recommendation. The court granted Reyes's extension request and allowed Reyes until May 2, 2022, to file objections to the Report and Recommendation (Doc. #13). To date, no objections have been filed. Having reviewed the report and recommendation along with the case file and applicable law, the court finds no plain error and accepts the report and recommendation for substantially the reasons stated therein. *See* FED. R. CIV. P. 72(b).

IT IS THEREFORE ORDERED that the United States Magistrate Judge's Report and Recommendation (Doc. #10) is hereby **APPROVED** and **ACCEPTED** by the court.

IT IS FURTHER ORDERED that Defendants City of Austin, Troy Wismar, Christopher Carlisle, Patrick Walsh, Kyu Suk An, Sarah Foster, and Greg McCormack's Rule 12(b)(1) & (6) Motion to Dismiss (Doc. #8) is **GRANTED IN PART AND DENIED IN PART AS FOLLOWS**: Reyes's claims against Greg McCormack, Trey Wismar, Christopher Carlisle, Patrick Walsh, Kyu Suk An, and Sarah Foster are **DISMISSED WITH PREJUDICE**. The motion is in all other respects **DENIED**. Reyes's Section 1983 claims against the City of Austin remain pending before the court.

SIGNED this 10th day of May, 2022.


LEE YEAKEL
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff,

v.

CITY OF AUSTIN,
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-CV-0992-LY

**DEFENDANT CITY OF AUSTIN’S ANSWER AND
AFFIRMATIVE DEFENSES TO PLAINTIFF’S COMPLAINT**

TO THE HONORABLE JUDGE LEE YEAKEL:

Defendant City of Austin (“Defendant” or the “City”) files this Answer and Affirmative Defenses to Plaintiff’s Complaint (Doc. No. 1). Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant respectfully shows the Court as follows:

PROCEDURAL HISTORY

On March 15, 2022 the Magistrate Court issued its Report and Recommendations. On April 1, 2022, Plaintiff filed a Motion to Stay, which the Court construed as a Motion to Extend Time to File Objections, giving Plaintiff until May 2, 2022 to file his objections. On May 10, 2022, this Honorable Court adopted the Magistrate’s Report and Recommendations, issued an order dismissing Plaintiff’s claims against individual defendants and denied the Motion to Dismiss Plaintiff’s civil rights claims against the City.

ORIGINAL ANSWER

Pursuant to Federal Rule of Civil Procedure 8(b) and 15(a)(3), the City responds to each of the specific averments in Plaintiff’s Original Petition as set forth below. To the extent that the City does not address a specific averment made by Plaintiff, the City expressly denies that averment. Several sections of Plaintiff’s Petition do not contain any pertinent factual allegations

that must be admitted or denied. To the extent the City does not respond to a factual allegation, that allegation is denied. Plaintiff has failed to consistently number his averments in his Original Petition; therefore the City will comply with a response to each specific averment to the best of their ability, but respectfully request that the Court reserve to the City a right to make modifications or corrections to rectify erroneous responses reasonably made due to Plaintiff's lack of consistently numbering his paragraphs.

PARTIES

1. The City lacks knowledge or information sufficient to form a belief about the truth of the Plaintiff's residence as averred in Paragraph 1.
2. The City admits it is the sole remaining defendant as averred in Paragraph 2 and its mailing address is proper. The City avers the remaining defendants have been dismissed.

JURISDICTION AND VENUE

3. The City admits the allegation in the first sentence of Paragraph 3 and that the Court has jurisdiction over the Defendant. To the extent there are allegations against the City in the second, third, and fourth paragraph, the City denies any and all allegations. The City denies the conspiracy alleged in the final sentence of Paragraph 3.

FACTS

4. The City admits that Plaintiff was arrested on November 5, 2019, in front of Salvation Army in the 700 block of Neches in Austin, Texas as alleged in Paragraph 4. The City admits several officers, including former defendants, were at the 700 block of Neches at the time of the arrest. The City admits Corporal Carlisle interacted with Plaintiff. The City admits that Plaintiff was arrested for Camping and Obstruction in Certain Public Areas Prohibited, a Class C misdemeanor. The City further admits the Class C misdemeanor Camping charge was dismissed.

5. The City denies the remaining allegations in Paragraph 4.
6. The City denies the allegations in the first unnumbered paragraph immediately following Paragraph 4.
7. The City admits the charge against Plaintiff was dismissed on November 18, 2019, as alleged in the second unnumbered paragraph immediately following Paragraph 4. The City denies the remaining allegations.
8. To the extent there are allegations against the City in the third unnumbered paragraph following Paragraph 4, the City denies any and all allegations.
9. To the extent there are allegations against the City in the fourth unnumbered paragraph following Paragraph 4, the City denies any and all allegations.
10. To the extent there are allegations against the City in the fifth unnumbered paragraph following Paragraph 4, the City denies any and all allegations.
11. The City denies the allegations in the sixth unnumbered paragraph following Paragraph 4.
12. The City denies the allegations in the seventh unnumbered paragraph following Paragraph 4.
13. The City denies the allegations in Plaintiff's numbered Paragraph 5.
14. The City denies the allegations in the first unnumbered paragraph following Paragraph 5.
15. The City denies the allegations in the second unnumbered paragraph following Paragraph 5.
16. The City specifically denies that it is engaging in a clear pattern or practice of targeting, abuse and deprivation of rights as alleged in the third unnumbered paragraph following Paragraph 5.

17. The City generally denies the remaining allegations in the third unnumbered paragraph following Paragraph 5.

18. The City denies the allegations in the fourth unnumbered paragraph following Paragraph 5.

AFFIRMATIVE DEFENSES

1. The City asserts the affirmative defense of governmental immunity as a municipal corporation entitled to immunity while acting in the performance of its governmental functions, absent express waiver.

2. The City asserts the affirmative defense of governmental immunity since its employees are entitled to qualified/official immunity for actions taken in the course and scope of their employment, absent express waiver.

3. As a political subdivision, the City denies that it can be liable for exemplary/punitive damages under 42 U.S.C. § 1983.

4. The City reserves the right to assert additional affirmative defenses throughout the development of the case.

DEFENDANT'S PRAYER

The City prays that all relief requested by Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award the City costs and attorney's fees, and any additional relief to which it is entitled under law or equity.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION

/s/ Sara E. Rice
SARA E. RICE
Assistant City Attorney
State Bar No. 24110273

sara.rice@austintexas.gov

City of Austin Law Department

P.O. Box 1546

Austin, Texas 78767-1546

Telephone: (512) 974-6463

Facsimile: (512) 974-1311

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 24th day of May 2022.

Via CM/ECF:

Julian Reyes

Pro Se

10900 Research Blvd.

Suite 160c Box 147

Austin, Texas, 78759

justicenowpeople@protonmail.com

PLAINTIFF, PRO SE

/s/ Sara E. Rice
SARA E. RICE

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff

v.

**CITY OF AUSTIN, INC., AUSTIN
POLICE DEPARTMENT, and
JOHN DOES,**
Defendants

§
§
§
§
§
§
§
§

CASE NO. 1:21-CV-00992-LY-SH

ORDER

Before the Court are Plaintiff’s Motion for Appointment of Counsel (Dkt. 15) and Motion for Stay/Leave (Dkt. 16), both filed May 22, 2022.¹

I. Background

Plaintiff Julian Reyes, acting *pro se*, brought this civil rights action under 42 U.S.C. § 1983. Reyes is a reporter and videographer for the Challenger Street Newspaper operated by homeless individuals in Austin, Texas. Complaint, Dkt. 1 ¶ 4. Reyes alleges that officers with the Austin Police Department (“APD”) repeatedly have wrongfully arrested him in retaliation for filming their interactions with unhoused people. *Id.* Reyes alleges that his repeated arrests violated his rights under First, Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. *Id.* ¶ 3. He alleges that APD has a “practice of false arrests to deprive Citizens of their rights,” including the First Amendment right “to film the Austin Police Department at work in public.” *Id.* ¶ 4. He further claims that this practice culminated in his multiple false arrests, rendering the City of Austin (“the City”) liable for the individual APD officers’ actions under § 1983. *Id.*

¹ The District Court referred all dispositive and nondispositive motions in this case to the undersigned Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1), Federal Rule of Civil Procedure 72, and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas (“Local Rules”). Dkt. 9.

The undersigned Magistrate Judge granted Reyes *in forma pauperis* status and recommended that the District Court grant Defendants’ Motion to Dismiss Reyes’ claims against individual defendants Greg McCormack and APD Officers Troy Wismar, Christopher Carlisle, Patrick Walsh, Kyu Suk An, and Sarah Foster, but deny the motion as to Reyes’ § 1983 claims against the City. Dkts. 5, 10. The District Court adopted the Report and Recommendation, and Reyes’ only remaining cause of action is his § 1983 claims against the City. Dkt. 14.

II. Appointment of Counsel

Reyes asks the Court to appoint counsel to represent him in this action. Dkt. 15. Reyes avers that he has contacted private attorneys, legal aid associations, and a lawyer referral service, but has been unable to secure representation. Dkt. 15-1. Reyes seeks appointment of counsel based on the “overwhelming complexity of the court rules and procedures” and “the discovery of evidence in a complex claim of multiple agents and incidents of false arrest,” and because “the evidence will consist of conflicting testimony and contested facts and omissions of evidence by the City.” Dkt. 15 ¶¶ 3, 7. The City did not file a response to Reyes’ motion.

The Court may appoint counsel in *in forma pauperis* proceedings pursuant to 28 U.S.C. § 1915(e)(1). District courts have discretion under § 1915(e)(1) to appoint an attorney to represent an indigent litigant. “But the appointment of counsel in a civil case is a privilege and not a constitutional right. It should be allowed in civil actions only in exceptional cases.” *Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982); *see also Naranjo v. Thompson*, 809 F.3d 793, 799 (5th Cir. 2015) (“Even when a plaintiff has nonfrivolous § 1983 claims, a trial court is not required to appoint counsel unless the case presents exceptional circumstances.”) (cleaned up). The Fifth Circuit Court of Appeals has identified factors courts should consider in determining whether exceptional circumstances warrant the appointment of counsel, including:

- (1) the type and complexity of the case;
- (2) the petitioner's ability adequately to present and investigate his case;
- (3) the presence of evidence which largely consists of conflicting testimony so as to require skill in presentation of evidence and in cross-examination; and
- (4) the likelihood that appointment will benefit the petitioner, the court, and the defendants by "shortening the trial and assisting in just determination."

Tampico v. Martinez, 987 F.3d 387, 392 (5th Cir. 2021) (quoting *Parker v. Carpenter*, 978 F.2d 190, 193 (5th Cir. 1992)).

The Court is mindful that Reyes has requested appointment of counsel in at least four previous civil rights actions in this Division.² In the first, *Reyes v. Walsh*, 1:15-CV-327-RP, which Reyes filed after his dog was shot and killed by Austin police in 2013, counsel was appointed and represented Reyes through settlement of his claims for unlawful seizure of his person. Reyes' requests were denied in three subsequent cases. *Reyes v. Tex. Dep't of Public Safety*, 1:16-CV-889-RP, Dkt. 41 (denying third motion to appoint counsel because "the legal and factual issues in this case are not so complex as to present the sort of exceptional circumstances that would justify appointing counsel"); *Reyes v. Berry*, 1:17-CV-908-RP, Dkt. 19 ("At this stage in the litigation, the Court finds that this case appears to raise neither novel nor complex issues."); *Reyes v. Sebek*, 1:19-CV-367-LY, Dkt. 21.

The Court has carefully considered the relevant factors and concludes that counsel should be appointed based on the circumstances presented at the current stage of this case. First, Reyes asserts a municipal liability claim against the City, alleging violations of his First, Fourth, and Fourteenth Amendments rights.

² A sixth case, *Reyes v. City of Austin, Inc.*, 1:22-CV-22-LY, was dismissed as duplicative of this action and therefore frivolous pursuant to § 1915(e)(2). *Id.* at Dkt. 4, Dkt. 9.

Section 1983 cases are “by their nature more complex than many other cases,” but that alone is insufficient to warrant the appointment of counsel. *Jackson v. Dallas Police Dep’t*, 811 F.2d 260, 262 (5th Cir. 1986). Because Reyes alleges that he is a journalist with the Challenger Street Newspaper, however, evaluation of his § 1983 claim may involve particularly complex issues. Reyes’ Fourth Amendment false arrest and First Amendment retaliatory arrest claims against the City likely will turn on whether there was probable cause for his arrest. *See, e.g., Villarreal v. City of Laredo*, 44 F.4th 363, 374 (5th Cir. 2022) (stating that to prevail on Fourth Amendment false arrest claim, plaintiff, a journalist, must show that she was seized and the seizure was unreasonable because it lacked probable cause); *Buehler v. Dear*, 27 F.4th 969, 993-94 (5th Cir. 2022) (affirming dismissal of First Amendment retaliatory arrest claim because officers had probable cause to arrest plaintiff filming police). The existence of probable cause, however, is not necessarily dispositive of Reyes’ Fourteenth Amendment claim. *See, e.g., Villarreal*, 44 F.4th at 377 (stating that probable cause is not a bar to a selective enforcement claim under the Fourteenth Amendment). Reyes also alleges numerous false arrests, involving several different agents of the City. *Cf. Kiser v. Dearing*, 442 Fed. App’x. 132, 134 (5th Cir. 2011) (denying request for appointment of counsel where “facts surrounding the single incident and the subsequent disciplinary hearing [were] relatively straightforward”). The Court finds that the first factor weighs in favor of appointing counsel.

Second, Reyes has demonstrated that he is unable to adequately investigate and present his case. Reyes alleges that he has been “chronically homeless for about 20 years.” Dkt. 1 ¶ 1. He further contends that his repeated arrests by the Austin Police Department interfere with his ability to prosecute the case. The fact that Reyes failed to respond to Defendants’ Motion to Dismiss (Dkt. 8) demonstrates his inability to prosecute his case. In addition, the effort required to prosecute this case is greater at this stage of the proceeding, given that Reyes’ claims against the

City survived the motion to dismiss stage and his case may proceed to summary judgment or trial. The Court finds that the second factor also weighs in favor of appointing counsel.

Third, it is likely that the evidence will consist largely of conflicting testimony concerning the City's purported practice of making false arrests to prevent the exercise of First Amendment rights, requiring skill in presentation of evidence and in cross-examination. This factor also weighs in favor of appointing counsel. *Cf. Jackson*, 811 F.2d at 262 (denying request for appointment of counsel where "review of the record indicates that the evidence will consist primarily of official records and other documentary type evidence").

With respect to the fourth factor, appointment of counsel likely will benefit Reyes, the court, and the City by promoting efficient and just adjudication of Reyes' claims.

As each of the relevant factors weighs in favor of appointing counsel, the Court finds that exceptional circumstances warrant the appointment of counsel in this case. Accordingly, the Court **GRANTS** Plaintiff's Motion for Appointment of Counsel (Dkt. 15). The Court hereby appoints the following attorney to represent Julian Reyes in the above-styled and numbered cause:

Peter D. Kennedy
Graves Dougherty Hearon & Moody
401 Congress Avenue, Suite 2700
Austin, Texas 78701

III. Motion to Stay

Reyes asks the Court to stay this action "for at least 30 days while I seek legal attention on these matters," and because he expected to lose internet access until late June or early July 2022. Dkt. 16 ¶ 1. He also asserts that he has been unable to find counsel and prepare a defense due to alleged harassment by the City and police. *Id.* ¶ 12. Defendants did not respond to Reyes' motion to stay.

A district court's power to stay proceedings is incidental to its inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Although a district court has wide discretion to stay proceedings, its power is not unbounded. *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983). A court must weigh the competing interests when exercising its discretion to issue a stay. *Landis*, 299 U.S. at 254-55. The moving party "must make out a clear case of hardship or inequity in being required to go forward." *Id.* at 255.

The Court finds that the balance of interests does not justify staying this case. Reyes' argument that he expected to lose internet access until July 2022 is moot, and he has provided no additional information regarding his current access. Because no scheduling order has been entered in this case, furthermore, there are no pending deadlines for which Reyes would require an extension of time. Plaintiff's Motion to Stay (Dkt. 16) is **DENIED** without prejudice to refiling.

IV. Motion to Amend

Finally, the Court construes Reyes' Motion for Stay/Leave as embodying a motion for leave to amend. *See* Dkt. 16 ¶ 14 ("I would also like the opportunity to amend my complaint . . ."). Reyes did not attach a proposed amended complaint to his Motion to Amend, as required by Local Rule CV-7(b). Despite proceeding *pro se*, Reyes must comply with the Federal Rules of Civil Procedure and Local Rules. *See Martin v. Harrison Cnty. Jail*, 975 F.2d 192, 193 (5th Cir. 1992). Reyes also does not specify any legal or factual information he proposes to add. For these reasons, the Court **DENIES** Plaintiff's Motion to Amend (Dkt. 16) without prejudice to refiling.

SIGNED on September 16, 2022.



SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,

Plaintiff,

V.

CITY OF AUSTIN, AUSTIN POLICE
DEPARTMENT, TROY WISMAR,
CHRISTOPHER CARLISLE,
PATRICK WALSH, KYU SUK AN,
SARAH FOSTER, GREG McCORMACK,
and JOHN DOES, individually and in
their official capacities,

Defendants.

Case No. 1:21-CV-00992-RP-SH

PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff Julian Reyes brings this action against Defendant City of Austin, Texas, and would respectfully show:

I. Introduction.

1. Plaintiff Julian Reyes is a videographer, reporter, legal documentarist, and street advocate. He brings this lawsuit pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 2000aa, *et seq.*, to vindicate the City of Austin’s repeated violation of his constitutional and statutory rights.

II. Parties.

2. Plaintiff Julian Reyes is a resident of Travis County, Texas.

3. Defendant City of Austin is a home rule city that has appeared and answered.

III. Jurisdiction and Venue.

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 1983, 1988, and 2000aa-6(h).

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because the City of Austin is located in this district and a substantial part of the events or omissions giving rise to the claims occurred in this district.

IV. Factual Allegations.

6. Plaintiff Julian Reyes is a reporter and videographer. His work is published in *The Challenger Street Newspaper*, which is published by homeless individuals and advocates in Austin, Texas. Reyes' video journalism is also published on YouTube and elsewhere.

7. Reyes has been repeatedly and wrongly arrested by officers with the Austin Police Department ("APD") while filming APD officers' interactions with unhoused people and other public actions.

8. For instance, on November 5, 2019, Reyes was filming the APD officers engaged in disrupting a protest in front of the Salvation Army homeless shelter in downtown Austin, Texas. While observing and filming, an APD officer informed him, by words and actions, that Reyes was being arrested for protesting, filming, and advocating for the rights of unhoused people living on the streets of Austin. Another APD officer arrested Reyes as he was engaged in observing and filming APD officers interacting with other people who were also engaged in exercising their First Amendment rights.

9. Reyes' arrest on November 5, 2019, was purportedly for committing the misdemeanor offense of violating the City's camping ban. However, the camping charge against Reyes was dismissed on the merits on or about November 18, 2019. Reyes' arrest was without

probable cause and was a pretext to stop Reyes from recording the police, to retaliate against him for doing so, and to discourage him from doing so in the future.

10. On October 24, 2021, Reyes was arrested on a Class C misdemeanor while exercising his free speech rights on a public sidewalk. During this arrest, Reyes' cameras, which are his primary work equipment, were seized by APD. Reyes' cameras contained work product and documentary materials that he intended to publish to the public.

11. Reyes' October 24, 2021, arrest was without probable cause and was a pretext to stop Reyes from recording the police, to retaliate against him for doing so, and to discourage him from doing so in the future. This charge was likewise dismissed.

12. Between June 2, 2014, through March 2023, Reyes was repeatedly arrested and/or interfered with by APD officers while engaged in the exercise of his rights to free speech and the press. City of Austin records reflect that on at least thirteen occasions, Reyes was arrested or interfered with by APD while filming APD activities. All, or nearly all, of these arrests were for filming the police while engaged in their duties, not for any violation of the law. By January 2017, if not sooner, the APD had labelled Reyes an "anti-police activist" based on his exercise of his rights to free speech and the press and repeatedly noted this disparaging label for Reyes in official police reports. APD repeatedly arrested Reyes on other charges which, on information and belief, were pretexts for retaliating against Reyes for exercising his rights to free speech and press and intended to discourage him from further exercising those rights.

V. Causes of Action.

A. Section 1983.

13. Reyes incorporates the allegations in the above paragraphs of this Complaint as though fully alleged herein.

14. Reyes' observation and recording of APD officers as alleged herein was an exercise of his constitutional rights to free speech and press as applied to the states and their subdivisions by the Fourteenth Amendment.

15. In committing the acts complained of, the City of Austin and its APD officers acted under color of state law to deprive Reyes of those constitutional rights.

16. The First Amendment right to record the police, made applicable to the states and their subdivisions through the Fourteenth Amendment, is well-established and was well-established at the time of each of Reyes' arrests.

17. Reyes' arrests are the result of a widespread practice or custom in which APD police officers falsely arrest people, or arrest them on pretextual bases, to prevent them from exercising their constitutional right to record police activities.

18. Reyes' arrests in particular are the result of a common practice or custom in which APD police officers falsely arrest Reyes in particular, or arrest him on pretextual bases, to prevent him from exercising his constitutional right to observe and record police activities, to retaliate against him for having exercised his constitutional right to observe and record police activities in the past, and/or to discourage him from exercising his constitutional right to observe and record police activities in the future.

19. Such arrests are so common and regular that they constitute a pattern of conduct, not isolated incidents. Such arrests constitute a custom that fairly represents City of Austin policy that is promulgated, endorsed, and/or tolerated by the City. This policy or practice was the moving force behind Reyes' arrests.

20. As a direct and proximate result of the City of Austin's violation of his constitutional rights, Reyes suffered actual damages.

B. Violation of the Privacy Protection Act of 1980 (42 U.S.C. §§ 2000aa, *et seq.*) – Seizure of Work Product Materials.

21. Reyes incorporates the allegations in the above paragraphs of this Complaint as though fully alleged herein.

22. The City of Austin’s seizures of Reyes’ cameras, videos, and other materials constituted the unlawful seizure of work product materials as defined in 42 U.S.C. § 2000aa-7(b), in violation of 42 U.S.C. § 2000aa(a). Reyes brings this action pursuant to 42 U.S.C. § 2000aa-6(a)(1) & (f).

23. The City of Austin, through its agents, seized Reyes’ work product materials while knowing, believing, or with reason to believe that Reyes possessed such materials with the purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.

24. The seized materials constituted materials, in anticipating of communicating such materials to the public, that were prepared, produced, authored, or created by Reyes and/or others, were possessed for the purposes of communicating such materials to the public, and included Reyes and/or others’ mental impressions, conclusions, opinions, and theories.

25. There was no probable cause to believe that Reyes had committed a criminal offense to which the materials related or reason to believe that the immediate seizure of such materials was necessary to prevent the death of, or serious bodily injury to, a human being.

26. The City of Austin’s unlawful seizures caused Reyes actual damages. Reyes sues to recover his actual damages, but not less than liquidated damages of \$1,000 for each violation, reasonable attorneys’ fees and other litigation costs incurred, and pre-judgment interest.

C. Violation of the Privacy Protection Act of 1980 (42 U.S.C. §§ 2000aa, *et seq.*) – Seizures of documentary materials.

27. The City of Austin’s seizures of Reyes’ cameras, videos, and other materials constituted seizures of documentary materials as defined in 42 U.S.C. § 2000aa-7(a), in violation of 42 U.S.C. § 2000aa(b). Reyes brings this action pursuant to 42 U.S.C. § 2000aa-6(a)(1) & (f).

28. The seized materials were possessed by Reyes in connection with the purpose of disseminating to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.

29. The seized materials consisted of materials upon which information was recorded, and including written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and/or other mechanically, magnetically, or electronically recorded cards, tapes, or discs. The materials were not contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.

30. There was no probable cause to believe that Reyes had committed a criminal offense to which the materials related; no reason to believe that the immediate seizure of such materials was necessary to prevent the death of, or serious bodily injury to, a human being; no reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials; and no court order directing compliance with a subpoena duces tecum.

31. The City of Austin’s unlawful seizures caused Reyes actual damages. Reyes sues to recover his actual damages, but not less than liquidated damages of \$1,000 for each violation, reasonable attorneys’ fees and other litigation costs incurred, and pre-judgment interest.

VI. Prayer for Relief.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Julian Reyes seeks judgment against Defendant City of Austin as follows:

1. Declaring that the City of Austin's policy and practice regarding the arrest of Reyes and others while engaged in recording police activity violates the First and Fourteenth Amendments;
2. Enjoining the City of Austin from further violations of Reyes' rights under the First and Fourteenth Amendments and the Privacy Protection Act of 1980;
3. Awarding Reyes his actual damages and minimum damages of \$1,000 per violation of the Privacy Protection Act;
4. Awarding Reyes reasonable attorneys' fees incurred in this lawsuit pursuant to 42 U.S.C. § 1988 and 2000aa-6(f);
5. Awarding costs of court herein; and
6. Granting such other and further relief deemed just and proper.

Respectfully submitted,

/s/ Peter D. Kennedy

Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5764
(512) 536-9908 (Fax)

ATTORNEYS FOR PLAINTIFF JULIAN REYES

CERTIFICATE OF SERVICE

I certify that on June 26, 2023, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy

Peter D. Kennedy

I. INTRODUCTION

1. The City lacks knowledge or information sufficient to form a belief as to the truth of Plaintiff's occupations and/or avocations in the first sentence of Paragraph 1. The City denies allegations in the second sentence of Paragraph 1.

II. PARTIES

2. The City lacks knowledge or information sufficient to form a belief as to the truth about Plaintiff's residence in Paragraph 2.

3. The City admits to Paragraph 3.

III. JURISDICTION AND VENUE

4. The City admits to Paragraph 4.

5. The City admits to Paragraph 5.

IV. FACTUAL ALLEGATIONS

6. The City lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 and therefore denies same.

7. The City denies Paragraph 7.

8. The City denies the allegations in the first and second sentences of Paragraph 8. The City denies the allegations in the third sentence of Paragraph 8, except that the City admits only that an APD officer arrested Plaintiff.

9. The City admits the allegations in the first sentence of Paragraph 9. The City admits the allegation in the second sentence of Paragraph 9 that the charge was dismissed on or about November 18, 2019. The City denies the allegation in the second sentence of Paragraph 9 that the charge was dismissed on the merits. The City denies the allegation in the third sentence of Paragraph 9.

10. The City denies the allegations in the first sentence of Paragraph 10, except that the City admits the allegation that Plaintiff was arrested on October 24, 2021 on a Class C misdemeanor. The City denies the allegations in the second sentence of Paragraph 10, except that the City admits the allegation only that the cameras were seized. The City denies the allegations in the third sentence of Paragraph 10.

11. The City denies the allegations in Paragraph 11.

12. The City denies the allegations in Paragraph 12.

V. CAUSES OF ACTION

A. Section 1983.

The allegations, if any, contained within the foregoing subtitle “A.” are denied.

13. The City denies the allegations in Paragraph 13.

14. The City denies the allegations in Paragraph 14.

15. The City denies the allegations in Paragraph 15.

16. To the extent Paragraph 16 makes allegations, the City denies said allegations.

17. The City denies the allegations in Paragraph 17.

18. The City denies the allegations in Paragraph 18.

19. The City denies the allegations in Paragraph 19.

20. The City denies the allegations in Paragraph 20.

B. Violation of the Privacy Protection Act of 1980 (42 U.S.C. §§ 2000aa, *et seq.*) - Seizure of Work Product Materials.

The allegations, if any, contained within the foregoing subtitle “B.” are denied.

21. The City denies the allegations in Paragraph 21.

22. The City denies the allegations in Paragraph 22.

23. The City denies the allegations in Paragraph 23.

24. The City lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 24 and therefore denies said allegations.

25. The City denies the allegations in Paragraph 25.

26. The City denies the allegations in Paragraph 26.

C. Violation of the Privacy Protection Act of 1980 (42 U.S.C. §§ 2000aa, *et seq.*) – Seizures of documentary materials.

The allegations, if any, contained within the foregoing subtitle “C.” are denied.

27. The City denies the allegations in Paragraph 27.

28. The City lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 28 and therefore denies said allegations.

29. The City admits the allegations in the first sentence of Paragraph 29. The City denies the allegations in the second sentence of Paragraph 29.

30. The City denies the allegations in Paragraph 30.

31. The City denies the allegations in Paragraph 31.

VI. PRAYER FOR RELIEF

The City denies the allegations in Section VI. Paragraphs 1-6 and specifically denies that Plaintiff is entitled to any relief whatsoever of and from the Defendant.

AFFIRMATIVE DEFENSES

1. Defendant City of Austin asserts the affirmative defense of governmental immunity as a municipal corporation entitled to immunity while acting in the performance of its governmental functions, absent express waiver.

2. The City asserts the affirmative defense of governmental immunity since its employees are entitled to qualified/official immunity for actions taken in the course and scope of their employment, absent express waiver.

3. As a political subdivision, the City denies that it can be liable for exemplary/punitive damages under 42 U.S.C. § 1983.
4. The incidents in question and the resulting harm to Plaintiff were caused or contributed to by Plaintiff's own illegal conduct.
5. The City reserves the right to assert additional affirmative defenses throughout the development of the case.
6. Pleading further and in the alternative, Plaintiff's injuries and damages were caused in whole or in part by the conduct of other persons or entities for whom the City is not liable or responsible and who are not currently parties to the lawsuit.
7. To the extent the City did not address a specific averment made by Plaintiff in the First Amended Complaint, the City specifically denies all such averments.

DEFENDANT'S PRAYER

The City prays that all relief requested by Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award the City costs and attorney's fees, and any additional relief to which it is entitled under law or equity.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION

/s/ Sara E. Rice

SARA E. RICE

Assistant City Attorney

State Bar No. 24110273

sara.rice@austintexas.gov

City of Austin Law Department

P.O. Box 1546

Austin, Texas 78767-1546

Telephone: (512) 974-6463

Facsimile: (512) 974-1311

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 6th day of July 2023.

Via CM/ECF:

Peter D. Kennedy

State Bar No. 11296650

pkennedy@gdhm.com

Daniela Peinado Welsh

State Bar No. 24127300

dwelsh@gdhm.com

Graves, Dougherty, Hearon & Moody, P.C.

401 Congress Avenue, Suite 2700

Austin, Texas 78701

(512) 480-5764

(512) 480-9908 (Fax)

ATTORNEYS FOR PLAINTIFF

/s/ Sara E. Rice
SARA E. RICE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff,

V.

**CITY OF AUSTIN, INC., AUSTIN
POLICE DEPARTMENT, TROY
WISMAR, CHRISTOPHER
CARLISLE, PATRICK WALSH, KYU
SUK AN, SARAH FOSTER, GREG
MCCORMACK, JOHN DOES,
individually and in their official
capacities,
*Defendants.***



CASE NO. 1:21-CV-0992-DII-SH

DEFENDANT CITY OF AUSTIN'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE PITTMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin, Texas files this Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure as follows:

I. Introduction

Plaintiff Julian Reyes brings a §1983 claim for violation of his First Amendment right to film police activity and two claims under the Privacy Protection Act of 1980 (PPA) for seizure of documentary materials and work product. Reyes complains that his repeated arrests by Austin Police Department (APD) lack probable cause, are in retaliation or are a pretext for his recording of police activity rather than for his criminal conduct, and that these arrests constitute a pattern or practice of arresting people for recording police activity. Reyes also complains that there was no probable cause to seize his video cameras during a November 2021 arrest. Reyes brought suit against the City of Austin, Austin Police Department, five APD officers (Wismar, Carlisle, Walsh, An, and Foster), a non-City individual (McCormack), and unnamed parties (John Does). The

causes of action against the individual Defendants were dismissed. ECF 14 p.1. Reyes’ civil-rights claims against the City of Austin remain. The City denies Reyes’ claims and maintains that Reyes cannot meet his considerable evidentiary burden to establish liability against the City under 42 U.S.C. §1983 or 42 U.S.C. §2000aa, *et seq.*

With respect to Reyes’ claims that APD police officers falsely or pretextually arrest him to prevent him from recording police activities, APD policy clearly establishes that its officers shall not arrest people for or otherwise prevent people from recording police activity. Substantial video and documentary evidence supports this policy. Hours of APD Body-Worn Camera video (BWC) clearly demonstrate officers’ compliance with the policy and utterly discredit Reyes’ versions of the facts. Reyes’ numerous arrests are supported by probable cause. Reyes’ complaints against APD are unsubstantiated and refuted by video evidence. Reyes claims that he is above the law because he films his confrontations with APD officers, that he can do what he wants because he is a member of the press, or that he is arrested when other similarly situated individuals are not. Reyes also claims that APD labeled him an “anti-police activist” for exercising his free speech rather than for his threats of and actual violence against police officers¹. ECF 28 ¶8. Reyes’ constitutional right to film police activities is subject to the same time, place and manner restrictions that are well-settled in First Amendment jurisprudence.

With respect to Reyes’ claim that there was no probable cause to seize his work product and documentary materials during his October 24, 2021 arrest, Reyes gave APD probable cause with his *res gestae* statement that he was filming. It is lawful to seize work product and documentary materials if “there is probable cause to believe that the person possessing the materials has committed or is committing a crime to which the materials relate.” 42 U.S.C.

¹ The City asks the Court to take judicial notice of 1:17-cv-00724-LY - ECF 75 p.6 fn.8.

§2000aa(a)(1), (b)(1). Reyes' PPA claim fails because probable cause existed to seize his cameras as evidence that he recorded his own criminal conduct.

Because of Reyes' numerous arrests, confrontations with APD, and complaints, there is significant evidence. Reyes still cannot raise a genuine issue of material fact to meet his burden to overcome summary judgment.

II. Summary Judgment Evidence

Exhibit 1: GO 19-3090412 – Nov 5 2019 – Violation of Camping Ordinance
Exhibit 2: Complaint 2020-0154 – Nov 5 2019
Exhibit 3: APD Offense Investigation Retention Schedule
Exhibit 4: Arrest Affidavit 19-3090412 – Nov 5 2019
Exhibit 5: Affidavit of Richard Jennings – APD Internal Affairs
Exhibit 6: CAD 21-2970640 – Oct 24 2021
Exhibit 7: GO 21-2970640 – Oct 24 2021 – Disorderly Conduct Unreasonable Noise
Exhibit 8: BWC 21-2970640 – Oct 24 2021 – Spitler
Exhibit 9: Arrest Affidavit 21-2970640 – Oct 24 2021
Exhibit 10: Complaint 2021-1084 – Oct 24 2021
Exhibit 11: Complaint 2021-1095 – Oct 24 2021
Exhibit 12: Affidavit of Ashley Edwards – APD Training Division
Exhibit 13: Search Warrant Affidavit 21-2970640 – Oct 24 2021
Exhibit 14: GO 20-0340571 – Feb 2 2020 – Interference with Public Duties
Exhibit 15: BWC 20-0340571 – Feb 2 2020 – McCameron
Exhibit 16: BWC 20-0340571 – Mar 7 2020 – Visi
Exhibit 17: Complaint 2020-1164 – Mar 7 2020
Exhibit 18: Complaint 2020-0135 – Mar 7 2020
Exhibit 19: GO 20-380587 – Feb 7 2020 – Failure to Obey a Lawful Order
Exhibit 20: BWC 20-380587 – Feb 7 2020 – Holland
Exhibit 21: Complaint 2020-0153 – Feb 7 2020
Exhibit 22: GO 20-1711715 – Jun 20 2020 – Assault with Injury
Exhibit 23: BWC 20-1711715 – Jun 20 2020 – Larned
Exhibit 24: Complaint 2022-1047 – Jun 20 2020
Exhibit 25: GO 22-2350929 – Aug 23 2022 – Criminal Trespass
Exhibit 26: BWC 22-2350929 – Aug 23 2022 – Ramos
Exhibit 27: Complaint 2022-0722 – Aug 23 2022
Exhibit 28: GO 23-70037 – Mar 11 2023 – Violation of City Ordinance - Noise
Exhibit 29: BWC 23-70037 – Mar 11 2023 – Pierron A
Exhibit 30: BWC 23-70037 – Mar 11 2023 – Pierron B
Exhibit 31: Complaint 2023-0222 – Mar 11 2023
Exhibit 32: BWC 23-1651442 – Jun 14 2023 – Tuminelli
Exhibit 33: GO 23-1651442 – Jun 14 2023 – Assault on a Public Servant
Exhibit 34: BWC 23-1651442 – Jul 9 2023 – Smart

Exhibit 35: GO 23-3570148 – Dec 23 2023 – Failure to Obey a Lawful Order
Exhibit 36: BWC 23-3570148 – Dec 23 2023 – Yarger
Exhibit 37: GO 24-681181 – Mar 8 2024 – Pedestrian on a Roadway - Walking
Exhibit 38: BWC 24-681181 – Mar 8 2024 – Juusola
Exhibit 39: Affidavit of Daniel Ellis Affidavit – OPO Complaint Supervisor
Exhibit 40: Declaration of Robin Henderson – APD Interim Chief of Police
Exhibit 41: *Turner v. Driver* Training Bulletin
Exhibit 42: Plaintiff's Responses to Interrogatories
Exhibit 43: Complaint 2022-1044 – Aug 23 2022
Exhibit 44: Affidavit of Renee Moore – APD Records Custodian

III. Facts

A. Facts Surrounding Arrests

1. Facts from Plaintiff's November 5, 2019 Arrest

Reyes claims he was arrested for “protesting, filming, and advocating for the rights of unhoused people living on the streets of Austin.” ECF 28 ¶8. Reyes was arrested for violating the City’s ordinance prohibiting camping in a public place. ECF 28 ¶9, Ex. 1.

The offense report states that Reyes was standing in front of a tent in a public area across from the Salvation Army. Ex. 1 p.6. His tent had items in it to store belongings for an extended period of time. *Id.* Based on these facts, Officer Walsh concluded that Reyes was camping in a public area not designated for camping. Walsh, Corporal Wismar and Corporal Carlisle warned Reyes to disassemble his tent, which Reyes ignored. *Id.* Officers checked if Reyes was on the list of people permitted to camp in the area, as per City Ordinance, and he was not listed. *Id.* Carlisle gave Reyes alternative camp sites, which Reyes refused, and checked ARCH for space, which was full. *Id.* At that point, Reyes was arrested. *Id.*

Officers’ BWC were operating at the time of the arrest. *Id.*, at p.7, Ex. 2 p.1. Reyes also filmed his interactions. Ex. 1 p.10. Reyes sued the City on November 3, 2021. Summons was issued November 30, 2021. ECF 1, ECF 6. APD’s BWC of the incident was deleted as per APD’s standard, published records control schedule. Ex. 3 p.7. Reyes provided no video evidence to

support his claim that he was arrested for filming police activity. Reyes also provided no evidence that there were other members of the public who were ordered by police to remove their tents from the sidewalk, refused, and were arrested, all while filming the interaction.

Reyes was arrested for violating the City's ordinance prohibiting camping in a public place. Ex. 4 p.1. Reyes filed an external complaint with the Office of Police Oversight (OPO). Ex. 2. OPO and Internal Affairs (IA) reviewed Reyes' complaint and closed it as a Class D, meaning the review of the "allegation shows it is not true." Ex. 4, Ex. 5 ¶5.

2. Facts from Plaintiff's October 24, 2021 Arrest

Reyes claims he was arrested on October 24, 2021 for exercising his free speech rights on a public sidewalk. ECF 28 ¶10. He claims his arrest lacked probable cause, was pretextual, retaliatory, and designed to discourage him from filming police activity in the future. ECF 28 ¶11.

The offense report and multiple officers' BWC contradict Reyes' claim. Evidence shows Reyes was using a bullhorn to shout obscenities at attendees of a Ford Motor Company event in Republic Square Park. Ex. 6 p.5, Ex. 7, Ex. 8 at 0:01:00. Event security called 911 to report "some protestors yelling on a megaphone...cursing, acting belligerent." Ex. 6. APD officers arrived on scene to discover the suspects were Julian Reyes and an associate, believed to be Breanna Arredondo. Rather than approach Reyes and Arredondo, who were inside the park, officers stood outside the park on the corner of Guadalupe St. and West 4th St. to discuss whether Reyes' shouting obscenities through a bullhorn was a criminal act and whether they had sufficient probable cause to arrest him for the criminal conduct. Ex. 8 at 0:04:00.

Reyes eventually approached officers, began shouting obscenities at officers and bystanders through his bullhorn, and demanded to speak to a supervisor before walking away. *Id.*, at 15:00. Detective Spitler called for a supervisor. Sergeant Rodriguez arrived on scene with

Corporal Wismar. *Id.*, at 1:11:24. Officers determined Reyes' use of a bullhorn to shout obscenities was disorderly conduct, that they had probable cause to arrest him for the conduct, and they had supervisor permission to arrest him for a Class C misdemeanor. *Id.*, at 1:14:09, Ex. 9.

APD officers arrested Reyes. As he was handcuffed, he stated, "I'm filming, you can't violate my rights." Ex. 8 at 1:15:26. Reyes' *res gestae* statement to police was sufficient probable cause for Spitler to seize Reyes' cameras as evidence of a crime and seek a search warrant. Spitler attempted to talk to Reyes about the evidence on his cameras but Reyes interrupted and ignored him. *Id.*, at 1:19:05. Spitler seized Reyes' cameras and wrote an affidavit for a search warrant. Ex. 13. The warrant was signed by Judge Ronald Meyerson. *Id.*

Rodriguez interviewed Reyes and documented his complaint. Ex. 10. Reyes filed his own complaint. Ex. 11. Both were closed without becoming Formal Complaints. Ex. 10, Ex. 11.

Arredondo was also shouting at event attendees but was unsuccessful at using the bullhorn. Ex. 8 at 0:13:40. Arredondo recorded Reyes' arrest. *Id.*, at 1:15:15. Officers did not ask her to stop filming or prevent her from filming. To the extent officers spoke to her at all, it was to give her Reyes' personal property at his request. *Id.*, at 1:15:06.

3. Facts from other arrests

Reyes additionally complains he was repeatedly arrested since 2014 while exercising his rights to free speech and free press.² ECF 28 ¶12. From November 5, 2019 to March 8, 2024, Reyes was arrested by APD ten times.³ Each followed this pattern of Reyes committing criminal acts in the presence of police officers and being arrested for them.

² The City does not factually address arrests that fall outside the statutory limitations period.

³ The City is aware of but does not have records for Reyes' arrests by other agencies, including DPS and UTPD.

BWC videos of Reyes' arrests utterly discredit his claim of violations of his First Amendment rights. Below are brief examples with General Offense (GO) Reports, BWC video and any OPO complaint filed by Reyes.

February 2, 2020. Officers responded to a call about an aggravated assault in Republic Square Park. Ex. 14. Reyes was recording police activity but began to interfere with the victim's belongings and tamper with evidence. Ex. 15 at 0:08:35. When Officer McCameron told him to stop, Reyes approached McCameron aggressively, swearing at him, and attempted to take McCameron's radio. Ex. 15 at 0:09:16. APD later issued an arrest warrant for Interference with Public Duties. Reyes was arrested on *March 7, 2020*. Ex. 14, Ex. 16 at 00:35, Ex. 17, Ex. 18.

February 7, 2020. Reyes and other activists were filming themselves interrupting a homeless encampment cleanup. Ex. 19. Reyes laid on top of property scheduled to be removed, was ordered to move or face arrest, refused to move, and was arrested for Failure to Obey a Lawful Order. Ex. 20 at 1:08:00, Ex. 21.

June 20, 2020. Reyes was filming APD assist EMS when he was assaulted by and then assaulted a passerby. Officer Larned witnessed Reyes assault the passerby and detained him. As he moved Reyes to the wall, Reyes assaulted Larned. Ex. 22, Ex. 23 at 17:50, Ex. 24.

August 23, 2022. Reyes was filming police arrest a suspect in a 7-11 parking lot. Reyes and the store manager had a verbal altercation. The manager asked police to ask Reyes to leave. The manager and Officer Ramos approached Reyes and told him to leave the property or he would be arrested for criminal trespass. Reyes refused to leave the property and was arrested for criminal trespass. Ex. 25, Ex. 26 at 0:41:55, Ex. 27.

March 11, 2023. In response to a complaint about Reyes playing guitar with an amplifier on the sidewalk in front of the Driskill Hotel, Officer Pierron asked Reyes to stop playing his guitar

or he would be cited. Reyes refused and demanded a citation, then demanded to be arrested because he would not stop playing even with a citation. He was arrested. Ex. 28, Ex. 29 at 0:00:55, Ex. 30 at 0:00:44, Ex. 31.

June 14, 2023. Reyes was filming APD stop and search a vehicle and subsequent search. Reyes was arguing with multiple victims and witnesses and using foul language. Ex. 32 at 0:00:30. Reyes stepped off the curb in front of Officer Tuminelli, who ordered Reyes back onto the sidewalk to prevent the argument from escalating. *Id.*, at 0:04:57. Reyes stepped off the sidewalk into Tuminelli, who pushed him back up onto the sidewalk and ordered him to stay on the sidewalk. Reyes stepped into the street and deliberately hit Tuminelli on the arm. *Id.*, at 0:05:45. Tuminelli reported the contact to a supervisor who advised him to write it up as an assault. Ex. 33. A warrant was issued for Felony Assault on a Public Servant⁴ and Interference with Public Duties and Reyes was subsequently arrested on *July 9, 2023*. Ex. 33, Ex. 34 at 0:00:00.

December 23, 2023. Reyes was filming APD make an arrest. Officer Johnson advised Reyes and his associate, Arredondo, to stand behind a designated line while APD conducted their investigation. Arredondo complied but Reyes refused. Reyes was warned again, refused to comply and was arrested for Failure to Comply with a Lawful Order. Ex. 35, Ex. 36 at 0:09:10.

March 8, 2024. Reyes was filming a daytime protest on downtown Austin streets. Attendees were ordered by police to stay on the sidewalk and not block a hotel driveway. Most attendees complied with this order including Arredondo. Reyes and three others refused to comply and were arrested. Ex. 37, Ex. 38 at 13:00.

⁴ Reyes was indicted on Feb. 1, 2024 in D-1-DC-23301930 for Assault on a Public Servant.

B. Policy Regarding Filming Police Activity

APD General Order 302 reminds officers that members of the general public have a First Amendment right to record APD officers unless the recording interferes with police activity. Ex. 5 Att. D. Cadets in APD's Academy receive hours of classroom instruction on Penal Code offenses, constitutional law, and General Orders. Ex. 12 ¶3. Cadets are trained to follow Penal Code, Code of Criminal Procedure and General Orders when interacting with the public, which includes people filming police activity. *Id.*, ¶5.

The Office of Police Oversight (OPO) is an independent, impartial office separate and apart from APD. OPO handles internal and external complaints about police interactions. Ex. 38. OPO conducts a preliminary review of every complaint before forwarding them to IA. *Id.* OPO also makes recommendations for discipline. *Id.* OPO is not aware of a policy or procedure that permits or encourages officers to arrest people for filming police activity. *Id.*

The Chief of Police has final authority over internal affairs investigations and officer discipline. Ex. 40 ¶4. Officers are responsible for knowing APD policy and must acknowledge new policies in writing. *Id.*, at ¶5. The Chief of Police also has final responsibility for setting APD policies. *Id.*, at ¶3.

Other than broad generalizations, Reyes has provided no evidence that the City has a policy, practice or custom of interfering with or arresting people for filming police activity.

C. Seizure of Plaintiff's Cameras

Reyes also asserts causes of action for the seizure of journalistic documentary materials and work product in violation of 42 U.S.C. §2000aa(a) and (b). ECF 28 ¶¶21-30. Reyes claims that Detective Spitler wrongfully seized his cameras because “he lacked probable cause to believe that Reyes had committed a criminal offense to which the materials related...” ECF 28 ¶¶25, 30.

Detective Spitler witnessed Reyes recording his criminal acts (disorderly conduct). Ex. 13. Additionally, Reyes stated to officers he was filming as he was being handcuffed. *Id.* Reyes' arrest was unrelated to the fact that he was filming. *Id.* He was arrested for using a bullhorn (also seized as evidence of a crime) to shout obscenities in a public park where an all-ages event was taking place. *Id.* Ex. 40 ¶¶10, 11.

Furthermore, there was no reasonable basis to believe Reyes' purpose for filming that day was to disseminate the materials to the public. Reyes identified himself as an activist for the unhoused and an anti-Ford protestor. There was no reasonable basis to believe that Reyes simply possessing a GoPro and camcorder on October 24, 2021, while he used a bullhorn to shout obscenities in a public park, was for public communication.

Reyes did not provide evidence that his purpose for possessing the cameras on October 24, 2021 was to disseminate videos of him shouting obscenities through a bullhorn. There is no factual issue as to whether Spitler had probable cause to believe Reyes was committing a crime. Accordingly, Reyes' PPA claims should be dismissed.

IV. STANDARD OF REVIEW

Summary judgment is proper against a party who bears the ultimate burden of proof and fails to establish the existence of an element essential to its case by raising an issue of material fact. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323. The moving party satisfies its burden by "pointing out to the district court . . . that there is an absence of evidence to support the non-moving party's case." *Id.* at 326. The plaintiff may not rest on allegations in pleadings, but must produce competent, tangible evidence to survive summary judgment. *Id.* at 325. Moreover, "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the

non-movant's burden." *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996).

V. Argument & Authorities

A. Claims against Municipalities under 42 U.S.C. §1983

The general contours of municipal liability for the conduct of its employees under 42 U.S.C. §1983 are well-defined in the Fifth Circuit. A city may not be held liable if the court finds that the plaintiff's constitutional rights were not violated. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003). Even if a city employee or police officer violated a plaintiff's constitutional rights, a city may not be found liable under §1983 under a theory of *respondeat superior*. *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978); *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force*, 379 F.3d 293, 308 (5th Cir. 2004). Cities are almost never liable under §1983 for the isolated actions of their employees, and they can only be held liable for acts that are directly attributable to it "through some official action or imprimatur." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

To establish municipal liability under §1983, a plaintiff must show: (1) an official policy (2) promulgated by the municipal policy maker (3) which was the moving force behind the violation of a constitutional right. *Id.* A policy or custom is official only "when it results from the decision or acquiescence of the municipal officer or body with final policymaking authority over the subject of the offending policy." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989); *Peterson v. City of Fort Worth, Texas*, 588 F.3d 838, 847 (5th Cir. 2009). To establish the "moving force" element, a plaintiff must show a direct causal link between the policy and the constitutional violation. *Piotrowski*, 237 F.3d at 580; *Peterson*, 588 F.3d at 848.

B. Plaintiff's §1983 claim against the City should be dismissed.

Reyes claims “his arrests are the result of a widespread practice or custom in which APD police officers falsely arrest people, or arrest them on pretextual bases, to prevent from exercising their constitutional right to record police activity.” ECF 28 ¶17. Reyes further claims that the custom “fairly represents City of Austin policy that is promulgated, endorsed and/or tolerated by the City” and said policy is the “moving force behind Reyes’ arrests.” ECF 28 ¶19.

Reyes additionally claims that “APD officers acted under color of state law to deprive Reyes” of his well-established First Amendment right to record police. ECF 28 ¶15. Reyes’ claims against individual police officers have already been dismissed. ECF 10, ECF 14.

In Reyes’ sole remaining §1983 claim against the City of Austin, he has failed to raise an issue of material fact that (1) the City has an official policy, practice or custom of arresting Reyes and others for filming police activity, (2) promulgated by an official policy maker, and (2) that there is a direct, causal link between the alleged policy and Reyes’ arrests.

1. Plaintiff's complaints of arrests before Nov. 5, 2019 are barred by limitations

Reyes filed the instant suit on November 3, 2021. ECF 1. His First Amended Complaint complains of arrests beginning as early as June 2014. ECF 28. Reyes’ complaints about arrests prior to November 5, 2019, are barred by the Texas statute of limitations on personal injury claims. Tex. Civ. Prac. & Rem. Code §16.003(a), *Piotrowski v. City of Houston*, 51 F.3d 512, 515 n.5 (5th Cir. 1995). ECF 28 ¶12. “Under federal law, a claim accrues and the limitations period begins to run the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.” *Spotts v. United States*, 613 F.3d 559, 574 (5th Cir. 2010). Reyes filed a Complaint on March 29, 2019 only citing an April 1, 2017 arrest while “involved in the exercise of filming the Austin police in Public.” *See* 1:19-cv-00367-LY ECF 1.

Reyes had chance to file suit about prior arrests and did so. Complaints of arrests prior to November 5, 2019 are time-barred by Texas's statute of limitations and should not be considered.

2. Plaintiff fails to show that the City has a policy of arresting people for filming police activity

Reyes cannot establish that the city has a policy or practice of arresting, retaliating against, or otherwise discouraging people from filming police activity. Reyes only makes a bare allegation that the city has a policy or procedure or practice of violating people's First Amendment right to film police activity. ECF 28 ¶12. Reyes produced no evidence of a written or unwritten policy. Reyes produced no evidence that officers who violate the policy are not disciplined. As a result, Reyes failed to meet his burden to show a material fact to meet the first element of his §1983 claim.

The undisputed evidence is that APD has a policy, in the form of written General Order 302, prohibiting officers from arresting or otherwise impeding members of the public from recording police activity “unless such recordings interfere with police activity.” Ex. 39, Ex. 40. Such restrictions have been determined to be constitutional. *See Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (holding that filming police is a right subject to reasonable time, place, and manner restrictions). “When police departments or officers adopt time, place, and manner restrictions, those restrictions must be ‘narrowly tailored to serve a significant governmental interest.’” *Id.*, citing *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). APD's time, place and manner restrictions are wholly unrelated to content, but rather are narrowly tailored to protect officers' safety and ability to conduct their official duties. Ex. 39 Att. 1, Ex. 40.

General Order 302 was in effect at the time of each of Reyes' arrests. After the Fifth Circuit's opinion in *Turner v. Driver*, APD issued a March 6, 2017 Training Bulletin to all APD employees instructing officers and supervisors to review the training bulletin, General Order 302,

and the opinion. Ex. 41 (opinion excluded from exhibit). There is simply no evidence of a contradictory policy at APD. Ex. 12, 38, 40.

Reyes also has not established any pattern that could constitute official policy. A pattern amounts to an official policy “when it is so common and well-settled as to constitute a custom that fairly represents municipal policy.” *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (internal quotes and citations omitted). To establish that prior incidents constitute a pattern, a plaintiff must show that the incidents have occurred for so long or with such frequency that policymakers must know that the improper conduct is the ordinary and accepted practice of the employees. *Id.* A pattern will not be established based on isolated incidents. Instead, the pattern must be composed of incidents that are numerous and similar to the specific violation alleged. *Id.* at 850-851. To meet these criteria, a plaintiff must put the prior incidents in context. For instance, the mere existence of 27 complaints of excessive force over a four-year period does not show a pattern of allowing excessive force when the city has a large police force that makes thousands of arrests per year. *Id.* at 851.

Despite Reyes being a “videographer, reporter, legal documentarist, street advocate or other member of the press,” he has produced no evidence of any prior similar incidents in which people were arrested for filming police activity sufficient to constitute any policy or practice. Rather, Reyes repeatedly films his own interactions with police which often include his own criminal conduct, files complaints against APD officers alleging violations of his and others’ constitutional rights, then claims APD has a pattern of arresting people for filming police activity. His allegations have all been unfounded, yet he uses his unsubstantiated allegations to attempt to prove an element of a §1983 action.

Each complaint is investigated by OPO and IA, and Reyes has not provided any evidence to the contrary. Ex. 5, Ex. 38. Reyes has no evidence that these investigations do not occur or that officers are not disciplined for violating the policies. *Id.* This contradicts the allegation that there is some custom or practice of depriving people of their constitutional rights. *See Peterson*, 588 F.3d at 852 (finding that the city investigated every excessive force complaint cuts against the allegation that the city condoned excessive force). Accordingly, Reyes has not met his burden to show a material fact to meet the first or second prong of a §1983 claim.

3. Plaintiff failed to show that the City’s policy was the moving force behind his arrests

Reyes likewise can show no causal link between the City’s alleged policy and his arrests. To survive summary judgment, Reyes must raise a genuine issue of material fact that his filming of police activity was the moving force behind his arrests. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) citing *Monell v. Dep’t. of Social Services*, 436 U.S. 658, 694 (1978). He must raise a genuine issue of material fact that his filming of police activity complied with time, place, and manner restrictions. *See Buehler v. Dear*, 27 F.4th 969, 976 (5th Cir. 2022) (explaining that there is a “line between filming the police, which is legal, and hindering the police, which is not”). There is substantial video evidence showing Reyes engaging in criminal conduct that does *not* involve his cameras.

Reyes’ version of the facts surrounding his arrests are debunked by officers’ BWC. “If there is video recorded evidence that discredits the non-moving party’s version of events, the court should not consider the evidence in the light most favorable to the non-movant.” *Bailey v. Ramos*, 657 F. Supp. 3d 927, 943 (W.D. Tex. 2023), citing *Scott v. Harris*, 550 U.S. 372, 380-81 (2007). Instead, the court should view the evidence in the light depicted in the video recording. *Id.*

Video evidence conclusively establishes that each of Reyes' arrests are supported by probable cause. The videos utterly discredit Reyes' versions of events. Because there is no genuine issue over these facts, Reyes cannot show that his filming police activity was the moving force behind his arrest. Accordingly, Reyes has not met his burden to show a material fact to meet the third prong of a §1983 claim.

4. That Plaintiff's charges were dismissed does not negate probable cause to arrest

Reyes cannot show that because the charges against him were ultimately dismissed, his arrests lacked probable cause. ECF 28 ¶¶ 9, 11. Probable cause requires a "basis for an officer to believe to a fair probability that a violation occurred." *Piazza v. Mayne*, 217 F.3d 239, 246 (5th Cir. 2000). Probable cause exists when the facts and circumstances known to an officer are sufficient to show the suspect has committed an offense, is presently committing an offense, or is about to commit an offense. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). Whether an offense is ultimately charged in the future by a prosecutor exercising his or her discretion does not undermine the existence of probable cause at the time of the arrest. "The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." *DeFillippo*, 443 U.S. at 36. Reyes' claims that his arrests lacked probable cause because the charges were dropped is insufficient to show a material fact issue supporting his §1983 claim.

5. Plaintiff's claims that he was singled out for arrest are unsubstantiated

Reyes cannot show that he was subject to selective enforcement of the law during his arrests. Reyes claimed that while he was arrested on November 5, 2019, others engaged in similar activity were not. Ex. 42, ROG 4. Probable cause generally defeats a retaliatory arrest claim. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727, 204 L. Ed. 2d 1 (2019). "[A] narrow qualification is warranted

for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” *Id.* The qualification does not apply when a plaintiff provides objective evidence that similarly situated individuals engaging in the same protect speech were not also arrested. *Id.* Reyes provided no evidence that he was singled out. Reyes provided no evidence of other individuals pitching a tent on a sidewalk, filming their interactions with police, and refusing police orders to remove their tents from the sidewalk. Reyes’ claim that he was singled out for arrest on November 5, 2019 does not raise an issue of material fact.

Reyes also did not provide evidence he was singled out for his other arrests. On October 24, 2021, Arredondo was also filming police activity. Officers did not witness her using a bullhorn to shout obscenities at people in the park, and she did not approach officers and shout at them through a bullhorn. The bullhorn was seized upon his arrest. Arredondo did not appear to have her own bullhorn. On March 9, 2024, three other people were arrested for refusing orders to get on the sidewalk during a protest. Ex. 37. Ex. 38.

C. Claims under §2000aa

To prevail on a claim of unlawful seizure of work product and documentary materials, a plaintiff must show that (1) he was a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce, and (2) that there was no probable cause to believe he had committed an offense to which the materials relate. 42 U.S.C. §2000aa.

The PPA states that “this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if... there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” 42 U.S.C. §2000aa. Protected

speech can be evidence that a speaker committed a separate crime but it cannot be the sole basis for probable cause. *Reichle v. Howards*, 566 U.S. 658, 668 (2012). “Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” *Nieves*, 139 S. Ct. at 1727.

A search warrant allows a magistrate to independently evaluate the facts underlying the basis for the search. *Winfrey v. Rogers*, 901 F.3d 483, 494 (5th Cir. 2018). The warrant requires the affiant to state particular facts to establish probable cause. *Id.* (citing *Franks v. Delaware*, 438 U.S. 154, 165 (1978)). The search warrant was signed by a magistrate, which invokes the independent-intermediary doctrine. “Under the independent-intermediary doctrine, ‘if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary’s decision breaks the chain of causation’ for the Fourth Amendment violation.” *Jennings v. Patton*, 644 F.3d 297, 300–01 (5th Cir. 2011) (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)).

D. Plaintiff’s §2000aa claim against the City should be dismissed

1. Reyes’ claim that his cameras are work product and documentary materials fails.

Reyes claims he is a member of the press. ECF 28 ¶1. At the time of his criminal acts on October 24, 2021, he did not identify himself as a member of the press. He identified himself as an activist for the unhoused, a protestor against Ford Motor Company, etc. *See generally*, Ex. 8. Reyes never provided any evidence he had his cameras with him because he intended to record his activity and disseminate the material to the public.

2. Officers had probable cause to arrest Plaintiff.

Officers witnessed Reyes committing a misdemeanor by using a bullhorn to shout obscenities in Republic Square Park on October 24, 2021. Ex. 8 at 0:04:00. Reyes was warned to stop using the bullhorn or face arrest. *Id.*, at 15:00. Officers conferred with a supervisor to get authority to arrest Reyes rather than simply issue a citation. *Id.*, at 1:11:24. Once officers received his authority, Reyes was arrested. Ex. 8 at 1:14:09. Reyes cannot show the APD lacked probable cause to arrest him.

3. Officers had probable cause to seize Plaintiff's cameras

Reyes was recording his own actions on a GoPro and camcorder. Ex. 8 at 1:15:26. Reyes told officers that he was recording his activities. *Id.* His admission gave APD probable cause to seize his cameras. Additionally, when Spitler attempted to explain his basis for seizing the cameras, Reyes refused to listen. *Id.* at 1:19:05.

4. Search warrant was signed by a disinterested magistrate

Spitler appropriately sought a search warrant before turning the cameras over to the Digital Forensics Team. Ex. 13. Spitler wrote an affidavit in which he swore the facts were correct. *Id.* The search warrant was signed by a disinterested magistrate. *Id.* Reyes produced no evidence that his arrest lacked probable cause, the seizure of his cameras lacked probable cause and did not show evidence of a crime, or that the search warrant was defective.

For these reasons, Reyes' PPA claim fails.

VI. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendant City of Austin respectfully requests that the Court grant its Motion for Summary Judgment and dismiss the Plaintiff's claims

against it with prejudice with all costs assessed to the Plaintiff. Defendant further requests that it recover any additional relief to which it may be entitled.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION

/s/ Sara E. Rice

Sara E. Rice

Assistant City Attorney

State Bar No. 24110273

sara.rice@austintexas.gov

City of Austin Law Department

P.O. Box 1546

Austin, Texas 78767-1546

Telephone: (512) 974-6463

Facsimile: (512) 974-1311

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on May 1, 2024 I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Sara E. Rice

Sara E. Rice

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,

Plaintiff,

V.

CITY OF AUSTIN, AUSTIN POLICE
DEPARTMENT, TROY WISMAR,
CHRISTOPHER CARLISLE,
PATRICK WALSH, KYU SUK AN,
SARAH FOSTER, GREG McCORMACK,
and JOHN DOES, Individually and in
their official capacities,

Defendants.

Case No. 1:21-CV-00992-RP-SH

**PLAINTIFF JULIAN REYES' RESPONSE TO DEFENDANT
THE CITY OF AUSTIN'S MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE ROBERT PITMAN:

Plaintiff Julian Reyes hereby responds to Defendant the City of Austin's Motion for Summary Judgment (Doc. 44) and would respectfully show as follows:

I. Introduction and summary.

The Court should deny the City of Austin’s Motion for Summary Judgment because there are material issues of contested fact as to each of Mr. Reyes’s claims. There is substantial summary judgment evidence supporting Mr. Reyes’ claim that the City of Austin has a custom, pattern, and practice of arresting him because of, and in retaliation for, the exercise of his clearly established First Amendment right to record and criticize police conduct. Likewise, there is substantial summary judgment evidence supporting Mr. Reyes’s claim that the City’s seizure of his cameras and the recordings they contained violated his rights under the Privacy Protection Act of 1980,

which precludes the seizure of journalists' work product and documentary materials except in very narrow circumstances not applicable here.

II. The procedural history.

Plaintiff Julian Reyes filed this lawsuit *pro se* on November 3, 2021, against the City of Austin and several individuals, claiming that his repeated arrests at the hands of the Austin Police Department while filming police activity violated his First Amendment rights. Doc. 1. The City moved to dismiss Mr. Reyes's complaint, arguing that he failed to state a claim against the City and that the arresting officers were entitled to qualified immunity. Doc. 8. The City's motion was referred to Magistrate Judge Susan Hightower by District Judge Lee Yeakel. Doc. 9.

Judge Hightower issued a Report and Recommendation on March 15, 2022, recommending that Mr. Reyes's claims against the individuals be dismissed based on qualified immunity, but finding that Mr. Reyes had stated a claim against the City. Doc. 10. Judge Hightower held that Mr. Reyes had "made specific factual allegations allowing a reasonable inference that the City had a policy, practice or custom of arresting individuals to prevent them from filming police activities" and that Mr. Reyes stated a plausible claim that the City's policy was the "moving force" behind the violation of his constitutional rights. Doc. 10 at 8-10. The City did not object to Judge Hightower's report and recommendation, which Judge Yeakel adopted. Doc. 14.

Mr. Reyes moved the Court to appoint counsel, Doc. 15, which Judge Hightower granted, appointing the undersigned. Doc. 19. Through counsel, Mr. Reyes filed a First Amended Complaint. Doc. 28. He alleges that he has been repeatedly and wrongfully arrested by officers with the Austin Police Department ("APD") while filming police officers' interactions with unhoused people and other public actions. *Id.* at 2. He alleges that, beginning as early as June 2, 2014, he has been repeatedly arrested and/or interfered with by APD officers while engaged in the

exercise of his rights to free speech and the press. *Id.* at 2-3. He alleges that these arrests were without probable cause and/or were made in retaliation against him for exercising his constitutional rights and to discourage him from further exercising those rights. *Id.* at 3. Mr. Reyes asserts causes of action under 42 U.S.C. § 1983 for violating his First and Fourteenth Amendment rights and under 42 U.S.C. § 2000aa, *et seq.*, for illegally seizing his journalist work product and documentary materials. *Id.* at 3-6.

III. The summary judgment evidence.

A. The standard of review.

Summary judgment is appropriate only if “the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. The movant bears the initial burden of “informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact.” *Valadez v. Paxton*, No. A-21-CV-519-RP, 2023 WL 6536246, at *3 (W.D. Tex. July 26, 2023) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), *adopted*, 2023 WL 6159822 (Sept. 21, 2023). The burden then shifts to the non-movant to establish the existence of a genuine issue of material fact for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). The court must view the summary judgment evidence in the light most favorable to the non-movant and draw all reasonable inferences in the nonmoving party’s favor, without making credibility determinations or weighing the evidence. *Kost v. Cotto*, 458 F. Supp. 3d 571, 582 (W.D. Tex. 2020). When video evidence is available, if “one party’s version of evidence does not ‘blatantly contradict’ the recording,” the video is not dispositive and “the typical summary judgment standard applies.” *Id.* (quoting *Ramirez v. Martinez*, 716 F.3d 369, 374 (5th Cir. 2013)). “[A] court should not discount the

nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account." *Id.* (quoting *Darden v. City of Fort Worth, Texas*, 880 F.3d 722, 730 (5th Cir. 2018)).

B. The summary judgment evidence shows a long-standing City policy and practice of singling out Julian Reyes for his First Amendment activity by making unjustified and retaliatory arrests.

1. Julian Reyes is a print and video journalist, an advocate for the homeless, and a police critic.

In April 2013, an APD officer shot and killed Mr. Reyes's dog, Shiner Bock, right in front of him. Ex. 1 ¶ 4. Mr. Reyes sued the City of Austin *pro se* for killing his dog; this Court appointed him counsel; and the City settled Mr. Reyes's claim before trial. *Id.* ¶ 5. Mr. Reyes was traumatized by what he believed was a wholly unnecessary killing, and he became an advocate, both at the municipal- and state-level governments, for improved police training to reduce officers' knee-jerk tendency to kill dogs. *Id.* ¶ 5-6.

Mr. Reyes also became an advocate for the homeless in Austin, Texas. *Id.* ¶ 7. He records police interactions with homeless individuals to keep police officers accountable and transparent to public view. *Id.* He primarily records police activities in downtown and central Austin. *Id.* He wears a clearly visible and displayed black press badge when recording, which was given to him by the director and editor of the *Challenger Street Newspaper*. *Id.*

Mr. Reyes's journalistic work began when he joined the *Austin Advocate* about 14 years ago and then continued when he joined the *Challenger* about 12 years ago. *Id.* ¶ 2. His work has been published online on the *Challenger's* website. *Id.* ¶ 3. He also publishes his own work on his YouTube channel and Facebook accounts. *Id.*

Mr. Reyes has been arrested over 20 times while recording police activities or otherwise advocating for government accountability; the charges were either acquitted, dismissed, no-billed,

or rejected by the prosecuting office. *Id.* ¶ 8. APD has seized his recording on at least January 4, 2019, and October 24, 2021, and as far as he can recall, on several other occasions besides those dates. *Id.* ¶ 13. His arrests have led to his hospitalization and PTSD. *Id.* ¶¶ 8, 12.

Mr. Reyes has filed two other federal civil rights lawsuits against the City prior to this one. *See* Doc. 19 at 3 & n.2. The Court did not appoint counsel for those suits, and they were ultimately dismissed. *Id.* Mr. Reyes has also submitted many complaints to the Office of Police Monitor/Oversight, the City, or the APD directly related to APD officers mistreating him or others while he was witnessing or recording their police activities. *Id.* at 10.

2. The City, knowing Mr. Reyes is a citizen journalist, has branded him an “anti-police activist,” “loony,” and a “turd” because he monitors and criticizes its homeless policies and police.

Since at least February 2017, APD has branded Mr. Reyes an “anti-police activist” based on his advocacy for Austin’s homeless population and his criticism of police conduct. The City’s 30(b)(6) witness, designated to testify as to the City’s police and arrests of Mr. Reyes, *see* Ex. 7, admitted that it is “[k]nown by officers” that Mr. Reyes is supposedly “anti-police,” and that the City gave Mr. Reyes the “anti-police activist” designation because “he films and follows officers and all law enforcement” and because of what he publishes and posts online. *See* Ex. 8 at 63:25-66:10.

The City’s files are filled with internal communications denigrating Mr. Reyes based on the content of his speech. For example, in a February 16, 2017, police report of a burglary where Mr. Reyes was nearby but not a suspect, an APD officer noted that he “is listed as CAUTION/ANTI-POLICE activist” in police records, speculated that he may have been observing the police, and stayed in the area until he left. Ex. 2. *See also* Ex. 3 at 2 (calling Mr. Reyes “a known Anti-Police subject” and noting that he complained when an APD officer obstructed his

filming police activity “from the sidewalk” at “a distance”); Ex. 4 (calling Mr. Reyes “a known anti police advocate”); Ex. 5 (calling Mr. Reyes “a known anti-police activist”); Ex. 6 (“Reyes is known as an anti-police activist and self-styled citizen journalist” who “has associated with anti-police organization [sic] ‘Peaceful Streets Project’”).

The City’s electronic database reflects Mr. Reyes’s employer as the *Challenger Street Newspaper*, a publication that advocates for Austin’s homeless population, so the City *knows* he is a journalist. Ex. 9. In the “Additional Remarks” section of Mr. Reyes’s police profile, it states in all caps “ANTI-POLICE ADVOCATE.” *Id.* When any officer enters Mr. Reyes’s name into APD’s system, it will auto-populate with this information, regardless of whether he is a witness, victim, or suspect:

<u>PERSON PARTICULARS</u>	
Place Of Birth	TEXAS
Occupation	LANDSCAPING
Employer	CHALLENGER STREET NEWSPAPER
Citizenship	AMERICAN
Ethnicity	NON-HISPANIC
Language(s) Spoken	ENGLISH
Height	5'08
Build	FAT
Eye Color	BROWN
Hair Color	BROWN
Additional Remarks	ANTI-POLICE ACTIVIST
Weight	200 LBS.
Complexion	MEDIUM
Hair Style	UNKEPT / SHAGGY

Ex. 9 at 5. *See also* Ex. 10 (containing multiple reports identifying Mr. Reyes as employed by the *Challenger Street Newspaper* and as an “ANTI-POLICE ACTIVIST”).

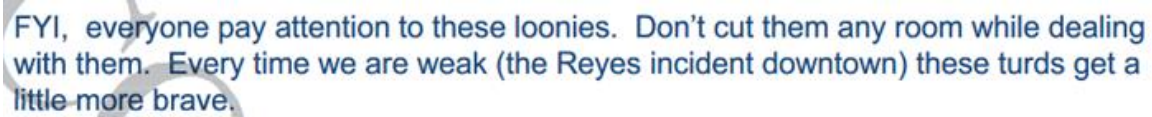
The City’s database identifying Mr. Reyes as journalist for the *Challenger* and an “ANTI-POLICE ACTIVIST” are seen by officers, detectives, supervisors, county and district attorneys, and defense attorneys. Ex. 8 at 71:4-24. The City admits that it has labelled Mr. Reyes an “ANTI-POLICE ACTIVIST” for “informational” purposes, “[s]o when officers encounter Mr. Reyes, they have an understanding of ... his stance in regards with law enforcement.” Ex. 8 at 71:4-10, that

is, based on the content of his speech. Police officers notify each other of Mr. Reyes's presence in a sector, using the "Anti Police Activist" label, even when not investigating a crime. For instance, on January 5, 2023, all APD Region 4 Supervisors were notified by email that "Julian Reyes 05/31/68 W/m, Anti Police Activist, has shown up again in DAVID sector." Ex. 11. The email noted that Mr. Reyes "was filming officers and an ME crew on a deceased person call" and that "[t]he ME team screened these attempts," *id.*, in clear violation of General Order 302, which directs that officers shall not "[i]ntentionally block or obstruct cameras or recording devices." Ex. 21. Rather than enforce the City's written policy against blocking citizens from filming police activity, the City instead warned supervisors *about* Mr. Reyes, who was doing nothing but exercising his clearly established First Amendment rights. *See Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) ("[A] First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions").

An APD email chain in February 2020 epitomizes the City's attitude towards Mr. Reyes and his fellow homeless advocates. On February 13, 2020, Jennifer Crowe, a Crime/ Intelligence Analyst, emailed an "eZine" published by "Stop the Sweeps" to Monica Caballero, a Region 3 – Henry Sector (downtown) Crime/Intelligence Analyst, and others. Ex. 12. Ms. Crowe called Stop the Sweeps a "pro-homeless activist organization," and wrote that "[m]ost likely," the publication "was penned by Julian Reyes" *Id.* at 2. She warned that the eZine was allegedly "bashing" the City and calling APD Officer Yarger "a 'bully' who 'escalates confrontations.'" *Id.*¹ She also claimed that "[a]dditional anti-police sentiment is expressed on Pages 22-23." *Id.* The same day, Ms. Caballero forwarded Ms. Crowe's email to APD Commander Jason Cumins and others. *Id.*

¹ This opinion was well grounded, as shown by the video of Mr. Reyes's unjustified arrest by Officer Yarger December 23, 2023, whose police report claiming Mr. Reyes was interfering with official conduct is flatly contradicted by the video evidence. *See* Section III.A.5, below.

at 1. Sgt. Mark Breckenridge then forwarded the Stop the Sweeps eZine to eleven more officers, including Officer Yarger, with this note:

A screenshot of a text message or email note. The text is in a blue, sans-serif font on a white background. The text reads: "FYI, everyone pay attention to these loonies. Don't cut them any room while dealing with them. Every time we are weak (the Reyes incident downtown) these turds get a little more brave." There is a faint, circular watermark or logo in the background of the text.

FYI, everyone pay attention to these loonies. Don't cut them any room while dealing with them. Every time we are weak (the Reyes incident downtown) these turds get a little more brave.

Ex. 12 at 1. This is a clear direction by a supervising officer to “get tough” with Mr. Reyes and homeless advocates based on their speech. There is no indication in any document produced by the City that this email met with any condemnation by Sgt. Breckenridge’s superiors at APD, or any indication that this email does not reflect the City’s *actual* policy regarding Mr. Reyes and other homeless advocates, contrary to the written General Order 302.

3. The City has repeatedly arrested Julian Reyes while he was documenting police conduct, in violation of its written policy of purportedly respecting citizens’ rights to do so.

The City publishes some APD policies as General Orders on the City’s website. Ex. 8 at 19:6-15. General Order 302 is entitled “Public Recording of Official Acts.” Ex. 21. It provides that “a bystander has the same right to ... make recordings as a member of the media, as long as the bystander has a legal right to be present where they are located.” *Id.* at 1. An officer shall not “[i]ntentionally block or obstruct cameras or recording devices” or “[i]n any way threaten, intimidate or otherwise discourage an individual from recording officer’s enforcement activities.” *Id.* at 1-2. To avoid interference with police duties or minimize safety concerns, General Order 302 provides that “an officer may direct the person to move to a position that will not interfere” or “to move to a safe position.” *Id.* However, “[a] person’s recording of officer’s activity from a safe distance, and absent any attendant action that obstructs the activity or threatens the safety of the officers, does not constitute interference.” *Id.* General Order 302 provides that “[a] person

has the right to express criticism of the police activity being observed.” *Id.* Such express criticisms do not constitute interference if it does not jeopardize the safety of others and “so long as the expression does not violate the law or incite others to violate the law.” *Id.*

The summary judgment evidence shows, however, that the APD has an unwritten policy of ignoring General Order 302 when it comes to Mr. Reyes, and instead has a practice of discriminating and retaliating against him because he is a known, vocal critic of the City’s homeless policy and policing.

For example, on January 4, 2019, Mr. Reyes was filming APD officers clearing homeless people from the sidewalk. Ex. 13A. Mr. Reyes recorded the group expressing their discontent with the APD officers’ conduct. *Id.* Mr. Reyes began expressing his own views, and some individuals expressed their views to Mr. Reyes’s camera. *Id.* An officer asked Mr. Reyes to step back on the curb, which he did. *Id.* at 00:04:20. Mr. Reyes sat down on the sidewalk, moving further away from the officer. *Id.* 00:05:35. Another officer then ordered Mr. Reyes to stand up, move, or leave the scene despite Mr. Reyes posing no threat to anyone’s safety and despite him not interfering with any officers’ public duties. *Id.* at 00:06:35. This officer claimed Mr. Reyes riled up the group, but the video contradicts this claim. *Id.* at 00:07:10. Nonetheless, Mr. Reyes was arrested, *id.* at 00:07:18, supposedly “for interfering with public duties,” even though verbally criticizing police conduct is not probable cause to arrest. Ex. 13B. *Freeman v. Gore*, 483 F.3d 404, 414 (5th Cir. 2007) (“yelling” and “screaming” at a police officer does not constitute probable cause to arrest for interference with public duties).

The APD arrest report is belied by the video evidence. The report falsely claims that Mr. Reyes was “antagonizing the group of violators which caused them to be less cooperative with police,” Ex. 13B at 6, but he did no such thing; the group had already been antagonized by the

police, who then shifted the blame to Mr. Reyes. The report claims that Mr. Reyes was ordered to stand “approximately 21 feet away,” Ex. 13B at 6, but that was not a lawful order because Mr. Reyes was posing no threat to the safety of others and was not interfering with public duties – unless the City contends that documenting and criticizing police conduct is “interference,” contrary to General Order 302. *See* Ex. 21. During this arrest, the City seized Mr. Reyes camera and cell phone. Ex. 13B at 7. The Travis County Attorney’s Office dismissed the charges. Ex. 13C.

Likewise, Mr. Reyes was arrested while filming City personnel sweep a homeless camp on July 22, 2020. Mr. Reyes was filming City officials conducting the sweep from a proper, safe distance without interfering, *see* Ex. 16B at 00:01:55, yet a City employee and APD officers approached him and demanded that he move further away. *Id.* at 00:03:20. Mr. Reyes defended his right to continue filming where he was, but he did eventually obey the unlawful order. Ex. 16A at 00:03:20; Ex. 16B at 00:08:35. Nonetheless, APD officers arrested Mr. Reyes. Ex. 16A at 00:03:35; Ex. 16B at 00:08:48. Again, Mr. Reyes was baselessly charged with interference with public duties. Ex. 16C. The Travis County Attorney’s Office rejected the charges. 16C.

4. The City has repeatedly arrested Julian Reyes while ignoring individuals engaged in similar conduct.

Mr. Reyes was arrested for violating a City camping ordinance while filming APD officers on November 5, 2019. Ex. 14A. Although others were present who were also filming the police, only Mr. Reyes was arrested. *Id.*; Ex. 14B. In the police report of Mr. Reyes’s arrest, the officers acknowledge that they knew him, complaining that Mr. Reyes is “a local activist who frequently follows police officer [sic] around documenting their actions and placing them on the internet for view,” Ex. 14A at 10, denigrating him as “a self proclaimed member of the press and a local activist.” *Id.* at 15. Following Mr. Reyes’s arrest, Lt. Christopher Gwaldo emailed “APD DTAC

Supervisors” that Mr. Reyes had been arrested despite other “protestors present filming.” Ex. 14B. Al Garibay then forwarded the email to eleven more individuals. Ex. 14C.

Similarly, on June 20, 2020, Mr. Reyes was filming EMS attempting to strap a person in distress to a stretcher on Sixth Street. *See* Ex. 15A at 00:17:15. Mr. Reyes knew the woman and knew she did not like being restrained. Ex. 1 at ¶ 8. When a pedestrian intentionally blocked Mr. Reyes’s camera, Mr. Reyes flicked the man’s hat off in frustration. *Id.* at 00:17:30. A second pedestrian then knocked Mr. Reyes’s camera out of his hands and into the street. *Id.* at 00:17:35. Rather than respond to this assault on Mr. Reyes, an APD officer went after Mr. Reyes, pushing him toward a wall and demanding that Reyes stand back despite no threat to the safety of others or any interference with public duties. *Id.* at 00:17:40; Ex. 15B at 00:18:00. Mr. Reyes took out another camera to record the officer’s conduct, but the Officer again pushed him, and then handcuffed him. *Id.* In his report, the arresting officer claimed he did not touch Mr. Reyes until after he had told him he was detained, Ex. 15C at 11, but this is contradicted by the video evidence. *See* Ex. 15B at 00:18:06 (pushing Mr. Reyes), 00:18:13 (telling Mr. Reyes he is detained). The City officers did not arrest the man who assaulted Mr. Reyes and prevented his further filming by knocking his camera into the street. The reporting officer stated, “I asked Sgt Howard if I should arrest Cornman as well as Reyes and he stated no because it sounded like legitimate defense of another.” Ex. 15C at 12. Knocking a person’s camera into the street is not “legitimate defense of another.” This excuse was a transparent attempt to justify arresting Mr. Reyes while ignoring the use of force against him to prevent the filming of police conduct. All charges against Mr. Reyes from that evening were dismissed. Ex. 15D, Ex. 15E.

On March 8, 2024, Mr. Reyes was filming a protest when he saw Jeff Zavala, another citizen journalist, being arrested by APD officers. Ex. 19A at 00:05:30. As the officers took

Mr. Zavala to a City vehicle, Mr. Reyes asked why he was being arrested. *Id.* at 00:06:50. As Mr. Reyes filmed, police officers used their bicycles as a barricade between the sidewalk and street. *Id.* at 00:07:40. Officers had also blocked the lane of traffic closest to the sidewalk. *Id.* Others were recording the police officers. *Id.* at 00:08:00. Mr. Reyes walked closer to the bicycle barricade to get a better view, criticizing the officers' actions; he did not try to cross the barricade or interfere with the officers. *Id.* at 00:08:50. Despite posing no threat to anyone's safety, police officers demanded Mr. Reyes move back to the sidewalk, even though the street was closed off. *Id.* Mr. Reyes obliged when another officer told him they were trying to open the road. *Id.* at 00:09:13.; Ex. 19B at 00:06:41. Although Mr. Reyes's complied, Lt. Christopher Juusola commanded officers, "Grab Julian; he's going to jail." Ex. 19C at 00:19:10. The arrest report states "Reyes was placed under arrest for Pedestrian on a roadway," despite the roadway being closed when Mr. Reyes stood there, and despite Mr. Reyes returning to the sidewalk when directed. Ex. 19D. Lt. Juusola did not provide a narrative in the report explaining Mr. Reyes's arrest; rather, the report only states that Officer Mathis arrested Julian under Lt. Juusola's command. *Id.* at 23. Others present who were filming were not arrested.

5. Julian Reyes's arrest while filming on December 23, 2023, by Sgt. Brian Yarger epitomizes the City's contempt for his First Amendment rights.

Officer Yarger arrested Julian Reyes while he was filming police activity on December 23, 2023. Ex. 18D. This arrest happened long after this case was filed, and long after Judge Hightower held that Mr. Reyes had stated a claim that the City had an unwritten policy of arresting him for filming the police. Officer Yarger was a recipient of Sgt. Breckenridge's email calling Mr. Reyes a "turd" and urging his officers not to be "weak" when dealing with Mr. Reyes and other homeless advocates. Ex. 12. Officer Yarger was identified by name in the "Stop the Sweeps" publication that warned he was a bully who escalated situations. Ex. 12 at 10. Officer Yarger has received

oral reprimands, written reprimands, and was suspended, including a reprimand for being rude and failing to maintain an impartial attitude. Ex. 20 at 18:3-20:13.

Officer Yarger submitted a police report of his arrest of Mr. Reyes. Ex. 18D. His report states that Mr. Reyes and a companion had approached within “10 feet from where officers were conducting their investigation.” *Id.* He then claimed this happened:

I instructed both of them to back up and pointed out a small road sign that was near the line they were originally instructed to stay behind as the point that they needed to stay behind. Reyes became argumentative with me. He backed up a few steps and then stopped. I repeated my instructions to back up to behind the sign. Reyes was still argumentative. He backed up a few more steps and then stopped again. At this point I believed that Reyes had no intention of voluntarily complying with my lawful order to film from a location that did not interfere with his ability to exercise his Constitutionally protected rights and also permitted the officers on the scene to conduct their investigation without distraction and interference from Reyes. Reyes was then placed under arrest for Failure to Comply with a Lawful Order.

Id.

The video evidence belies Officer Yarger’s report. Ex. 18A. In fact, Mr. Reyes never got close to ten feet from the patrol cars. He was filming, from a considerable distance and without interfering in any way, ADP officers who had two individuals handcuffed against a patrol car. *Id.* at 00:00:24. Two pedestrians are clearly seen in the video walking directly past the police and the two handcuffed individuals, much closer than ten feet, without being interfered with in any way by the police. *Id.* at 00:00:43. Mr. Reyes asked whether he could use the sidewalk as other people were doing, but was told he could not, without giving any reason. *Id.* at 00:01:05. After the police placed the two suspects in a patrol car, another couple walked past the police vehicles, again quite close, and again without any interference. *Id.* at 00:01:10 Only Mr. Reyes and his companion, who was also filming, were prevented from getting any nearer to the police vehicles. *Id.*

By the time Officer Yarger inserted himself into the situation, there was no “investigation” going on; the suspects were within the patrol car. *Id.* When Mr. Reyes began to move forward,

and while he was much further than ten feet from the patrol cars, and much further than the four other citizens had been allowed to go, Officer Yarger charged at Mr. Reyes, yelling at him to move back. *Id.* at 00:01:35. He gave Mr. Reyes a single instruction (not two) to back up, and while Mr. Reyes was doing so, but apparently not fast enough for Officer Yarger, Officer Yarger immediately and violently seized Mr. Reyes and arrested him. *Id.* A reasonable factfinder watching the video of Officer Yarger's conduct could easily conclude that he was targeting Mr. Reyes specifically, as he required things of Mr. Reyes that he required of no one else, and he gave him no reasonable opportunity to comply with an order that clearly violated General Order 302 before arresting him. In short, a factfinder could determine that Officer Yarger was following the City's instructions not to be "weak" around this "ANTI-POLICE ACTIVIST" "turd."

The City's Motion for Summary Judgment claims that videos of its arrests of Mr. Reyes "utterly discredit Reyes' version of events," Mot. at 16, but in fact it is Officer Yarger's version that is "utterly discredited" by video evidence. Nonetheless, the City, after reviewing Officer Yarger's report and video, ratified his conduct and confirmed that his arrest of Mr. Reyes was fully consistent with the City's policy regarding citizens recording police conduct. Ex. 8 at 102:5-19.

6. The City had confirmed that APD's arrests of Julian Reyes while filming police activities are fully consistent with its policy.

Mr. Reyes noticed the City's deposition pursuant to Rule 30(b)(6), Fed. R. Civ. P., to testify on the City's behalf as to (1) the City's policy and practice regarding arrests of individuals engaged in filming police activity; (2) whether the arrests of Julian Reyes were consistent with, or in violation, of the City's policy and practice; and (3) whether any officer received any correction or discipline of Julian Reyes's arrests. Ex. 7. For every arrest from January 2019 to January 2024, Assistant Chief Miesse read the arrest reports and watched the available video. Ex. 8 at 85:13-22. He was also specifically asked about six of Mr. Reyes's arrests at issue in this lawsuit, including

from January 4, 2019, *id.* at 84:4-6; February 7, 2020, *id.* at 87:24-88:1; June 20, 2020, *id.* at 88:19-22; October 24, 2021, *id.* at 90:3-5; June 14, 2023, *id.* at 94:1-4; and December 23, 2023, *id.* at 97:2-4. He confirmed that he had reviewed the arrest reports and available video of each incident. *Id.* at 85:19-22; 88:2-5; 88:23-89:7; 90:6-8; 95:11-17; 102:5-8. Then, asked to testify on behalf of the City as to whether those arrests were pursuant to City policy, he confirmed that they were. *Id.* at 86:1-2; 88:6-9; 89:8-10; 90:9-11; 95:18-20; 102:9-11. Assistant Chief Miesse further confirmed there was no discipline or training of police officers and no changes in APD policy made after any arrests. *Id.* at 88:10-15; 89:11-22; 90:12-23; 95:21-96:5; 102:12-103:9.

IV. Multiple contested issues of fact preclude summary judgment on Julian Reyes’s Section 1983 and Privacy Protection Act claims.

A. The Court should deny summary judgment as to Julian Reyes’s Section 1983 claim because there are contested issues of fact as to whether the City has a policy or practice of arresting him to prevent or retaliate against his First Amendment protected activity.

The City raises five arguments as to Mr. Reyes’s Section 1983 claims: (1) his arrests prior to November 5, 2019, are barred by limitations; (2) there is no evidence of a City policy of arrests for filming police activity; (3) there is no evidence that a City policy was the “moving force” behind his arrests; (4) the universal dismissal of the City’s charges against Mr. Reyes does not disprove probable cause; and (5) there is no evidence the City singled out Mr. Reyes for arrest. Mot. at 12-17. None of these grounds warrant summary judgment for the City.

1. The City has waived the defense of limitations.

The City argues that Mr. Reyes’s “complaints about arrests prior to November 5, 2019, are barred by the Texas two-year statute of limitations on personal injury claims.” Mot. at 12. Limitations is an affirmative defense that must be pled in a defendant’s answer. Fed. R. Civ. P. 8(c)(1). The City has not pled limitations. *See* Doc. 29 at 4-5. The deadline to amend pleadings

was May 12, 2023, Doc. 24, and therefore the City has waived the defense of limitations. *Lebouef v. Island Operating Co.*, 342 Fed. Appx. 983, 984 (5th Cir. 2009) (“If the affirmative defense is not included in the [answer], it is waived.”). “Once the defendant has waived that defense, it cannot revive the defense in a memorandum in support of a motion for summary judgment.” *Id.* (quoting *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91, 96 (5th Cir. 1976)).

Even if the City had not waived this defense, the City’s conduct towards Mr. Reyes, including arrests prior to November 5, 2019, would remain relevant to show the City’s long-standing practice of singling out Mr. Reyes for discriminatory and retaliatory treatment because of his First Amendment protected activities, *i.e.*, what the City labels his “anti-police activism.”

2. There is ample summary judgment evidence of a City policy and practice of arresting Julian Reyes to prevent, and to retaliate for, his First Amendment protected activity.

Section 1983 provides a right of action against municipalities for the “deprivation of any rights, privileged, or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. The City of Austin can no longer claim that its citizens do not have a constitutional right to film police activities, nor can it claim that such a right is not clearly established.

More than seven years ago, the Fifth Circuit held unequivocally that “First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions.” *Turner*, 848 F.3d at 688. “Filming the police contributes to the public’s ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy.” *Id.* at 689.

Gathering information about government officials in a form that can be readily disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’ ... This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to

deprive individuals of their liberties. Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.

Id. at 689-90 (quoting *Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011) (citations omitted)).

A municipality is liable under Section 1983 when (1) an official policy or practice; (2) promulgated or knowingly tolerated by a municipal policymaker; (3) was the moving force behind the violation of the plaintiff's constitutional rights. *Webb v. Town of Saint Joseph*, 925 F.3d 209, 214 (5th Cir. 2019).

After raising its waived defense of limitations, the City argues that Mr. Reyes "fails to show" that the City has a policy of arresting him for filming police activity. Mot. at 13-15. The City cites its General Order 302 and a training bulletin, claiming "[t]here is simply no evidence of a contradictory policy at APD." *Id.* at 14. The summary judgment evidence described above, shows the contrary.

For example, Mr. Reyes was singled out and arrested on December 23, 2023. The video evidence shows that pedestrians were walking closer to APD officers than where Mr. Reyes was filming. Ex. 18A. Yet, Officer Yarger demanded that Mr. Reyes move further away despite no threat to the safety of others or any interference with public duties in violation of General Order 302. *Id.* As the City acknowledged, it is not a lawful order to ask someone to move off a public sidewalk that is not within a crime scene or work zone. Ex. 8 at 101:19-22. Mr. Reyes was the only person arrested despite not being the closest to scene.

The City also arrested Mr. Reyes on July 22, 2020, in violation of its General Order 302. Mr. Reyes was recording police and City activities at a proper, safe distance. Ex. 16B at 00:01:44. Then, City police officers and an employee demanded that Mr. Reyes move further away despite no threat to the safety of others or any interference with public duties. *Id.* at 00:03:20. Although

Reyes obeyed the order to move back, he was still arrested. Ex. 16A at 00:03:35; Ex. 16B at 00:08:48.

Likewise, Mr. Reyes was arrested on January 4, 2019 while filming at a safe and proper distance. Ex. 13A. While Mr. Reyes was criticizing the police, such criticism is not interference, as stated in General Order 302. *See* Ex. 21. Contrary to the police reports, Mr. Reyes did not rile up any other person; as the video evidence shows, the other individuals were already upset with City police officers. Ex. 13A. Officers arrested Mr. Reyes in violation of General Order 302 because he had not interfered with public duties and was not threatening anyone's safety.

An official policy need not be written; it may constitute “a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy.” *Alvarez v. City of Brownsville*, 904 F.3d 382, 390 (5th Cir. 2018). “That is, the existence of a persistent pattern of illegal conduct, tolerated by municipal policy makers, tends to show that the subject conduct does not represent an unauthorized departure from lawful policy but instead represents the realization of an unlawful policy.” *Milam v. City of San Antonio*, 113 F. Appx. 622, 625 (5th Cir. 2004)). Furthermore,

the failure to take disciplinary action in response to an illegal arrest, when combined with other evidence, could tend to support an inference that there was a preexisting de facto policy of making illegal arrests: the policymaker did not discipline the employee because, in the policymakers' eyes, the employee's illegal conduct actually conformed with municipal policy.

Id. Following Mr. Reyes's repeated and targeted arrests, the City acknowledged that there was no discipline or training of police officers and no changes in APD policy. Ex. 8 at 88:10-15, 89:11-22; 90:12-23; 95:21-96:5, 102:12-103:9. This is true even after some of Mr. Reyes's complaints reached APD's Internal Affairs Division. *E.g.* Ex. 22. Only one complaint by Mr. Reyes regarding

his treatment while filming police was taken seriously, and it resulted in nothing except oral reprimands. Ex. 22 at 3-4.

The summary judgment evidence is more than sufficient to support a finding that the City's repeated arrests of Mr. Reyes reflect an unwritten policy to prevent, disrupt, or retaliate against Mr. Reyes's exercise of his First Amendment rights.

3. There is ample summary judgment evidence that the City's policy and practice was the moving force behind Julian Reyes's arrests.

The City next moves for summary judgment on the ground that Mr. Reyes failed to show the City's policy is a moving force behind his arrest. First, the City argues that Reyes must raise a fact issue "that his filming complied with time, place, and manner restrictions." Mot. at 15. But such a requirement is unsupported by the case law it cites. Furthermore, Mr. Reyes does not argue General Order 302 is the moving force behind his arrests.

Second, the City argues that officers' body camera footage shows Mr. Reyes engaged in criminal conduct that does not involve his cameras. Mot. at 15. This argument, however, is a repackaging of the City's argument that Mr. Reyes's arrests were supported by probable cause. The existence of probable cause does not defeat Reyes's claims against the City. *Lozman v. City of Riviera Beach, Fla.*, 585 U.S. 87, 101 (2018). And even so, the summary judgment evidence creates a fact issue regarding probable cause for several of Mr. Reyes's arrest, including the arrests on January 4, 2019; July 22, 2020; December 23, 2023; and March 8, 2024.

Last, the City argues that Mr. Reyes's version of the facts are debunked by officers' body camera footage. Mot. at 15. But "a court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonably jury could not believe his account." *Kost*, 458 F. Supp. 3d at 582 (quoting *Darden*, 880 F.3d at 730). The body camera footage does not provide so much clarity that a reasonably jury could not believe Mr. Reyes's account of the

arrests. Rather, the videos and summary judgment evidence presented by Mr. Reyes create a fact issue precluding summary judgment.

Mr. Reyes has presented evidence that the City targets Mr. Reyes for exercising his protected First Amendment Activities, providing a moving force behind Mr. Reyes's arrests. There is ample evidence of the City labeling Mr. Reyes as an anti-police activist. Exs. 2-6. In fact, the City's 30(b)(6) witness admitted officers know Mr. Reyes by that label. Ex. 8 at 63:25-64:10. And an officer labeled Mr. Reyes a "loony" and "turd," warning other officers not to be "weak." Ex. 12. Mr. Reyes is constantly singled out in his arrests. For example, on March 8, 2024, Lt. Juusola stated, "Grab Julian; he's going to jail" despite Mr. Reyes following Lt. Juusola's orders. Exs. 19A at 00:09:13; 19B at 00:06:41; 19C at 00:19:10. On December 23, 2023, Officer Yarger arrested Mr. Reyes when filming while letting others come far closer to a (no longer ongoing) investigation. Exs. 18A; 18B; 18C.

To show a moving force, a plaintiff "must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Piotrowski v. City of Houston*, 237 F.3d 567, 580 (5th Cir. 2001); *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997). Mr. Reyes presents sufficient evidence to raise a fact issue whether the City's practice of arresting Mr. Reyes for recording police activities is the "moving force" behind his arrests: the City identifies Mr. Reyes as an anti-police activist, the City routinely targets and arrest Mr. Reyes as he is recording police activity despite not interfering, the City takes no meaningful action on Mr. Reyes's complaints, and insists that every arrest has been consistent with its policy. If the arrests are compliant with City policy and practice, then the practice of targeting and arresting Mr. Reyes in retaliation for exercising his constitutional rights must be the motivating force behind the arrests.

4. Probable cause does not defeat Julian Reyes’s claims, and even if it did, there are fact issues as to whether the City had probable cause to arrest him.

The City’s charges against Mr. Reyes are routinely dismissed. *See* Sections III.B.3 & 4, above. The City makes a one-paragraph, double-negative argument that the repeated dismissal of charges against Mr. Reyes does not mean there was no probable cause for his arrest. Mot. at 16.² In any case, the City’s claim about probable cause does not warrant summary judgment, for two reasons.

First, while probable cause may defeat a one-off First Amendment claim against an individual officer, *see Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), probable cause does *not* defeat a First Amendment claim against a municipality for discriminatory and retaliatory arrests. *Lozman*, 585 U.S. at 100. “[W]hen retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.” *Id.* at 100-01. Where, as here, “a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been,” probable cause becomes immaterial. *Buehler v. Dear*, 27 F.4th 969, 993-94 (5th Cir. 2022).

Mr. Reyes has been repeatedly arrested while filming police while others who were not filming were left alone. Mr. Reyes has been arrested while filming while others who were filming (but were apparently not considered “anti-police activists” by the City) were not. To cite several examples, on December 23, 2023, Yarger arrested Mr. Reyes while he was filming the police conducting an arrest from a safe distance, while he allowed others who were not filming the police

² The City cites *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979), which notes that a suspect’s later *acquittal* does not mean there was no probable cause for their arrest, Mot. at 16, but *DeFillippo* does not address the question presented here, which is whether the repeated dismissal of charges before trial supports an inference that the arrests lacked probable cause or were made pursuant to a constitutionally impermissible policy or practice.

to stroll on by. On March 8, 2024, officers specifically targeted and arrested Mr. Reyes despite Mr. Reyes obeying orders to return to the sidewalk. On July 22, 2020, APD officers arrested Mr. Reyes but not the other individual recording the homeless sweep. On June 20, 2020, APD officers arrested Mr. Reyes for assault, but they let the man who knocked Mr. Reyes's camera out of his hands to walk away. On November 5, 2019, officers only arrested Mr. Reyes despite noting other individuals present filming the event.

In any case, the City's probable cause to arrest Mr. Reyes is in dispute. While the dismissal of any single charge may not show the lack of probable cause, the routine dismissal of charges lodged against Mr. Reyes calls into question the City's practice of routinely arresting him while filming police.

5. There is ample evidence that the City has singled Julian Reyes out for discrimination and retaliation for exercising his First Amendment rights.

The City blithely dismisses Mr. Reyes's fear that the City has singled him out for special treatment as "unsubstantiated," Mot. at 16–17, ignoring the plethora of evidence that APD—with the City's approval and ratification—has done just that. For starters, APD has officially and continuously labeled Mr. Reyes as an anti-police activist, targeting him based on his viewpoint. *See* Ex. 8 at 63:25-64:10; Ex. 9 at 5; Ex. 10. The City does not label "pro-police activists." Ex. 8 at 76:3-6. Viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The City invites, indeed, suggests it officers commit viewpoint discrimination with its repeated labelling of Mr. Reyes by his beliefs. As noted above, there is substantial evidence that the City treats Mr. Reyes differently than other citizens, whether they were filming or not. Ex. 14B (noting Mr. Reyes was the only person arrested, despite other protesters filming); Ex. 15C at 12 (declining to

arrest the person who knocked away Mr. Reyes's camera); Ex. 16A (arresting only Mr. Reyes, despite another individual filming). Other documents demonstrate that officers have known about and singled out Mr. Reyes since at least 2017. Ex. 3 at 2; Ex. 4; Ex. 5; Ex. 6; Ex. 14A at 10. There is substantial summary judgment evidence supporting Mr. Reyes's claim of discriminatory and retaliatory treatment.

B. The Court should deny summary judgment on Julian Reyes's Privacy Protection Act claim because there are contested issues of material fact as to whether the City's repeated warrantless seizures of his cameras and journalist work product were legally justified.

1. The Privacy Protection Act.

In 1979, the Supreme Court held that reporters have no First Amendment right to be free from searches and seizures of "evidence" they may have gathered while newsgathering. *Zurcher v. Stanford Daily*, 436 U.S. 547. In response, Congress enacted the Privacy Protection Act of 1980 ("the PPA"), which prohibits federal and state governments, except in narrow circumstances, from seizing publishers' work product and documentary materials – with or without a search warrant. 42 U.S.C. § 2000aa. Congress also provided a civil remedy against governmental units for those aggrieved by a search or seizure in violation of the PPA. 42 U.S.C. § 2000aa-6(a)(1); (f). *Minneapolis Star and Tribune Co. v. United States*, 713 F. Supp. 1308, 1309-15 (D. Minn. 1989) (awarding attorney's fees under PPA for FBI's illegal seizure of journalists' videos and photographs of a narcotics arrest in north Minnesota). Governmental units liable for violating the PPA may not assert the purported immunity or good faith of the officer who conducted the search and seizure. 42 U.S.C. § 2000aa-6(c). *See Binion v. City of St. Paul*, 788 F. Supp. 2d 935, 948 (D. Minn. 2011) (fact issues precluded summary judgment on PPA claim against City, which lacked immunity for illegal seizure of internet journalist's videos).

The PPA enacts broad prohibitions against the search and seizure of journalists’ (1) work product and (2) documentary materials.

First, it prohibits “a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or similar form of public communication” 42 U.S.C. § 2000aa(a). “Work product materials” include materials “prepared, produced, authored, or created” “in anticipation of communicating such materials to the public” that are possessed for that purpose and include “mental impressions, conclusions, opinions, or theories” of the person who prepared them. 42 U.S.C. § 2000aa-7(b).

Second, the PPA prohibits government officers from searching or seizing “documentary materials,” which include “written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, taps, or discs” 42 U.S.C. § 2000aa(b); § 2000aa-7(a).

Relevant to this case, “work product” and “documentary materials” may be searched for or seized only if “there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate,” except not when “the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein” 42 U.S.C. § 2000aa(a)(1); (b)(1).³

³ The other exceptions are not relevant here: national defense, classified information, restricted data, child pornography, child sex trafficking, to prevent death or serious bodily injury, to prevent destruction, alteration, or concealment, or after a court order produced in response to a subpoena has been defied. *See* 42 U.S.C. § 2000aa(a)(1)(2); (b)(1)-(4).

Both the City's written policy regarding citizens filming police (General Order 302) and its Motion for Summary Judgment demonstrate a fundamental failure to understand and comply with the Privacy Protection Act of 1980.

2. The City's General Order 302 violates the PPA, on its face, as to citizen and professional journalists.

General Order 302(f) addresses "Evidence on a Camera or Recording Device." Ex. 21 at 2. It provides that if "an officer has probable cause to believe that a camera or other recording device contains images or sounds that are evidence of criminal acts," and the individual doing the recording "declines to voluntarily provide the device or recording medium," the officer "*shall* take control of the device" if they believe "exigent circumstances exist insofar as the evidence of criminal activity will be lost absent an immediate seizure of the device." *Id.* at 2-3 (emphasis added). General Order 302 makes no exception for the media or anyone else whose purpose is to "disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" and who is therefore protected by the Privacy Protection Act. Under General Order 302(f), if any officer of the APD thinks a local photojournalist has taken photographs of criminal conduct yet (as is likely) refuses to hand over their photos to the police, the officer "shall" seize the photojournalist's camera if they think the photos will be lost.

As applied to any journalist and or other citizen creating content to be published, General Order 302(f) violates federal law on its face by *requiring* (not just permitting) the seizure of material protected by the PPA. The Act has no "exigent circumstances" exception that allows the police to seize work product or documentary materials from journalists out of some subjective fear that the journalist may delete their own materials. The Act *prohibits* the seizure of work product materials of journalists that may contain evidence of a crime unless doing so "is necessary to prevent the death of, or serious bodily injury to, a human being," or the journalist is committing a

crime “to which the materials relate,” but not a crime consisting of “the receipt, possession, communication, or withholding of such materials.” 42 U.S.C. § 2000aa(a). That is, the police cannot order a journalist to turn over work product and then – as General Order 302(f) requires – seize the materials if the journalist refuses by claiming that doing so is a crime. And, while the PPA includes some additional exceptions for the seizure of documentary materials, there is no “exigent circumstances” exception, and the Act clearly contemplates that such materials will be sought first by subpoena, not the warrantless seizure that General Order 302(f) requires. 42 U.S.C. § 2000aa(b), (c).

Given that General Order 302(f) was written in apparent ignorance (or defiance) of federal law, it is not surprising that there is summary judgment evidence showing that the City violated the PPA when it seized Mr. Reyes’s cameras and the recordings they contained, as explained below.

3. There are disputed issues of fact as to whether City’s arrests of Julian Reyes violated the PPA.

The City’s Motion for Summary Judgment addresses only a single seizure of Mr. Reyes’s journalistic materials, the one it conducted on October 24, 2021. Mot. at 18-19. The City ignores its seizure of Mr. Reyes’s cameras and materials conducted on January 4, 2019. Ex. 13B at 7. It is therefore not entitled to summary judgment as to its violations of the PPA on that date. As for the October 24, 2021 arrest, the City’s four brief arguments fail to establish grounds for dismissal.

First, the City’s claim that Mr. Reyes “did not identify himself as a member of the press” on October 24, 2021, and did not “provide[] any evidence he had his cameras with him because he intended to record his activity and disseminate the material to the public,” Mot. at 18, ignores both the facts and the law. Long before October 2021, the City had flagged Mr. Reyes as an “anti-police *activist*,” indicating it knew he was engaging in constitutionally protected activities by

criticizing police conduct. *E.g.*, Ex. 2. The City knows he works for the *Challenger Street Newspaper*; it's in the City's provide of Mr. Reyes. In any case, the PPA is not limited to "the press;" it applies whenever a person is "reasonably believed" to "have a purpose to disseminate to the public" materials. 42 U.S.C. § 2000aa(a). Steve Jackson Games was not "the press;" it published role playing game books, yet Judge Sparks correctly held that its work product materials were protected from seizure by the Secret Service, even pursuant to a search warrant. *Steve Jackson Games, Inc. v. U.S. Secret Service*, 816 F. Supp. 432, 437-38 (W.D. Tex. 1993). The City's motion *admits* that Mr. Reyes "told officer that he was recording his [sic] activities." Mot. at 19. *See Garcia v. Montgomery County, Md.*, 145 F. Supp. 3d 492, 524-25 (D. Maryland 2015) (denying summary judgment on PPA claim where journalist identified himself as a member of the press, "a self-identification that would support the reasonable belief that [he] intended to disseminate his recording to the public").

Second, whether the City had probable cause to arrest Mr. Reyes is in dispute, as noted in Section IV.A.4, above. It is also beside the point, because the purported existence of probable cause to arrest Mr. Reyes did not provide the City justification to seize his journalistic materials, because those materials did not relate to the purported offense – unless the City is conceding it arrested Mr. Reyes *because* he was filming the police, and that his recording were evidence of *that* offense. If so, that would be admitting to a violation of his First Amendment rights. *Turner*, 848 F.3d at 690. In any case, the dispute in this case over probable cause precludes summary judgment. *E.g.*, *Basler v. Barron*, No. H-15-2254, 2015 WL 477573, at *12 (S.D. Tex. Feb. 6, 2017) (PPA applies to arborist by profession who contributes to internet publications critical of police; denying summary judgment due to fact issue on probable cause for arrest); *Dunn v. City of Fort Valley*, 464 F. Supp. 3d 1347, 1369 (M.D. Ga. 2020) (citizen stated claim under PPA when he was arrested

without probable cause while filming inside courthouse); *Madaio v. Roden*, No. CV-06-BE-0904-S, 2007 WL 9697592, at *4 (N.D. Ala. May 9, 2007) (denying summary judgment on PPA claim where probable cause and photographer’s consent to search were in dispute).

Third, Mr. Reyes was not “recording his own actions,” as the City claims, Mot. at 19, he was recording *the police officer’s* actions. He does not point the camera at himself; he records and publishes police conduct.

Finally, the City’s argument that the City did not search the contents of Mr. Reyes’s cameras seized on October 24, 2021, until a “disinterested magistrate” signed a search warrant, Mot. at 19, wholly misses the point of the PPA, which broadly *prohibits* using search warrants to search through a journalist’s materials. By making this argument, the City concedes that it treats PPA-protected material no differently than other materials, and therefore fails to comply with the statute’s requirements.

Because there are, at a minimum, fact issues as to whether the City’s seizure of Mr. Reyes’s work product and documentary materials violated the PPA, summary judgment should be denied.

V. Conclusion and prayer.

For these reasons, Plaintiff Julian Reyes requests that the Court deny the City of Austin’s Motion for Summary Judgment and grant such other and further relief to which he may be entitled.

Respectfully submitted,

By: /s/ Peter D. Kennedy
Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5600 (Phone)
(512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on May 22, 2024, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy
Peter D. Kennedy

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff,

V.

**CITY OF AUSTIN, INC., AUSTIN
POLICE DEPARTMENT, TROY
WISMAR, CHRISTOPHER
CARLISLE, PATRICK WALSH, KYU
SUK AN, SARAH FOSTER, GREG
MCCORMACK, JOHN DOES,
individually and in their official
capacities,
*Defendants.***



CASE NO. 1:21-CV-0992-DII-SH

DEFENDANT'S REPLY IN SUPPORT OF SUMMARY JUDGMENT

TO THE HONORABLE JUDGE PITMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin, Texas files this Reply in support of Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure as follows:

I. Introduction

Briefly and concisely, Reyes has a decade-long history of being a presence at various law enforcement scenes and some of those times, he has been arrested as warranted. Reyes began filming APD officers since on or about early 2014. *See* Exhibit 1. In the past decade, members of the public have complained about him and he has interacted directly with the police in various law enforcement capacities. In this context, he has been harassing the police, interfering with their investigations, violating their lawful orders, and generally required so much attention that officers are taken from their duties at hand to deal with him. In his Response Declaration, Reyes declares, “I do not want to get into shouting matches or to be assaulted, threatened, touched, harassed, or targeted; just let me film.” Resp. Ex. 1 at ¶12. He has been filming police activity for many years.

Id. at ¶7. Indeed, he regularly films police activity without being arrested. *See* Exhibit 2. The Response does nothing to change the fact that when Reyes “just films” and is just present then he is not arrested as supported by the City of Austin’s Motion for Summary Judgment. *Id.*

As explained more specifically below and by way of separate Motions to Strike, his Response provides deficient summary judgment proof to support his Response’s central contention that genuine issues of material fact remain on the two key fronts. The Court should grant the City of Austin’s Motion for Summary Judgment because there are no contested material facts as to 1) whether the City has a policy, practice or custom of retaliating against him for filming police activity; and 2) whether the City violated the Privacy Protection Act of 1980 when it seized Plaintiff’s cameras. Consequently, Reyes’ remaining claims must be denied and dismissed.

II. Exhibits

Exhibit 1: GO Report 2014-1530165

Exhibit 2: GO Report Narratives

Exhibit 3: GO Report 2019-41140

Exhibit 4: Affidavit of Brandon Gilstrap

III. Arguments

A. Reyes lacks support for his claim that the City has a policy, practice or custom of arresting him for filming police activity.

1. Reyes makes misstatements to support his Response on this point.

As an initial matter, Reyes misstates two facts in his Response. Reyes complains that the City violated General Order 302 when, on January 5, 2023, the ME prevented him from filming an investigation of a deceased person. Resp. at 7. Video clearly shows the ME vehicle is the Travis County Medical Examiner and the ME employees as Travis County Medical Examiner employees. APD’s General Orders do not extend to Travis County employees.

Moreover, Reyes claims that his cameras were seized during his arrest on January 4, 2019. In support, Reyes attaches undisclosed video to support his claim that there was no probable cause to arrest him. First, the City objects to Reyes' use of the video because he did not disclose it during discovery despite two separate opportunities to provide it. *See* Doc. 48. Second, APD did not seize his cameras. *See* Exhibit 3.

2. Reyes provides no objective evidence to support his claim that he is singled out for arrest while others engaging in similar conduct are not arrested.

Next, Reyes claims that he is repeatedly arrested when others engaged in similar conduct are not. *See* Resp. at 22. “[T]he no-probable cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” *Nieves v. Bartlett*, 587 U.S. 391, 407 (2019). Reyes has provided no such evidence and instead relies on his own conclusory remarks despite video footage to the contrary.

November 5, 2019. Specifically, Reyes claims that he was arrested on November 5, 2019, while filming police when other individuals also filming were not arrested. Resp. at 10. However, he was not just filming police activity as is clear from his own Declaration admissions. *See* Resp. Ex. 1 at ¶ 8.d. He fails to support his claim that the other individuals were similarly situated.

June 20, 2020. Reyes was also not singled out when he was arrested on June 20, 2020, after assaulting an individual blocking his view of police activity. *See* Resp. Ex. 15A at 17:29. Reyes then assaulted Officer Larned and was arrested. *See* Resp. Ex. 15B at 18:05. Again, Reyes was arrested based on his own conduct.

December 23, 2023. Reyes was also not singled out when he was arrested on December 23, 2023. *See* Resp. at 21. Reyes wrongly claims that passersby who were monitored walking by

the scene on the sidewalk without stopping, instead of being forced into oncoming traffic, were similarly situated. *See* Resp. Ex. 18A.

March 8, 2024. Reyes was again not singled out when he was arrested on March 8, 2024. Numerous individuals were arrested for obstructing a roadway. *See* Resp. Ex. 19B and 19C.

3. A signal act by individual APD officers do not rise to a “policy.”

Reyes claims an individual entry in his Master Name Index record is evidence that the City repeatedly labels him “Anti-Police Activist.” *See* Resp. at 22. Reyes further claims that an individual email sent by an APD employee on February 13, 2020, to a select number of other APD employees is evidence of the City’s policy of arresting Reyes for filming police activity. *See* Resp. Ex. 12.

“A pattern is tantamount to official policy when it is “so common and well-settled as to constitute a custom that fairly represents municipal policy.” *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850 (5th Cir. 2009). A plaintiff “must demonstrate a pattern of abuses that transcends the error made in a single case.” *Id.* at 851 (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 582 (5th Cir. 2001)). A pattern requires sufficiently numerous incidents. *Id.* (holding that eleven prior reports of excessive force were not sufficient to show a pattern of illegal conduct).

The City’s evidence refutes Reyes’ claim. A single officer entered the “Anti-Police Activist” remark in Reyes’ MNI. *See* Ex. 4 at ¶4. The purpose of the Additional Remark is so “a user can quickly view important information and details associated with an individual.” Ex. 4 at ¶2. The single remark does not prove a pattern of illegal conduct on the part of the City. Furthermore, a February 13, 2020, email from one APD officer to a small group of other APD officers does not prove a pattern of illegal conduct on the part of the City and resulting in his arrest nearly four years later on December 23, 2023. *See* Resp. at 7.

B. There are no genuine issues of material facts that preclude summary judgment for Reyes' PPA claim.

1. Reyes' claim that his cameras were seized by APD on January 4, 2019 is false.

Reyes claims the City violated the PPA and unlawfully seized his cameras upon his arrest on January 4, 2019. *See* Resp. Ex. 1 at ¶ 8c, Resp. at 10, 26. His camera and cell phone were not seized. These items were turned into Travis County Booking as inventory upon arrival at the Jail. *See* Ex. 3 at 5. Instead, on January 9, 2019, the evidence “seized” was actually HALO video requested by Reyes through a Public Information Request on that same day. *Id.* at 9-10, 14-15. His Response Declaration is the very first time he claims the camera was seized. *See* Resp. Ex. 1 at ¶8c. Furthermore, Reyes posted video from his camera shortly after his arrest. *See* https://youtu.be/dpr8wo4vxfc?Si=zffhrxt-F9_4ods

2. Reyes admits he used a megaphone on October 24, 2021, and its use put him in violation of the Texas Penal Code resulting in his arrest.

Reyes claims APD arrested him on October 24, 2021 for filming police rather than for violating 42.01(2) of the Texas Penal Code. Resp. at 27. Yet Reyes declares that he “used a megaphone that day due to having pneumonia...” Resp. Ex 1 at ¶8h. Reyes’ megaphone and two cameras were seized upon his arrest. *See* Doc. 44 Ex. 7. Reyes claims this violates the Privacy Protection Act of 1980.

The PPA is not a blanket prohibition on seizure of documentary materials and work product. The PPA makes an exception where “there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate....” 42 U.S.C. § 2000aa(a). The statute does not state that the materials must *show* evidence of a crime. Reyes relies on *Steve Jackson Games, Inc. v. U.S. Secret Serv.* to argue that his work product material were seized in violation of the PPA. 816 F. Supp. 432, 438 (W.D. Tex.

1993), *aff'd*, 36 F.3d 457 (5th Cir. 1994). *Steve Jackson Games* is distinguishable because federal agents had no reason to believe the corporation was involved in criminal activity. *Id.*

For the above reasons, the City's Motion for Summary Judgment should be granted and Reyes' PPA claims should be dismissed.

IV. Prayer

WHEREFORE, PREMISES CONSIDERED, Defendant City of Austin respectfully requests that the Court grant its Motion for Summary Judgment and further deny and dismiss the Plaintiff's claims against it with prejudice with all costs assessed to the Plaintiff. Defendant further requests that it recover any additional relief to which it may be entitled.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION

/s/ Sara E. Rice

Sara E. Rice

Assistant City Attorney

State Bar No. 24110273

sara.rice@austintexas.gov

H. Gray Laird

Assistant City Attorney

State Bar No. 24087054

gray.laird@austintexas.gov

City of Austin Law Department

P.O. Box 1546

Austin, Texas 78767-1546

Telephone: (512) 974-6463

Facsimile: (512) 974-1311

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on June 3, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Sara E. Rice
Sara E. Rice

FILED

June 10, 2024

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY: pg
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,

Plaintiff,

V.

CITY OF AUSTIN, AUSTIN POLICE
DEPARTMENT, TROY WISMAR,
CHRISTOPHER CARLISLE,
PATRICK WALSH, KYU SUK AN,
SARAH FOSTER, GREG McCORMACK,
and JOHN DOES, Individually and in
their official capacities,

Defendants.

[illegible]

Case No. 1:21-CV-00992-RP-SH

**PLAINTIFF JULIAN REYES’S SURREPLY IN OPPOSITION
TO DEFENDANT CITY OF AUSTIN’S MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE ROBERT PITMAN:

Plaintiff Julian Reyes hereby files his Surreply in Opposition to Defendant City of Austin's Motion for Summary Judgment, and would respectfully show as follows:

I. Introduction and summary.

Without seeking leave of Court, Defendant City of Austin filed four new exhibits with its Reply in Support of Summary Judgment. Mr. Reyes files this Surreply to address those late-filed exhibits. As explained below, rather than support the City's motion, these exhibits confirm that there are genuine issues of material fact that preclude summary judgment in the City's favor.

II. The City’s new exhibits confirm there are fact issues precluding summary judgment.

The City’s reply in support of its summary judgment makes certain arguments based on four newly submitted exhibits. Mr. Reyes briefly addresses those exhibits below.¹

A. Reply Exhibit 1 – a police report of Mr. Reyes’s June 2, 2014 arrest.

The City cites its Reply Exhibit 1 as proof of the fact that Mr. Reyes has been recording Austin Police Department officers since at least early 2014, which is not in dispute. Doc. 50 at 9-25. The June 2, 2014, report, however, hardly supports the City’s contention that it does not single Mr. Reyes out for harsher treatment based on his exercise of his First Amendment rights. The report relates that an officer detained Mr. Reyes, intending to issue him a citation, but that after Mr. Reyes began recording the police, he was handcuffed and then taken to jail. Doc. 50 at 15-16.

B. Reply Exhibit 2 – various reports of APD interactions with Mr. Reyes.

The City cites Reply Exhibit 2 to support its claim that Mr. Reyes “regularly films police activity without being arrested.” Doc. 50 at 2, 27-53. Many of the narratives in this exhibit, however, do not reflect that Mr. Reyes was filming police at all; the City appears to proffer this new exhibit simply so it can claim it does not arrest Mr. Reyes every time officers interact with him. *See* Doc. 50 at 27 (Mr. Reyes filmed altercation not involving police); at 28-29 (Mr. Reyes not filming); at 32 (Mr. Reyes filmed “Melissa and her family,” not police); at 34 (Mr. Reyes not filming); at 38 (Mr. Reyes not filming); at 42–43 (Mr. Reyes not filming); at 44 (Mr. Reyes not filming); at 47 (Mr. Reyes not filming). The fact that *sometimes* the City does not arrest Mr. Reyes does not conclusively prove that it does not regularly arrest him without probable cause while

¹ The City’s Reply is correct on one point: the public officials who stymied Mr. Reyes’s attempt to film a public incident on January 5, 2023, were from the Travis County Medical Examiner’s office, not APD, and thus technically were not subject to APD’s General Order 302. Doc. 50 at 2.

filming police, nor that it does not regularly treat him differently than others similarly situated, as shown in his Response to the City’s Motion for Summary Judgment.

C. Reply Exhibit 3 – police report confirming the City’s seizure of his camera.

The City cites its Reply Exhibit 3 as proof that it did not seize Mr. Reyes’s cell phone and camera when he was arrested on January 4, 2019. Doc. 50 at 3, 5. But Reply Exhibit 3 expressly states that the City *did* seize those devices:

Julian was in possession of a small camera which appeared he was utilizing. . . . Julian’s camera and cell phone were turned into booking officials.

Doc. 50 at 61. The City does not explain how taking a citizen’s camera and cell phone and handing them over to “booking officials” is not a “seizure.” Rather than support the City’s motion, Reply Exhibit 3 *confirms* that the City seized his camera, and that the City *knew* he was using it to record police activity—two elements of Mr. Reyes’s Privacy Protection Act claim.

D. Reply Exhibit 4 - Declaration of Brandon Gilstrap.

The City proffers a new declaration from an individual it never identified in its disclosures or discovery responses, Brandon Gilstrap, APD’s Administrative Manager of Central Records. Doc. 50 at 74-76. The City claims Mr. Gilstrap’s declaration shows that “[a] single officer entered the ‘Anti-Police Activist’ remark in Reyes’ [Master Name Index],” purportedly disproving that the disparaging label placed on Mr. Reyes was part of a City’s policy or practice. Doc. 50 at 4. But Mr. Gilstrap does not claim he has personal knowledge of how the label was attached to Mr. Reyes’s entry in APD’s Master Name Index, *see* Doc. 50 at 74-76, so his testimony is of questionable relevance. *See* Fed. R. Civ. P. 56(c)(4). While Mr. Gilstrap claims “ANTI POLICE” is a preexisting category in the City’s software that can be selected by officers, Doc. 50 at 75, that does not disprove that the City has disparagingly labelled Mr. Reyes according to his viewpoint. Moreover, Mr. Gilstrap’s description of the “predetermined” category—ANTI POLICE—is

inconsistent with the label that repeatedly appears on Mr. Reyes’s arrest reports—ANTI POLICE *ACTIVIST*. Compare Doc. 50 at 75, with Doc 47-1, Ex. 9 at 5; Ex. 10 at 1-15. The City does not explain the discrepancy between Mr. Gilstrap’s declaration and its police reports, making his late-filed testimony even less probative.

In any case, Mr. Gilstrap’s declaration does not address or refute the many times the City has labeled Mr. Reyes an anti-police activist in documents that did not pull information from the City’s Master Name Index. *See, e.g.*, Doc. 47-1, Ex. 10 at 16; Ex. 14A at 10, Ex. 19D at 15; *see also* Doc. 47-1, Ex. 12 at 1 (labeling Mr. Reyes as a “turd”). Indeed, in the City’s own Reply Exhibit 2, one officer relied on the “Anti-Police Activist” designation to speculate on Mr. Reyes’s actions; another wrote that Mr. Reyes is “a known anti police advocate;” and a third identified Mr. Reyes as part of “a group of activists” who monitor homeless sweeps and as “a known agitator who is vocal and persistent in his protest.” Doc. 50 at 29, 47, 49, 47.

III. Conclusion.

The City’s four-late filed exhibits do not support a finding that the uncontested evidence conclusively demonstrates that there is no genuine issue of material fact and that the City is not entitled to judgment as a matter of law. Rather, they confirm the existence of fact issues that preclude summary judgment.

Respectfully submitted,

By: /s/ Mark A. Stahl
Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5600 (Phone)
(512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on June 10, 2024, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Mark A. Stahl
Mark A. Stahl

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DOW JONES & COMPANY, INC.,

Plaintiff,

v.

THOMAS BRITTON HARRIS IV,

Defendant.

§
§
§
§
§
§
§
§

Civil Action No. 1:22-cv-00564-DAE

**SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFF'S
RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE ROBERT PITMAN:

Plaintiff respectfully brings to the Court's attention a new ruling by the United States Supreme Court that supports his response to Defendant's summary judgment motion (Doc. 47):

I.

In *Gonzalez v. Trevino*, – S. Ct. –, 2024 WL 3056010 (U.S. June 20, 2024) (*per curiam*), the Supreme Court reaffirmed the principle that “[t]he existence of probable cause does not defeat a plaintiff’s claim [of retaliatory arrest] if he produces ‘objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.’” *Id.* at *1 (quoting *Nieves v. Bartlett*, 587 U.S. 391, 407 (2019)) (attached). The *Nieves* exception to the no-probable-cause rule, which applies to individual retaliatory arrests, complements the exception recognized in *Lozman v. Riviera Beach*, 585 U.S. 87, 100 (2018), for municipal policies or practices motivated by retaliation.

In *Gonzalez v. Trevino*, the Supreme Court reversed a ruling by the Fifth Circuit, which had reversed a ruling by Judge David A. Ezra. The Court held that the Fifth Circuit, in reversing Judge Ezra, had taken “an overly cramped view of *Nieves*” by requiring “very specific comparator

evidence – that is, examples of identifiable people who” engaged in the exact same conduct as the plaintiff “but were not arrested.” *Id.* Requiring “virtually identical and identifiable comparators goes too far.” *Id.*

Gonzalez v. Trevinio supports Mr. Reyes’s argument that the alleged existence of probable cause does **not** defeat his retaliatory arrest claim because he has presented summary judgment evidence that he was arrested while similarly situated persons – who had not been singled out by the City as “antipolice activists” – were not. *See* Doc. 47 at 22-23, Ex. 14B, Ex. 15C, & Ex. 16A.

Respectfully submitted,

By: /s/ Peter D. Kennedy
Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5600 (Phone)
(512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on June 21, 2024, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy
Peter D. Kennedy

138 S.Ct. 1945

Supreme Court of the United States

Fane LOZMAN, Petitioner

v.

City of RIVIERA BEACH, Florida.

No. 17–21

|

Argued Feb. 27, 2018.

|

Decided June 18, 2018.

Synopsis

Background: Owner of floating home located in city's marina brought § 1983 action alleging that city, through actions of its city council members, retaliated against him for criticizing municipal development project and opposing what he perceived as improper conduct of various council members, in violation of his First, Fourth, and Fourteenth Amendment rights. The United States District Court for the Southern District of Florida, No. 9:08–cv–80134–DTKH, Daniel T.K. Hurley, J., granted judgment for city after jury verdict in its favor. Owner appealed. The Court of Appeals for the Eleventh Circuit affirmed in a per curiam opinion, 681 Fed.Appx. 746. Certiorari was granted.

The Supreme Court, Justice Kennedy, held that under the circumstances of this case, the existence of probable cause did not bar owner's First Amendment retaliatory arrest claim, abrogating *Dahl v. Holley*, 312 F.3d 1228.

Vacated and remanded.

Justice Thomas filed a dissenting opinion.

****1946 Syllabus***

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

87** After petitioner Lozman towed his floating home into a slip in a marina owned by the city of Riviera Beach, he became an outspoken critic of the City's plan to use its eminent domain power to seize waterfront homes for private development and often made critical comments about officials during the public-comment period of city council meetings. He also filed a lawsuit alleging that the City Council's approval of an agreement with developers violated Florida's open-meetings laws. In June 2006 the Council held a closed-door session, in part to discuss Lozman's lawsuit. He alleges that the meeting's transcript shows that councilmembers devised an official plan to intimidate him, and that many of his subsequent disputes with city officials and employees were part of the City's retaliation plan. Five months after the closed-door meeting, the Council held a public meeting. During the public-comment session, Lozman began to speak about the arrests of officials from other jurisdictions. When he refused a councilmember's request to stop making his remarks, the councilmember told the police officer in attendance to “carry him out.” The officer handcuffed Lozman and ushered him out of the meeting. The City contends that he was arrested for violating the City Council's rules of procedure by discussing issues unrelated to the City and then refusing to leave the podium. Lozman claims that his arrest was to retaliate for his lawsuit and his prior public criticisms of city officials. The State's attorney determined that there was probable *1947** cause for his arrest, but decided to dismiss the charges.

Lozman then filed suit under 42 U.S.C. § 1983, alleging a number of incidents that, under his theory, showed the City's purpose was to harass him, including by initiating an admiralty lawsuit against his floating home, see *Lozman v. Riviera Beach*, 568 U.S. 115, 133 S.Ct. 735, 184 L.Ed.2d 604. The jury returned a verdict for the City on all of the claims. The District Court instructed the jury that, for Lozman to prevail on his claim of a retaliatory arrest at the city council meeting, he had to prove that the arresting officer was motivated by impermissible animus against Lozman's protected speech and that the officer lacked probable cause to make the arrest. The Eleventh Circuit affirmed, concluding that any error the District Court made when it instructed the jury to consider the officer's retaliatory animus was harmless because the jury necessarily determined that the arrest was supported by probable cause when it found ***88** for the City on Lozman's other claims. The existence of probable cause, the court ruled, defeated a First Amendment claim for retaliatory arrest.

Held : The existence of probable cause does not bar Lozman's First Amendment retaliation claim under the circumstances of this case. Pp. 1950 – 1955.

(a) The issue here is narrow. Lozman concedes that there was probable cause for his arrest. Nonetheless, he claims, the arrest violated the First Amendment because it was ordered in retaliation for his earlier, protected speech: his open-meetings lawsuit and his prior public criticisms of city officials. Pp. 1950 – 1951.

(b) In a § 1983 case, a city or other local governmental entity cannot be subject to liability unless the harm was caused in the implementation of “official municipal policy.” *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611. The Court assumes that Lozman's arrest was taken pursuant to an official city policy.

Two major precedents bear on the issue whether the conceded existence of probable cause for the arrest bars recovery regardless of any intent or purpose to retaliate for past speech. Lozman argues that the controlling rule is found in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471, a civil case in which a city board of education decided not to rehire an untenured teacher after a series of incidents, including a telephone call to a local radio station. The phone call was protected speech, but, the Court held, there was no liability unless the alleged constitutional violation was a but-for cause of the employment termination. *Id.*, at 285–287, 97 S.Ct. 568. The City counters that the applicable precedent is *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441, where the Court held that a plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge, *id.*, at 265–266, 126 S.Ct. 1695. If there was probable cause, the case ends. If the plaintiff proves the absence of probable cause, then the *Mt. Healthy* test governs. Pp. 1951 – 1954.

(c) Whether *Hartman* or *Mt. Healthy* governs here is a determination that must await a different case. For Lozman's claim is far afield from the typical retaliatory arrest claim, and the difficulties that might arise if *Mt. Healthy* is applied to the mine run of arrests made by police officers are not present here. Lozman alleges that the City itself retaliated against him pursuant to an “official municipal policy” of intimidation. *Monell, supra*, at 691, 98 S.Ct. 2018. The fact that he must prove the existence and enforcement of an official ****1948** policy motivated by retaliation separates his claim from the typical retaliatory arrest claim. An official retaliatory

policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. And it can be difficult to dislodge. A citizen can seek to have an individual officer disciplined or removed from service, but there may be little practical recourse when ***89** the government itself orchestrates the retaliation. Lozman's allegations, if proved, also alleviate the problems that the City says will result from applying *Mt. Healthy* in retaliatory arrest cases, for it is unlikely that the connection between the alleged animus and injury in a case like this will be “weakened ... by [an official's] legitimate consideration of speech,” *Reichle v. Howards*, 566 U.S. 658, 668, 132 S.Ct. 2088, 182 L.Ed.2d 985, and there is little risk of a flood of retaliatory arrest suits against high-level policymakers. Because Lozman alleges that the City deprived him of the right to petition, “ ‘one of the most precious of the liberties safeguarded by the Bill of Rights,’ ” *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524, 122 S.Ct. 2390, 153 L.Ed.2d 499, his speech is high in the hierarchy of First Amendment values. On these facts, *Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim. On remand, the Eleventh Circuit may consider any arguments in support of the District Court's judgment that have been preserved by the City, including whether a reasonable juror could find that the City formed a retaliatory policy to intimidate Lozman during its closed-door session, whether a reasonable juror could find that the arrest constituted an official act by the City, and whether, under *Mt. Healthy*, the City has proved that it would have arrested Lozman regardless of any retaliatory animus. Pp. 1953 – 1955.

681 Fed.Appx. 746, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a dissenting opinion, post, p. ____.

Attorneys and Law Firms

Pamela S. Karlan, Stanford, CA, for Petitioner.

Shay Dvoretzky, Washington, D.C., for Respondent.

Jeffrey B. Wall, Washington, D.C., for the United States as amicus curiae, by special leave of the Court, supporting the respondent.

Kerri L. Barsh, Greenberg Traurig, Miami, FL, Pamela S. Karlan, Jeffrey L. Fisher, David T. Goldberg, Stanford Law

School, Supreme Court Litigation Clinic, Stanford, CA, for Petitioner.

Benjamin M. Flowers, Jones Day, Columbus, OH, Shay Dvoretzky, Jeffrey R. Johnson, Vivek Suri, Jones Day, Washington, D.C., Benjamin L. Bedard, Stephanie W. Kaufer, Roberts, Reynolds, Bedard & Tuzzio, PLLC, Andrew DeGraffenreidt III, City Attorney, Lina Busby, Assistant City Attorney, City of Riviera Beach, Riviera Beach, FL, for Respondent.

Opinion

Justice KENNEDY delivered the opinion of the Court.

90** This case requires the Court to address the intersection of principles that define when arrests are lawful and principles that prohibit the government from retaliating against a person for having exercised the right to free speech. An arrest deprives a person of essential liberties, but *1949** if there is probable cause to believe the person has committed a criminal offense there is often no recourse for the deprivation. See, e.g., *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). At the same time, the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech. *Crawford-El v. Britton*, 523 U.S. 574, 592, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

The petitioner in this case alleges that high-level city policymakers adopted a plan to retaliate against him for protected speech and then ordered his arrest when he attempted ***91** to make remarks during the public-comment portion of a city council meeting. The petitioner now concedes there was probable cause for the arrest. The question is whether the presence of probable cause bars the petitioner's retaliatory arrest claim under these circumstances.

I

The city of Riviera Beach (City) is on the Atlantic coast of Florida, about 75 miles north of Miami. The petitioner here is Fane Lozman. In 2006 Lozman towed his floating home into a slip in the City-owned marina, where he became a resident. Thus began his contentious relationship with the City's elected officials.

Soon after his arrival Lozman became an outspoken critic of the City's plan to use its eminent domain power to seize

homes along the waterfront for private development. Lozman often spoke during the public-comment period at city council meetings and criticized councilmembers, the mayor, and other public employees. He also filed a lawsuit alleging that the Council's approval of an agreement with developers violated Florida's open-meetings laws.

In June 2006 the Council held a closed-door session, in part to discuss the open-meetings lawsuit that Lozman recently had filed. According to the transcript of the meeting, Councilmember Elizabeth Wade suggested that the City use its resources to “intimidate” Lozman and others who had filed lawsuits against the City. App. 176. Later in the meeting a different councilmember asked whether there was “a consensus of what Ms. Wade is saying,” and others responded in the affirmative. *Id.*, at 181–182. Lozman alleges that these remarks formed an official plan to intimidate him. The City, on the other hand, maintains that the only consensus reached during the meeting was to invest the money and resources necessary to prevail in the litigation against it.

In all events, Lozman became embroiled in a number of disputes with city officials and employees over the ensuing ***92** years, many of which Lozman says were part of the City's plan of retaliation. The dispute that led to this litigation took place in 2006. In November of that year, five months after the closed-door meeting where the “intimidate” comment was made, the City Council held a public meeting. The agenda included a public-comment session in which citizens could address the Council for a few minutes. As he had done on earlier occasions and would do more than 200 times over the coming years, see Tr. in No. 9:08–cv–80134 (SD Fla.), Doc. 785, p. 61, Lozman stepped up to the podium to give remarks. He began to discuss the recent arrest of a former county official. Councilmember Wade interrupted Lozman, directing him to stop making those remarks. Lozman continued speaking, this time about the arrest of a former official from the city of West Palm Beach. Wade then called for the assistance of the police officer in attendance. The officer approached Lozman and asked him to leave the podium. Lozman refused. So Wade told the officer to “carry him ****1950** out.” The officer handcuffed Lozman and ushered him out of the meeting. The incident was recorded on video. See Record, Def. Exh. 505, Doc. 687, available at https://www.supremecourt.gov/media/video/mp4files/Lozman_v_RivieraBeach.mp4. According to the City, Lozman was arrested because he violated the City Council's rules of procedure by discussing issues unrelated to the City and then refused to leave the podium. According

to Lozman, the arrest was to retaliate for his open-meetings lawsuit against the City and his prior public criticisms of city officials.

Under arrest, Lozman was escorted to police headquarters. He was charged with disorderly conduct and resisting arrest without violence and then released. Later, the State's attorney determined there was probable cause to arrest Lozman for those offenses but decided to dismiss the charges.

***93** Lozman filed this lawsuit under Rev. Stat. § 1979, 42 U.S.C. § 1983. The complaint described a number of alleged incidents that, under Lozman's theory, showed the City's purpose to harass him in different ways. These ranged from a city employee telling Lozman that his dog needed a muzzle to the City's initiation of an admiralty lawsuit against Lozman's floating home—the latter resulting in an earlier decision by this Court. See *Lozman v. Riviera Beach*, 568 U.S. 115, 133 S.Ct. 735, 184 L.Ed.2d 604 (2013). The evidence and arguments presented by both parties with respect to all the matters alleged in Lozman's suit consumed 19 days of trial before a jury. The jury returned a verdict for the City on all of the claims.

Before this Court, Lozman seeks a reversal only as to the City's alleged retaliatory arrest at the November 2006 city council meeting. The District Court instructed the jury that, for Lozman to prevail on this claim, he had to prove that the arresting officer was himself motivated by impermissible animus against Lozman's protected speech and that the officer lacked probable cause to make the arrest. The District Court determined that the evidence was insufficient as a matter of law to support probable cause for the offenses charged at the time of the arrest (disorderly conduct and resisting arrest without violence). But the District Court concluded that there may have been probable cause to arrest Lozman for violating a Florida statute that prohibits interruptions or disturbances in schools, churches, or other public assemblies. Fla. Stat. § 871.01 (2017). (The City had brought this statute to the District Court's attention during the course of the litigation.) The District Court allowed the jury to decide whether there was probable cause to arrest for the public-disturbance offense.

Judgment having been entered for the City after the jury's verdict, Lozman appealed. The Court of Appeals for the Eleventh Circuit affirmed. 681 Fed.Appx. 746 (2017). As ***94** relevant here, the Court of Appeals assumed that the District Court erred when it instructed the jury that the

officer, rather than the City, must have harbored the retaliatory animus. But the Court of Appeals held that any error was harmless because the jury necessarily determined that the arrest was supported by probable cause when it found for the City on some of Lozman's other claims—specifically, his claims that the arrest violated the Fourth Amendment and state law. *Id.*, at 751–752. And, under precedents which the Court of Appeals deemed controlling, the existence of probable cause defeated a First Amendment claim for retaliatory arrest. See *id.*, at 752 (citing *Dahl v. Holley*, 312 F.3d 1228, 1236 (C.A.11 2002)).

This Court granted certiorari, ****1951** 538 U.S. 972, 138 S.Ct. 447, 199 L.Ed.2d 328 (2017), on the issue whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under § 1983. The Court considered this issue once before, see *Reichle v. Howards*, 566 U.S. 658, 663, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012), but resolved the case on different grounds.

II

The issue before the Court is a narrow one. In this Court Lozman does not challenge the constitutionality of Florida's statute criminalizing disturbances at public assemblies. He does not argue that the statute is overly broad, *e.g.*, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); *Watchtower Bible & Tract Soc. of N. Y., Inc. v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002); or that it impermissibly targets speech based on its content or viewpoint, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); or that it was enforced in a way that curtailed Lozman's right to peaceful assembly, *e.g.*, *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). Lozman, furthermore, does not challenge the validity of the City Council's asserted limitations on the subjects speakers may discuss during the public-comment portion of city council meetings (although he continues to dispute whether those limitations in fact existed).

***95** Instead Lozman challenges only the lawfulness of his arrest, and even that challenge is a limited one. There is no contention that the City ordered Lozman's arrest to discriminate against him based on protected classifications, or that the City denied Lozman his equal protection rights by placing him in a “class of one.” See *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060

(2000) (*per curiam*). Lozman, moreover, now concedes that there was probable cause for the arrest. Although Lozman does not indicate what facts he believes support this concession, it appears that the existence of probable cause must be based on the assumption that Lozman failed to depart the podium after receiving a lawful order to leave.

Lozman's claim is that, notwithstanding the presence of probable cause, his arrest at the city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech: his open-meetings lawsuit and his prior public criticisms of city officials. The question this Court is asked to consider is whether the existence of probable cause bars that First Amendment retaliation claim.

III

It is well established that in a § 1983 case a city or other local governmental entity cannot be subject to liability at all unless the harm was caused in the implementation of “official municipal policy.” *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); see *Los Angeles County v. Humphries*, 562 U.S. 29, 36, 131 S.Ct. 447, 178 L.Ed.2d 460 (2010). Lozman's § 1983 damages claim is against only the City itself, based on the acts of its officers and employees—here, the members of the City Council. Lozman says that the City, through its city councilmembers, formed an official policy to retaliate against him and ordered his arrest. The Court assumes in the discussion to follow that the arrest was taken pursuant to an official city policy, but whether there was such a policy and what its content may have been are issues not decided here.

96** This brings the discussion to the issue the parties deem central to the *1952** case: whether the conceded existence of probable cause for the arrest bars recovery regardless of any intent or purpose to retaliate for past speech. Two major precedents could bear on this point, and the parties disagree on which should be applicable here. The first is this Court's decision in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). See also *Board of Comm'rs, Wabauunsee Cty. v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). Lozman urges that the rule of *Mt. Healthy* should control and that under it he is entitled to recover. The second is this Court's decision in *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), which the City cites for the proposition that once there

is probable cause there can be no further claim that the arrest was retaliation for protected speech.

Mt. Healthy arose in a civil, not criminal, context. A city board of education decided not to rehire an untenured school teacher after a series of incidents indicating unprofessional demeanor. 429 U.S., at 281–283, 97 S.Ct. 568. One of the incidents was a telephone call the teacher made to a local radio station to report on a new school policy. *Id.*, at 282, 97 S.Ct. 568. Because the board of education did not suggest that the teacher violated any established policy in making the call, this Court accepted a finding by the District Court that the call was protected speech. *Id.*, at 284, 97 S.Ct. 568. The Court went on to hold, however, that since the other incidents, standing alone, would have justified the dismissal, relief could not be granted if the board could show that the discharge would have been ordered even without reference to the protected speech. *Id.*, at 285–287, 97 S.Ct. 568. In terms of precepts in the law of torts, the Court held that even if retaliation might have been a substantial motive for the board's action, still there was no liability unless the alleged constitutional violation was a but-for cause of the employment termination. *Ibid.*; see also *Umbehr, supra*, at 675, 116 S.Ct. 2342.

***97** The City resists the applicability of the *Mt. Healthy* test as the sole determinant here. It contends that, where there was probable cause for the arrest, the applicable precedent is *Hartman*—a case that was in the criminal sphere and that turned on the existence of probable cause.

The background in *Hartman* was that a company and its chief executive, William Moore, had engaged in an extensive lobbying and governmental relations campaign opposing a particular postal service policy. 547 U.S., at 252–253, 126 S.Ct. 1695. Moore and the company were later prosecuted for violating federal statutes in the course of that lobbying. *Id.*, at 253–254, 126 S.Ct. 1695. After being acquitted, Moore filed suit against five postal inspectors, alleging that they had violated his First Amendment rights when they instigated his prosecution in retaliation for his criticisms of the Postal Service. *Id.*, at 254, 126 S.Ct. 1695. This Court held that a plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge. *Id.*, at 265–266, 126 S.Ct. 1695. If there was probable cause, the case ends. If the plaintiff proves the absence of probable cause, then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the prosecution, and, if that showing is made, the defendant can prevail only by showing that the prosecution

would have been initiated without respect to retaliation. See 547 U.S., at 265–266, 126 S.Ct. 1695.

The Court in *Hartman* deemed it necessary to inquire as to the existence of probable ****1953** cause because proving the link between the defendant's retaliatory animus and the plaintiff's injury in retaliatory prosecution cases “is usually more complex than it is in other retaliation cases.” *Id.*, at 261, 126 S.Ct. 1695. An action for retaliatory prosecution “will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute.” *Id.*, at 261–262, 126 S.Ct. 1695. Instead, the plaintiff must sue some other government official and prove that the official “induced the prosecutor to bring ***98** charges that would not have been initiated without his urging.” *Id.*, at 262, 126 S.Ct. 1695. Noting that inquiries with respect to probable cause are commonplace in criminal cases, the Court determined that requiring plaintiffs in retaliatory prosecution cases to prove the lack of probable cause would help “bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action.” *Id.*, at 263, 126 S.Ct. 1695.

The City's argument here is that, just as probable cause is a bar in retaliatory prosecution cases, so too should it be a bar in this case, involving a retaliatory arrest. There is undoubted force in the City's position. *Reichle*, 566 U.S., at 667–668, 132 S.Ct. 2088. There are on average about 29,000 arrests per day in this country. Dept. of Justice–FBI, Uniform Crime Report, Crime in the United States, 2016 (Fall 2017). In deciding whether to arrest, police officers often make split-second judgments. The content of the suspect's speech might be a consideration in circumstances where the officer must decide whether the suspect is ready to cooperate or, on the other hand, whether he may present a continuing threat to interests that the law must protect. See, e.g., *District of Columbia v. Wesby*, 583 U.S. 48, 60, 138 S.Ct. 577, 587, 199 L.Ed.2d 453 (2018) (“suspect's untruthful and evasive answers to police questioning could support probable cause” (internal quotation marks omitted)).

For these reasons retaliatory arrest claims, much like retaliatory prosecution claims, can “present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury.” *Reichle*, 566 U.S., at 668, 132 S.Ct. 2088. That means it can be difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech. *Ibid.* And the complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits. See Brief for District of Columbia et al. as *Amici Curiae* 5–11.

At the same time, there are substantial arguments that *Hartman*'s framework is inapt in retaliatory arrest cases, and that *Mt. Healthy* should apply without a threshold inquiry ***99** into probable cause. For one thing, the causation problem in retaliatory arrest cases is not the same as the problem identified in *Hartman*. *Hartman* relied in part on the fact that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision to prosecute is weakened by the “presumption of regularity accorded to prosecutorial decisionmaking.” 547 U.S., at 263, 126 S.Ct. 1695. That presumption does not apply in this context. See *Reichle*, *supra*, at 669, 132 S.Ct. 2088. In addition, there is a risk that some police officers may exploit the arrest power as a means of suppressing speech. See Brief for Institute for Free Speech as *Amicus Curiae*.

IV

The parties' arguments raise difficult questions about the scope of First Amendment protections when speech is made in connection with, or contemporaneously to, ****1954** criminal activity. But whether in a retaliatory arrest case the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case. For Lozman's claim is far afield from the typical retaliatory arrest claim, and the difficulties that might arise if *Mt. Healthy* is applied to the mine run of arrests made by police officers are not present here.

Here Lozman does not sue the officer who made the arrest. Indeed, Lozman likely could not have maintained a retaliation claim against the arresting officer in these circumstances, because the officer appears to have acted in good faith, and there is no showing that the officer had any knowledge of Lozman's prior speech or any motive to arrest him for his earlier expressive activities.

Instead Lozman alleges more governmental action than simply an arrest. His claim is that the City itself retaliated against him pursuant to an “official municipal policy” of intimidation. *Monell*, 436 U.S., at 691, 98 S.Ct. 2018. In particular, he ***100** alleges that the City, through its legislators, formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials and his open-meetings lawsuit. And he asserts that the City itself, through

138 S.Ct. 1945, 201 L.Ed.2d 342, 86 USLW 4428, 18 Cal. Daily Op. Serv. 5864...

the same high officers, executed that plan by ordering his arrest at the November 2006 city council meeting.

The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim. An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

In addition, Lozman's allegations, if proved, alleviate the problems that the City says will result from applying *Mt. Healthy* in retaliatory arrest cases. The causation problem in arrest cases is not of the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made. In determining whether there was probable cause to arrest Lozman for disrupting a public assembly, it is difficult to see why a city official could have legitimately considered that Lozman had, months earlier, criticized city officials or filed a lawsuit against the City. So in a case like this one it is unlikely that the connection between the alleged animus and injury will be “weakened ... by [an official's] legitimate consideration of speech.” *Reichle*, 566 U.S., at 668, 132 S.Ct. 2088. This unique class of retaliatory arrest claims, moreover, will require objective evidence of a policy motivated by retaliation to survive summary judgment. ***101** Lozman, for instance, cites a transcript of a closed-door city council meeting and a video recording of his arrest. There is thus little risk of a flood of retaliatory arrest suits against high-level policymakers.

As a final matter, it must be underscored that this Court has recognized the “right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights.” ***1955** *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002) (internal quotation marks omitted). Lozman alleges the City deprived him of this liberty by retaliating against him for his lawsuit against the City and his criticisms of public officials. Thus, Lozman's speech is high in the hierarchy of First Amendment values. See *Connick v.*

Myers, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

For these reasons, Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City. On facts like these, *Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim. The Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts.

This is not to say, of course, that Lozman is ultimately entitled to relief or even a new trial. On remand, the Court of Appeals, applying *Mt. Healthy* and other relevant precedents, may consider any arguments in support of the District Court's judgment that have been preserved by the City. Among other matters, the Court of Appeals may wish to consider (1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session; (2) whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; and (3) whether, under *Mt. Healthy*, the City has proved that it would have arrested Lozman regardless of any retaliatory animus—for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of discussion, thus explaining his arrest here.

***102** For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, dissenting.

We granted certiorari to decide “whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under [42 U.S.C.] § 1983.” *Ante*, at 1950 – 1951. Instead of resolving that question, the Court decides that probable cause should not defeat a “unique class of retaliatory arrest claims.” *Ante*, at 1954. To fall within this unique class, a claim must involve objective evidence, of an official municipal policy of retaliation, formed well before the arrest, in response to highly protected speech, that has little relation to the offense of arrest. See *ante*, at 1954 – 1955. No one briefed, argued, or even hinted at the rule that the Court announces today. Instead of dreaming up our own rule, I would have answered the question presented and held that plaintiffs must plead and prove a lack of probable cause as

an element of a First Amendment retaliatory-arrest claim. I respectfully dissent.

I

The petition for certiorari asked us to resolve whether “the existence of probable cause defeat[s] a First Amendment retaliatory-arrest claim as a matter of law.” Pet. for Cert. i. That question has divided the federal courts for decades. See *id.*, at 10–13. We granted certiorari to consider it six years ago in *Reichle v. Howards*, 566 U.S. 658, 663, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). But we did not resolve it then because the petitioner’s second question presented—whether qualified immunity applied—fully resolved the case. *Ibid.* Since *Reichle*, the split in the federal courts has widened. See Pet. for Cert. 12–13. In this case, we again granted certiorari, ****1956** 583 U.S. 972, 138 S.Ct. 447, 199 L.Ed.2d 328 (2017), this time only on the question of probable cause, see Pet. for Cert. i.

***103** Yet the Court chooses not to resolve that question, leaving in place the decades-long disagreement among the federal courts. The parties concentrated all their arguments on this question in their briefs and at oral argument. Neither party suggested that there was something special about Fane Lozman’s claim that would justify a narrower rule. See, e.g., Tr. of Oral Arg. 15–16 (refusing to take the “fallback position” that this “is some special kind of case”). Yet the Court does that work for them by defining a “unique class of retaliatory arrest claims” that do not require plaintiffs to plead and prove a lack of probable cause. *Ante*, at 1956.

By my count, the Court has identified five conditions that are necessary to trigger its new rule. First, there must be “an ‘official municipal policy’ of intimidation.” *Ante*, at 1954 (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). Second, the policy must be “premeditated” and formed well before the arrest—here, for example, the policy was formed “months earlier.” *Ante*, at 1954.¹ Third, there must be “objective evidence” of such a policy. *Ibid.* at 1954. Fourth, there must be “little relation” between the “protected speech” that prompted the retaliatory policy and “the criminal offense for which the arrest is made.” *Ibid.* at 1954. Finally, the protected speech that provoked the retaliatory policy must be “high in the hierarchy of First Amendment values.” *Ante*, at 1955. Where all these features are present, the Court explains,

there is not the same “causation problem” that exists for other retaliatory-arrest claims. *Ante*, at 1954.

1

This requirement suggests that the Court’s rule does not apply when the “policy” that the plaintiff challenges is an on-the-spot decision by a single official with final policymaking authority, like the “policy” that this Court recognized in *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). See *id.*, at 484–485, 106 S.Ct. 1292 (holding that a county prosecutor’s order to forcibly enter the plaintiff’s clinic was a “municipal policy”).

I find it hard to believe that there will be many cases where this rule will even arguably apply, and even harder to ***104** believe that the plaintiffs in those cases will actually prove all five requirements. Not even Lozman’s case is a good fit, as the Court admits when it discusses the relevant considerations for remand. See *ante*, at 1954 – 1955. In my view, we should not have gone out of our way to fashion a complicated rule with no apparent applicability to this case or any other.

II

Turning to the question presented, I would hold that plaintiffs bringing a First Amendment retaliatory-arrest claim must plead and prove an absence of probable cause.² This Court has “repeatedly noted that 42 U.S.C. § 1983 creates ‘a species of tort liability.’” *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) (footnote omitted). Accordingly, we “defin[e] the contours and prerequisites of a § 1983 claim” by “look[ing] first to the common ****1957** law of torts.” *Manuel v. Joliet*, 580 U.S. 357, 370, 137 S.Ct. 911, 920, 197 L.Ed.2d 312 (2017); see, e.g., *Heck v. Humphrey*, 512 U.S. 477, 484, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (analogizing to the “common-law cause of action for malicious prosecution”); *id.*, at 491, 114 S.Ct. 2364 (THOMAS, J., concurring) (emphasizing that the decision was “consistent ... with the state of the common law at the time § 1983 was enacted”).

2

I am skeptical that 42 U.S.C. § 1983 recognizes a claim for retaliatory arrests under the First Amendment. I adhere to the view that “no ‘intent-based’ constitutional tort would have been actionable under the § 1983 that Congress enacted.” *Crawford-El v. Britton*, 523 U.S. 574, 612, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (Scalia, J., dissenting). But because no party presses this

argument, I assume that such claims are actionable under § 1983.

When § 1983 was enacted, there was no common-law tort for retaliatory arrest in violation of the freedom of speech. See *Hartman v. Moore*, 547 U.S. 250, 259, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006). I would therefore look to the common-law torts that “provid[e] the closest analogy” to this claim. *Heck, supra*, at 484, 114 S.Ct. 2364. The closest analogs here are the three arrest-based torts under the common law: false imprisonment, malicious prosecution, and malicious arrest. In defining the elements of these *105 three torts, 19th-century courts emphasized the importance of probable cause.

Consider first the tort of false imprisonment. Common-law courts stressed the need to shape this tort with an “indulgence” for peace officers, who are “specially charged with a duty in the enforcement of the laws.” T. Cooley, *Law of Torts* 175 (1880) (Cooley); see, e.g., *Hogg v. Ward*, 3 H. & N. 417, 423, 157 Eng. Rep. 533, 536 (Ex. 1858) (opinion of Watson, B.) (stressing “the utmost importance that the police throughout the country should be supported in the execution of their duty”). Accordingly, private citizens were always liable for false imprisonment if the arrestee had not actually committed a felony, but constables were “excused” if they had “made [the arrest] on reasonable grounds of belief”—i.e., probable cause. Cooley 175; accord, 2 C. Addison, *Law of Torts* § 803, p. 18 (1876); 1 F. Hilliard, *The Law of Torts or Private Wrongs* § 18, pp. 207–208, and n. (a) (1866). As Lord Mansfield explained, it was “of great consequence to the police” that probable cause shield officers from false-imprisonment claims, as “it would be a terrible thing” if the threat of liability dissuaded them from performing their official duties. *Ledwith v. Catchpole*, 2 Cald. 291, 295 (K.B.1783). This concern outweighed “the mischief and inconvenience to the public” from the reality that “[m]any an innocent man has and may be taken up upon suspicion.” *Ibid.* Many State Supreme Courts agreed with Lord Mansfield’s reasoning. See, e.g., *Burns v. Erben*, 40 N.Y. 463, 469 (1869) (opinion of Woodruff, J.) (quoting *Ledwith*); *Brockway v. Crawford*, 48 N.C. 433, 437 (1856) (“[The] exempt [ion] from responsibility” for arrests based on probable cause “encourages ... a sharp look-out for the apprehension of felons”). As one court put it, “How, in the great cities of this land, could police power be exercised, if every peace officer is liable to civil action for false imprisonment” whenever “persons arrested upon probable cause shall afterwards be found innocent?” *Hawley v. Butler*, 54 Barb. 490, 496 (N.Y. 1868).

*106 Courts also stressed the importance of probable cause when defining the torts of malicious prosecution and malicious arrest. See, e.g., *Ahern v. Collins*, 39 Mo. 145, 150 (1866) (holding that “malice and want of probable cause are necessary ingredients of both”). For the tort of malicious prosecution, courts emphasized the “necessity” of both the “allegation” and “proof” of probable cause, in light of the public interest “that criminals should be brought to justice.” *Hogg v. Pinckney*, 16 S.C. 387, 393 (1882); see also *Chrisman v. Carney*, 33 Ark. 316, 326 (1878) (“The existence of probable cause is of itself alone a complete “and entire” defense The interest which society has in the enforcement of the criminal laws requires this rule”). Similarly, if the element **1958 of probable cause were not “strictly guarded,” “ill consequences would ensue to the public, for no one would willingly undertake to vindicate a breach of the public law and discharge his duty to society, with the prospect of an annoying suit staring him in the face.” *Ventress v. Rosser*, 73 Ga. 534, 541 (1884); accord, *Cardinal v. Smith*, 109 Mass. 158 (1872). The element of probable cause also played an evidentiary role for both torts. Lack of probable cause provided “evidence of malice, though inconclusive,” *Herman v. Brookerhoff*, 8 Watts 240, 241 (Pa.1839), because “[m]alice may be inferred from a total want of probable cause,” *Ventress, supra*, at 541; accord, *Ahern, supra*, at 150.

In sum, when § 1983 was enacted, the common law recognized probable cause as an important element for ensuring that arrest-based torts did not unduly interfere with the objectives of law enforcement. Common-law courts were wary of “throw[ing] down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground.” *Chelsey v. King*, 74 Me. 164, 175–176 (1882).

*107 Applying that principle here, it follows that plaintiffs bringing a First Amendment retaliatory-arrest claim under § 1983 should have to plead and prove a lack of probable cause. I see no justification for deviating from the historical practice simply because an arrest claim is framed in terms of the First Amendment. Even under a First Amendment theory, “the significance of probable cause or the lack of it looms large.” *Hartman*, 547 U.S., at 265, 126 S.Ct. 1695. The presence of probable cause will tend to disprove that the arrest was done out of retaliation for the plaintiff’s speech, and the absence of probable cause will tend to prove the opposite. See *id.*, at

261, 126 S.Ct. 1695. Because “[p]robable cause or its absence will be at least an evidentiary issue in practically all such cases” and “[b]ecause showing [its] absence ... will have high probative force, and can be made mandatory with little or no added cost,” the absence of probable cause should be an “element” of the plaintiff’s case. *Id.*, at 265–266, 126 S.Ct. 1695; see also *id.*, at 264, n. 10, 126 S.Ct. 1695 (refusing to carve out an exception for unusual cases).

Moreover, as with the traditional arrest-based torts, police officers need the safe harbor of probable cause in the First Amendment context to be able to do their jobs effectively. Police officers almost always exchange words with suspects before arresting them. And often a suspect’s “speech provides evidence of a crime or suggests a potential threat.” *Reichle*, 566 U.S., at 668, 132 S.Ct. 2088. If probable cause were not required, the threat of liability might deter an officer from arresting a suspected criminal who, for example, has a political bumper sticker on his car, cf. *Kilpatrick v. United States*, 432 Fed.Appx. 937 (C.A.11 2011); is participating in a politically tinged protest, *Morse v. San Francisco Bay*

Area Rapid Transit Dist., 2014 WL 572352 (N.D.Cal., Feb. 11, 2014); or confronts and criticizes the officer during the arrest of a third party, *Holland v. San Francisco*, 2013 WL 968295 (N.D.Cal., Mar. 12, 2013). Allowing plaintiffs to bring a retaliatory-arrest claim in such circumstances, without pleading and proving a lack of probable cause, would permit *108 plaintiffs to harass officers with the kind of suits that common-law courts deemed intolerable.

* * *

****1959** Because we should have answered the question presented and held that probable cause necessarily defeats First Amendment retaliatory-arrest claims, I respectfully dissent.

All Citations

585 U.S. 87, 138 S.Ct. 1945, 201 L.Ed.2d 342, 86 USLW 4428, 18 Cal. Daily Op. Serv. 5864, 2018 Daily Journal D.A.R. 5783, 27 Fla. L. Weekly Fed. S 363

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff

v.

CITY OF AUSTIN, INC.,
Defendant

§
§
§
§
§
§

Case No. 1:21-CV-00992-DII-SH

**ORDER AND REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

TO: THE HONORABLE DISTRICT COURT

Now before the Court are Defendant City of Austin’s Motion for Summary Judgment, filed May 1, 2024 (Dkt. 44); Defendant City of Austin’s Motion to Strike Plaintiff’s Summary Judgment Evidence, filed June 3, 2024 (Dkt. 49); and the associated response, reply, and surreply briefs.¹

I. Background

Plaintiff Julian Reyes, a self-described “videographer, reporter, legal documentarist, and street advocate,” brings this civil rights suit against the City of Austin.² Dkt. 28 ¶ 1.

A. Plaintiff’s Allegations

In his Amended Complaint, Reyes makes the following allegations: He “has been repeatedly and wrongly arrested by officers with the Austin Police Department (‘APD’) while filming APD officers’ interactions with unhoused people,” in violation of his First Amendment rights to free speech and press. *Id.* ¶ 7. He was “arrested or interfered with” on “at least thirteen occasions”

¹ The District Court referred all motions in this case to this Magistrate Judge, pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas (“Local Rules”). Dkt. 9.

² Reyes originally filed this suit *pro se* against APD, five APD officers, an individual, and unnamed parties on November 3, 2021. Dkt. 1. All defendants except the City have been dismissed. Dkt. 14. The Court appointed counsel to represent Reyes on September 16, 2022. Dkt. 19.

between June 2014 and March 2023 without probable cause and as “a pretext to stop Reyes from recording police, to retaliate against him for doing so, and to discourage him from doing so in the future.” *Id.* ¶¶ 9, 12. “All, or nearly all, of these arrests were for filming the police while engaged in their duties, not for any violation of the law.” *Id.* ¶ 12. By January 2017, “APD had labelled Reyes an ‘anti-police activist’ based on his exercise of his rights to free speech and the press and repeatedly noted this disparaging label for Reyes in official police reports.” *Id.*

Reyes was arrested on November 5, 2019, while he was filming APD officers disrupting a protest in front of the Salvation Army shelter in downtown Austin. *Id.* ¶ 8. The purported reason for his arrest—violating the City’s camping ban—was pretextual, and “an APD officer informed him, by words and actions, that Reyes was being arrested for protesting, filming, and advocating for the rights of unhoused people living on the streets of Austin.” *Id.* The camping charge was dismissed on the merits. *Id.* ¶ 9.

Reyes was arrested again on October 24, 2021, “while exercising his free speech rights on a public sidewalk.” *Id.* ¶ 10. During that arrest, APD officers seized his cameras, which “contained work product and documentary materials that he intended to publish to the public.” *Id.* The misdemeanor charge against him was dismissed. *Id.* ¶ 11.

Reyes alleges that his arrests “are the result of a widespread practice or custom in which APD police officers falsely arrest people, or arrest them on pretextual bases, to prevent them from exercising their constitutional right to record police activities.” *Id.* ¶ 17. He alleges that his arrests violated his First Amendment right to record police activities, and that the seizure of his cameras, videos, and other materials were unlawful seizures of work product and documentary materials in violation of the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa-6(a). Dkt. 28 ¶¶ 22, 27.

B. Defendant's Response

The City acknowledges that Reyes was arrested ten times between November 5, 2019 and March 8, 2024, but contends that he was arrested each time for violating the law, not because he was videotaping APD officers. Dkt. 44 at 6. The City emphasizes that it has a written policy that “its officers shall not arrest people for or otherwise prevent people from recording police activity.” *Id.* at 2 (citing APD General Order 302, Dkt. 44-40 at 8). The City argues that video and documentary evidence “clearly demonstrate officers’ compliance with the policy and utterly discredit Reyes’ versions of the facts.” *Id.*

C. Proceedings

The City moves for summary judgment, arguing that Reyes raises no genuine issue of material fact to show municipal liability under Section 1983 or a violation of the Privacy Protection Act. Reyes responds that he has raised material fact issues as to each element of his claims. The City also moves to strike two exhibits attached to Reyes’ response brief.

II. Motion to Strike

The City moves to strike a video of Reyes’ arrest on January 4, 2019 (Plaintiff’s Ex. 13A, Dkt. 47-1 at 253) and deposition testimony from Assistant Chief of Police Eric Miesse (Plaintiff’s Ex. 8, Dkt. 47-1 at 92-97). Local Rule CV-7(g) provides:

The court may refuse to hear or may deny a nondispositive motion unless the movant advises the court within the body of the motion that counsel for the parties have first conferred in a good-faith attempt to resolve the matter by agreement and, further, certifies the specific reason that no agreement could be made.

The City neither includes a certificate of conference nor states in its motion to strike that it conferred with Reyes’ counsel in a good-faith attempt to resolve this dispute without court intervention. It has violated Local Rule CV-7(g), and the Court could deny the motion on that basis alone. The Court nevertheless addresses the merits of the Motion to Strike.

A. Plaintiff's Exhibit 13A

The City moves to strike the video of Reyes' arrest on January 4, 2019, because Reyes failed to disclose the video during the discovery period as required by Rule 26(a)(1)(A)(ii). Reyes states that he produced more than 20 videos to the City and that his failure to disclose Exhibit 13A was inadvertent and because of a "technical error." Dkt. 52 at 3.

Rule 37(c)(1) provides that "if a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." To evaluate whether a Rule 26 violation was harmless, courts look to four factors: "(1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party's failure to disclose." *United States v. Grigsby*, 86 F.4th 602, 615 (5th Cir. 2023).

The Court finds that the Rule 26 violation was harmless. The City will suffer no prejudice from the video because it has been able to respond to it in its pleadings. The Court also finds that the video is important to the central issues here. For these reasons, the Court denies the City's Motion to Strike Plaintiff's Exhibit 13A.

B. Plaintiff's Exhibit 8

The City also moves to strike some deposition testimony of APD Assistant Chief Eric Miesse, its Rule 30(b)(6) witness, under Rule 56(c)(2). In his deposition notice, Reyes asked the City to designate a witness to testify on: "(1) the City's policy and practice regarding arrests of individuals while engaged in filming police activity; (2) whether the arrests of Julian Reyes were consistent with, or in violation, of the City's policy and practice; and (3) whether any officer received any correction or discipline for any of Julian Reyes' arrests." Dkt. 52-2 at 1. During Miesse's

deposition, Reyes’ attorney asked him several questions about whether APD had labeled Reyes an “anti-police activist” in its Master Name Index. Plaintiff’s Ex. 8, Dkt. 47-1 at 92-97. The City argues that any testimony as to whether Reyes was labeled an anti-police activist was outside the scope of the noticed Rule 30(b)(6) topics and should be stricken.

The Court finds that testimony regarding whether Reyes was labeled an anti-police activist is sufficiently related to the noticed topics and relevant to Reyes’ claims. Because Reyes alleges in his Amended Complaint that “APD had labelled Reyes an ‘anti-police activist,’” the City had notice of this allegation. The Court denies the City’s motion to strike the deposition testimony.

III. Motion for Summary Judgment

The City argues that it is entitled to summary judgment because “Reyes cannot meet his considerable evidentiary burden to establish liability against the City under 42 U.S.C. § 1983 or 42 U.S.C. § 2000aa.” Dkt. 44 at 2.

A. Legal Standard

Summary judgment shall be rendered when the pleadings, the discovery and disclosure materials, and any affidavits on file show that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). A material fact dispute is “genuine” if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is “material” if its resolution would affect the outcome of the case. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000).

When ruling on a motion for summary judgment, a court “may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). The court must view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

574, 587 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). But “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007). “Accordingly, where testimony conflicts with video evidence, [courts] must view the ‘facts in the light depicted by the videotape.’” *Crandel v. Hall*, 75 F.4th 537, 549 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1002 (2024) (quoting *Scott*, 550 U.S. at 380).

Once the moving party has shown the absence of a genuine issue of material fact, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 585 n.10, 586-87. The nonmovant “cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or ‘only a scintilla of evidence.’” *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (citation omitted). The party opposing summary judgment must identify specific evidence in the record and articulate the precise way that evidence supports its claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). If the nonmoving party fails to make a showing sufficient to establish an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

B. Section 1983 Claim

Reyes argues that his arrests by APD officers violated his First Amendment right to observe and record police activities and that his arrests were in retaliation for exercising his First Amendment rights. Reyes argues that the City is legally responsible for those constitutional violations under 42 U.S.C. § 1983.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that a municipality can be found liable under § 1983 only where the municipality itself causes the constitutional violation at issue. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). “*Respondeat superior* or vicarious liability will not attach under § 1983. It is only when the execution of the government’s policy or custom inflicts the injury that the municipality may be held liable under § 1983.” *Id.* (cleaned up).

To succeed on his Section 1983 claim against the City, Reyes must establish that (1) the City had an official policy, practice, or custom of unlawfully arresting individuals for filming police activities (2) promulgated by a municipal policymaker (3) that was the moving force behind the constitutional violation. *Monell*, 436 U.S. at 694; *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). The City argues that Reyes’ municipal liability claim fails because he raises no issue of material fact on these elements. The City also argues that Reyes’ complaints of arrests before November 5, 2019 are barred by limitations.

1. Statute of Limitations

First, the City argues that Reyes’ arrests before November 5, 2019 are barred by the Texas statute of limitations for personal injury claims. Dkt. 44 at 12 (citing TEX. CIV. PRAC. & REM. CODE § 16.003(a) (“A person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues.”)). But the City did not plead this affirmative defense in its Answer. Rule 8(c) requires: “In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . statute of limitations.” If the affirmative defense is not included in the complaint, it is waived. *Davis v. Huskipower Outdoor Equip. Corp.*, 936 F.2d 193, 198 (5th Cir. 1991). Once the defendant has waived that defense, it cannot revive it in a memorandum in support of a motion for summary judgment. *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91, 96 (5th Cir. 1976). The City has waived this affirmative defense.

2. No First Amendment Violation

The City cannot be liable under Section 1983 unless Reye's constitutional rights were violated. *Windham v. Harris Cnty., Tex.*, 875 F.3d 229, 243 (5th Cir. 2017) ("We have stated time and again that without an underlying constitutional violation, an essential element of municipal liability is missing.") (quoting *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 866-67 (5th Cir. 2012)).

The First Amendment protects freedom of speech and freedom of the press. *Turner v. Lt. Driver*, 848 F.3d 678, 688 (5th Cir. 2017). The principles underlying the First Amendment support the particular right to record the police, subject only to reasonable time, place, and manner restrictions, as the Fifth Circuit explained in *Lt. Driver*:

Filming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy. Filming the police also frequently helps officers; for example, a citizen's recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing. As one court explained:

Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs. Moreover, as the Supreme Court has noted, freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties. Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.

Protecting the right to film the police promotes First Amendment principles.

Id. at 689-90 (cleaned up).

The First Amendment also generally prohibits government officials from subjecting an individual to retaliatory actions, such as arrest for engaging in protected speech. *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019). A plaintiff bringing a retaliatory arrest claim generally must plead and prove the absence of probable cause for the arrest. *Id.* at 404. There is a narrow exception to this rule if the plaintiff produces “objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” *Id.* at 407.

Probable cause for a warrantless arrest exists when all facts known by a police officer are sufficient for a reasonable person to conclude that the suspect had committed, or was committing, an offense. *Espinal v. City of Houston*, 96 F.4th 741, 745 (5th Cir. 2024). Probable cause “is not a high bar.” *Kaley v. United States*, 571 U.S. 320, 338 (2014). “A ‘fair probability’ that the suspect has committed a crime is enough to establish probable cause. The likelihood that he has done so ‘need not reach [even] the fifty percent mark.’” *Espinal*, 96 F.4th at 745 (quoting *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999)).

Reyes alleges in his Amended Complaint that he was arrested at least thirteen times between June 2014 and March 2023 “while engaged in the exercise of his rights to free speech and the press.” Dkt. 22 ¶ 12. But in response to the City’s summary judgment motion, he points to evidence that he was arrested seven times, allegedly without probable cause. The record shows that his First Amendment rights were not violated.

a. January 4, 2019

APD officers arrested Reyes on January 4, 2019 for interference with public duties, a Class B misdemeanor. The police report states that Reyes was arrested after he interfered with APD officers trying to hand out citations to three homeless individuals for violating the City ordinance banning camping in public areas such as City sidewalks. Austin, Tex., Austin City Code, § 9-4-

11.³ APD Officer Gadiel Alas states in his report that Reyes “inject[ed] himself into my lawful stop and began antagonizing the group of violators which caused them to become less cooperative with police.” Dkt. 50 at 60. Alas states that he was writing a citation “and I had to stop and address Julian about his behavior which was disruptive and impeding my public duties.” *Id.* Alas then asked Reyes several to move away from him so he could finish fulfilling his duties, but Reyes refused to comply. *Id.* at 60-61. Alas then arrested him. *Id.* at 61.

Reyes argues that he was arrested not for interfering with public duties but because he was filming police activities. Reyes claims that the video from his camera shows that he was singled out and arrested because he was recording the police. Dkt. 47 at 17. The video evidence does not support his allegations; instead, it confirms Alas’ police report. The video shows two APD officers attempting to cite four homeless individuals camping on a City sidewalk for violating the City camping ban ordinance. Dkt. 47-1 at 252 (Plaintiff’s Video Ex. 13A). Reyes approaches one of the APD officers while filming and says the officers should be arrested for harassing and bullying the individuals. Exh. 13A at 0:02:27-50. As the other individuals argue with the officers about the ordinance, one of the officers asks Reyes to move farther away and tells him he is interfering with police duties. *Id.* at 0:04:29. A few minutes later, the officer again asks Reyes to move away from the area, but he does not comply and tells the officer: “I am not going to do anything you tell me to do.” *Id.* at 0:06:18. Reyes then is arrested.

While Reyes claims he was singled out and the only one arrested because he was filming police activities, the video shows he was the only individual failing to comply with police orders and interfering with their duties. The other individuals argued with the officers about the fairness of

³ https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT9PRAC_CH9-4PRAC.

the City camping ban ordinance, but the video does not show them failing to comply with police orders or interfering with their duties. *Nieves*, 587 U.S. at 407.

The video shows that the officers had probable cause to arrest Reyes for interference with public duties. Section 38.15(a)(1) of the Texas Penal Code provides: “A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with . . . a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law.” Probable cause exists when a person does not follow instructions necessary for an officer to perform their duties. *See Spiller v. Harris Cnty., Tex.*, --- F.4th ---, 2024 WL 4002382, at *4 (5th Cir. Aug. 30, 2024) (finding that officer had probable cause to arrest plaintiff for interference with public duties when he failed to comply with instructions to move away from a crime scene); *Westfall v. Luna*, 903 F.3d 534, 544 (5th Cir. 2018) (finding that officer had probable cause to arrest plaintiff for interfering with his duties when she did not follow his instructions not to go into a home); *Childers v. Iglesias*, 848 F.3d 412, 415 (5th Cir. 2017) (finding that officer had probable cause to arrest plaintiff for violating officer’s instructions when plaintiff “did more than just argue with police officers; he failed to comply with an officer’s instruction, made within the scope of the officer’s official duty and pertaining to physical conduct rather than speech”).

b. November 5, 2019

Reyes was arrested on November 5, 2019 for violating the City’s camping ban ordinance. Dkt. 47-1 at 284. In the police report, APD Officer Patrick Walsh states he observed Reyes standing in front of a blue tent set up in a public area in downtown Austin. *Id.* Walsh repeatedly asked Reyes to take down the tent down because he was violating the City’s camping ban ordinance and that his tent was too close to a roadway, where there was substantial risk that Reyes

or others could be hit by a car. *Id.* Walsh states that he arrested Reyes “after all options were exhausted and Reyes continued to disregard our commands to dissa[se]mble the tent.” *Id.*

Reyes does not deny that he violated the City’s camping ban ordinance and refused to comply with Walsh’s instructions, but argues that his arrest was pretextual because he was a member of the press filming police activity. But, as he acknowledges, others “were also filming the police” and were not arrested. Dkt. 47 at 10. Reyes does not show the absence of probable cause or that he was singled out because he was filming. *Nieves*, 587 U.S. at 407; *Childers*, 848 F.3d at 415.

c. June 20, 2020

Reyes was arrested on June 20, 2020 for assaulting a police officer and assault with injury. Dkt. 44-22 at 11-14. Reyes claims he was arrested not because he assaulted a police officer, but because he was filming police activities. Dkt. 47 at 11.

Video from APD Officer Travis Larned’s body-worn camera shows Larned asking a non-responsive individual sleeping on a sidewalk in downtown Austin to get up and move. Dkt 44-23 (Defendant’s Video Ex. 23) at 0:01:38. After she does not respond, Larned calls emergency medical services, who arrive and put her on a stretcher. While she is being strapped to the stretcher by Travis County EMS, Reyes can be heard in the background yelling at Larned: “You be fucking nice to her,” “she doesn’t want to be strapped down,” and “she doesn’t need you pigs holding her down.” *Id.* at 0:17:30-40. Reyes then approaches Larned and tells him that a pedestrian walking by had knocked Reyes’ camera out of his hands and into the street. *Id.* at 0:18:09. Larned tells Reyes that he saw Reyes assaulting the pedestrian. Reyes denies that he assaulted the pedestrian and tells Larned he is going to go get his camera from the street. *Id.* at 18:55. Larned tells Reyes not to move and that he is being detained. *Id.* at 18:57. Reyes does not comply with Larned’s

instructions and tries to leave. When Larned puts his hand on Reyes to stop him, Reyes strikes Larned's arm with his hand. *Id.* at 0:18:59. Larned then arrests Reyes. *Id.* at 0:19:15.

The video shows that Larned had probable cause to arrest Reyes for disregarding his instructions and assaulting him. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”); *United States v. Watson*, 423 U.S. 411, 418 (1976) (“[A] peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence.”); Tex. Penal Code § 22.01(b)(1) (“An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against . . . a person the actor knows is a public servant while the public servant is lawfully discharging an official duty.”).

Reyes argues that he was singled out because he was filming Larned's activities, but the video shows that no other pedestrian assaulted Larned or refused to comply with his orders. Reyes does not show that his First Amendment rights were violated. *Nieves*, 587 U.S. at 407.

d. July 22, 2020

Reyes was arrested on July 22, 2020 for interfering with public duties. Dkt. 47 at 17. Reyes argues that he was arrested for recording police activities, while other pedestrians who did not record police activities were not arrested. *Id.* Reyes' video evidence contradicts his allegations.

In Reyes' video, two APD officers ask him to move away from a construction road work zone because they are concerned that he may get injured. Dkt. 47-1 at 347 (Plaintiff's Video Ex. 16B) at 0:06:34-08:15. Reyes tells the officers to “go fuck yourself and get out of my face,” that they have no right to tell him to move, and that he is placing them “under citizen's arrest.” *Id.* at 07:15-38. After Reyes repeatedly fails to comply with the officers' instructions to move away, the officers

arrest him for interfering with public duties. *Id.* at 0:08:57. The video shows that the officers had probable cause to arrest Reyes for interfering with their duties. *Westfall*, 903 F.3d at 544; *Childers*, 848 F.3d at 415. Another individual who appeared to be complying with the officers' instructions and who was also filming the APD officers was not arrested. *Id.* at 0:08:58. Reyes fails to show he was singled out for filming police activities. *Nieves*, 587 U.S. at 407.

e. October 24, 2021

Reyes was arrested on October 24, 2021 for disorderly conduct for making unreasonable noise in a public park, in violation of Texas Penal Code § 42.01(1)(5) (prohibiting individuals from intentionally or knowingly making "unreasonable noise in a public place"). Dkt. 44-13. Again, Reyes argues that he was arrested without probable cause and as "a pretext to stop Reyes from recording the police, Dkt. 28 ¶¶ 10-11, but the evidence contradicts his allegations.

In the video from APD Officer Richard Spitler's body-worn camera, Reyes can be seen and heard walking in and next to Republic Square Park in downtown Austin, using a megaphone to amplify his voice and a recording in which he repeats more than thirty times: "Fuck the police. All cops are bastards. All cops belong in a fucking jail cell." Dkt. 44-8 (Defendant's Video Ex. 8) at 0:02:14-03:05, 43:15-49:59. APD officers reported that "[t]he volume on the megaphone was so loud it could be heard a block away from where Reyes was using it." Dkt. 44-13 at 3. City of Austin Ordinance § 9-2-11 requires individuals to obtain a permit to operate sound equipment "audible to the public."⁴

Reyes continued to use the bullhorn for more than an hour, during which the officers received many complaints from people at and near the park about the noise and profanities from his hand-held amplifier. Defendant's Video Ex. 8 at 43:14; Dkt. 44-7 at 8, 15. APD officers then told Reyes

⁴ https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT9PRAC_CH9-4PRAC.

he was violating the City Ordinance by using his amplifier in the park without a permit. *Id.* The video shows Reyes arguing with the officers and informing them that he was not violating the City Ordinance at that time because he was standing on the street next to the park. He continues to use his amplifier to play his profanity-laced recording and to shout expletives at the officers. *Id.* at 43:15-49:59. About 20 minutes later, Reyes reenters the park and again can be heard using his amplifier. *Id.* at 1:12. A few minutes later, APD officers approach Reyes and tell him he is being arrested for using the megaphone in a public park. *Id.* at 1:15:30. The officers take Reyes into custody and seize his cameras and the amplifier. *Id.* at 1:19:19-25.

The video shows the officers had probable cause to arrest Reyes for using an amplifier in violation of the City Ordinance and disorderly conduct for making unreasonable noise in a public place in violation of Texas Penal Code § 42.01(1)(5) (prohibiting individuals from intentionally or knowingly making “unreasonable noise in a public place”). *Atwater*, 532 U.S. at 354. Reyes also does not show he was singled out for the arrest because he was filming the police. The video shows another person also filming the police while yelling profanities, but she was not using a bullhorn and was not arrested. Defendant’s Video Ex. 8 at 1:19:19-25; *Nieves*, 587 U.S. at 407.

f. December 23, 2023

Reyes again was arrested on December 23, 2023 for interfering with a police investigation and public duties. He argues that he was singled out and arrested because he was filming police activity, but evidence from his video camera shows that he attempted to interfere with a police investigation and willfully violated police orders. Dkt. 47-1 at 422 (Plaintiff’s Video Ex. 18A) at 0:01:50-00. The video shows that APD officers arrest Reyes after they direct him to walk around a crime scene, but he does not comply and argues with the officers. *Id.* The video shows no other pedestrians failing to comply with police orders to move away from a crime scene. *Id.*

Failure to comply with a police officer's instruction to move away from a crime scene is not protected speech and gives the officer probable cause for arrest under Texas Penal Code § 38.15. *See Spiller*, 2024 WL 4002382, at *4 (finding that officer had probable cause to arrest plaintiff for interference with public duties when plaintiff refused to leave crime scene when asked to do so); *Duncantell v. State*, 230 S.W.3d 835, 842 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). The Court finds that officers had probable cause to arrest Reyes for violating their instructions to move away from a crime scene, and that Reyes does not show he was singled out for recording the police. *Nieves*, 587 U.S. at 407.

g. March 8, 2024

Finally, Reyes was arrested on March 8, 2024 during a protest rally in downtown Austin for blocking a hotel driveway. Dkt. 37. Again, Reyes argues he was arrested for filming police activity. Again, the video evidence again refutes his allegation. Video from APD Officer Christopher Juusola's body-worn camera shows that Reyes and others were told repeatedly to move their protest to a sidewalk rather than blocking a hotel driveway. Dkt. 44-38 (Defendants' Video Ex. 38) at 0:13:00. After they failed to comply, several individuals were arrested, including Reyes. *Id.* at 0:19:13-31. The Fifth Circuit has found that a police officer had probable cause to arrest an individual for violating the officer's instructions in similar circumstances. *See Childers*, 848 F.3d at 415 (finding that officer had probable cause to arrest plaintiff when he failed to comply with instructions to move his truck blocking police officers' entry to property). While Reyes and two other individuals arrested were filming at the time, the video shows that a woman also was arrested while standing in the driveway but not filming. *Id.* at 0:14:49. So Reyes does not show he was singled out because he was filming police activity. *Nieves*, 587 U.S. at 407.

h. Conclusion as to First Amendment Allegations

Because Reyes shows neither the absence of probable cause for any of his arrests nor “objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been,” he does not show a violation of his First Amendment rights. *Nieves*, 587 U.S. at 404, 407. There can be no liability against the City. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Windham*, 875 F.3d at 243.

3. No Policy or Practice

Even if Reyes had shown that his First Amendment rights were violated, he fails to show that the City had policy, custom, or practice of violating his or others’ First Amendment rights by arresting individuals for filming police activity.

Official policy establishes culpability, and can arise in various forms. It usually exists in the form of written policy statements, ordinances, or regulations, but it may also arise in the form of a widespread practice that is “so common and well-settled as to constitute a custom that fairly represents municipal policy..”

Peterson v. City of Fort Worth, Tex., 588 F.3d 838, 848 (5th Cir. 2009) (quoting *Piotrowski*, 237 F.3d at 578). A plaintiff can also show a policy or custom in limited circumstances where a municipality fails to train or supervise its police officers which amounts to deliberate indifference or fails to discipline officers for committing constitutional violations that amounts to ratification of a policy. *Id.*

Reyes acknowledges that there is no official written or otherwise specifically articulated policy on which he can rely. As the City emphasizes, it has a written policy that “its officers shall not arrest people for or otherwise prevent people from recording police activity.” *Id.* at 2 (citing APD General Order 302, Dkt. 44-40 at 8). He advances two theories of municipal liability. Reyes alleges that his repeated arrests by APD officers while he was filming police activity were part of a “persistent pattern of illegal conduct” that was so common and well-known to policymakers that

it constitutes a custom that fairly represents official policy. Dkt. 47 at 18. He also alleges the City is also liable because it ratified the illegal conduct by failing to discipline the APD officers involved in his arrests.

“A pattern is tantamount to official policy when it is so common and well-settled as to constitute a custom that fairly represents municipal policy.” *Peterson*, 588 F.3d at 850. When prior incidents are used to prove a pattern, they “must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees.” *Webster*, 735 F.2d at 842. “It is thus clear that a plaintiff must demonstrate a pattern of abuses that transcends the error made in a single case.” *Peterson*, 588 F.3d at 850 (citation omitted).

A pattern also requires “sufficiently numerous prior incidents,” as opposed to “isolated instances.” *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir.1989). In *Pineda v. City of Houston*, 291 F.3d 325 (5th Cir. 2002), eleven incidents of warrantless entry did not support a pattern of unconstitutional warrantless entry. In each of those eleven incidents, officers reported either consent or exigent circumstances. *Id.* at 329 n. 12. “Eleven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation’s largest cities and police forces.” *Id.* at 329. Similarly,

27 incidents of excessive force over a period of four years do not reflect a pattern that can be said to represent official policy of condoning excessive force so as to hold the City liable for the acts of its employees’ unconstitutional conduct. To hold otherwise would be effectively to hold the City liable on the theory of *respondeat superior*, which is expressly prohibited by *Monell*.

Peterson, 588 F.3d 852.

In his Amended Complaint, Reyes alleges: “Between June 2, 2014, through March 2023, Reyes was repeatedly arrested and/or interfered with by APD officers while engaged in the exercise of

his rights to free speech and the press.” Dkt. 22 ¶ 12. As sated, he alleges that he was arrested “at least thirteen times” during this period, *id.*, but comes forward with summary judgment evidence as to only seven of these arrests. And to show a pattern of illegal conduct, Reyes points to only three arrests over four years, on January 4, 2019, July 22, 2020, and December 23, 2023. *See* Dkt. 47 at 17-18. Applying *Pineda* and *Peterson*, the Court finds this insufficient to show a pattern of illegal conduct. *See Peterson*, 588 F.3d at 851. “Proving a pattern is a heavy burden, one that has rarely been met in our caselaw.” *Shepherd v. Dallas Cnty.*, 591 F.3d 445, 452 (5th Cir. 2009); *see also Sanchez v. Young Cnty.*, 956 F.3d 785, 793 (5th Cir. 2020) (“Showing a pervasive pattern is a heavy burden.”).

Reyes also relies only on his own three arrests to show a pattern of illegal conduct. “But plausibly to plead a practice ‘so persistent and widespread as to practically have the force of law,’ a plaintiff must do more than describe the incident that gave rise to his injury.” *Pena v. City of Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018) (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)); *see also Piotrowski*, 237 F.3d at 582 (“As is the case with allegations of failure to adequately screen prospective police officers, it is nearly impossible to impute lax disciplinary policy to the City without showing a pattern of abuses that transcends the error made in a single case.”); *Barkai v. Nuendorf*, No. 21-CV-4060 (KMK), 2023 WL 2691712, at *35 (S.D.N.Y. Mar. 29, 2023) (“Plaintiff does not point to any instance of Rockland County allegedly implementing this widespread practice beyond his own case. This alone would be fatal to Plaintiff’s *Monell* claim, even if he had asserted a viable underlying Constitutional violation.”). The Court finds that Reyes does not show a persistent pattern of conduct that constitutes a City policy.

In the alternative, Reyes argues that the City had a policy of making illegal arrests of individuals who film police activity because the City did not discipline the officers involved in his

arrests. “If the authorized policymakers approve a subordinate’s decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.” *Peterson*, 588 F.3d at 854 (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)). But ratification “is limited to ‘extreme factual situations.’” *Davidson v. City of Stafford, Texas*, 848 F.3d 384, 395 (5th Cir. 2017) (quoting *Peterson*, 588 F.3d at 848). A policymaker who defends conduct that is later shown to be unlawful does not necessarily incur liability on behalf of the municipality. *Peterson*, 588 F.3d at 848.

The underlying conduct by the officers involved in Reyes’ arrests was insufficiently extreme for a finding of ratification. Compare *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), with *Davidson*, 848 F.3d at 395-96 (finding that arresting abortion protester without probable cause “while unconstitutional, was not sufficiently extreme to qualify for a finding of ratification”), and *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 169 (5th Cir. 2010) (no ratification when a municipality defended the constitutionality and propriety of its officers’ actions despite the court’s later determination that the officers’ actions violated the Fourth Amendment). Reyes cannot rely on the ratification theory to show a City policy or custom.

Because the Court finds that there was no custom or policy of the City, it need not consider the moving force factor. *Zarnow*, 614 F.3d at 171.

4. No Evidence of a Policymaker

Finally, even if Reyes established all other elements of municipal liability, he identifies no municipal policymaker who could be held responsible, through actual or constructive knowledge, for enforcing an unconstitutional policy. *Piotrowski*, 237 F.3d at 579.

5. Conclusion as to Motion for Summary Judgment

Because Reyes comes forward with no summary judgment evidence creating a fact issue that the City had an official policy, practice, or custom of unlawfully arresting individuals for filming

police activities, promulgated by a municipal policymaker who was the moving force behind the constitutional violation, this Magistrate Judge recommends that the District Court grant the City's motion for summary judgment as to his Section 1983 claim. *Monell*, 436 U.S. at 694.

B. Privacy Protection Act Claims

Reyes also asserts that the seizures of his cameras, videos, and other materials during his arrests on January 4, 2019 and October 24, 2021 violated the Privacy Protection Act ("PPA"), 42 U.S.C. § 2000aa. The PPA "generally prohibits government officials from searching for and seizing documentary materials possessed by a person in connection with a purpose to disseminate information to the public." *Citicasters v. McCaskill*, 89 F.3d 1350, 1353 (8th Cir. 1996).

Congress passed the PPA in response to *Zurcher v. Stanford Daily*, 436 U.S. 547, 567-68 (1978), in which the Supreme Court held that the Fourth Amendment does not prohibit the search of a newspaper office for photographs revealing the identities of individuals who assaulted police officers during a demonstration, even though no one employed by the newspaper was suspected of involvement. *See Guest v. Leis*, 255 F.3d 325, 340 (6th Cir. 2001) ("[T]he PPA was enacted to afford the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment."). Although the statute is more than 40 years old, caselaw on the PPA is sparse.

The PPA provides that

it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.

42 U.S.C. § 2000aa(a).⁵ The PPA also prohibits the search and seizure of “documentary materials,”⁶ other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.” *Id.* § 2000aa(b).

The PPA “carves out various exceptions to the prohibition against searches and seizures of materials intended for public dissemination.” *Sennett v. United States*, 667 F.3d 531, 535 (4th Cir. 2012). Under the “suspect exception,” the police can avoid the constraints of the PPA “when the person possessing the materials is a criminal suspect, rather than an innocent third party.” *Id.* (cleaned up). For the government to take advantage of that exception, there must be “probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” 42 U.S.C. § 2000aa(a)(1). The materials exempted under the suspect exception “must relate to the offense.” *Guest*, 255 F.3d at 341.

Section 2000aa-6 of the PPA creates a private right of action for damages resulting from a search or seizure of materials that violates the statute. 42 U.S.C. § 2000aa-6(a). A “person aggrieved” by such an unlawful search or seizure may bring the suit “against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for

⁵ “Work product materials” are defined in 42 U.S.C. § 2000aa-7(b) as:

materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offense, and (1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person; (2) are possessed for the purposes of communicating such materials to the public; and (3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.

⁶ “Documentary materials” are defined in 42 U.S.C. § 2000aa-7(a) as:

materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically¹ or electronically recorded cards, tapes, or discs, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.

damages resulting from a violation of this chapter, or against any other governmental unit.” *Id.* A plaintiff also may sue “an officer or employee of a State who has violated this chapter . . . if such State has not waived its sovereign immunity. *Id.*

1. October 24, 2021 Seizure

Reyes alleges that he was arrested without probable cause by APD officers on October 24, 2021, “while exercising his free speech rights on a public sidewalk” and as “a pretext to stop Reyes from recording the police.” Dkt. 28 ¶¶ 10-11. He alleges that during this arrest his cameras, “which are his primary work equipment, were seized by APD,” and that his cameras “contained work product and documentary materials that he intended to publish to the public.” *Id.* ¶ 10. Reyes asserts that APD officers seized his work product and documentary materials “knowing, believing, or with reason to believe that Reyes possessed such materials with the purpose to disseminate to the public.” *Id.* ¶ 23. He contends that the APD officers had “no probable cause to believe that Reyes had committed a criminal offense to which the materials related.” *Id.* ¶ 25.

The City argues that Reyes’ PPA claim fails because the APD officers did not have a reasonable belief that he was a member of the press who intended to “disseminate” the video recordings “to the public,” as required by 42 U.S.C. § 2000aa(a). Dkt. 44 at 18. The City emphasizes that Reyes “did not identify himself as a member of the press,” but instead “identified himself as an activist for the unhoused” and “a protester against Ford Motor Company.” *Id.*

The record supports the City’s position. The evidence shows that workers called 911 to complain about a protestor yelling profanities through an amplifier during the event. Dkt. 44-6 at 6; Dkt. 44-7 at 8; Dkt. 44-13 at 3. As stated above, body-worn camera video confirms that Reyes repeatedly uttered profanities through a megaphone while “numerous children” were in the park. Dkt. 44-7 at 8. The officers who arrested Reyes seized his cameras and megaphone as evidence of his offense. *Id.* at 9, 19-20; Dkt. 44-8 at 1:15:24, 1:19:19-25.

Reyes comes forward with no competent summary judgment evidence to create the existence of a genuine fact issue that APD officers reasonably believed they were seizing work product materials “to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.” 42 U.S.C. § 2000aa(a). He offers evidence that the City’s electronic database describes him as an “anti-police activist” and reflects that his employer is the *Challenger Street Newspaper*, a publication that advocates for Austin’s homeless population, “so the city **knows** he is a journalist.” Dkt. 47 at 6. Plaintiff’s Exs. 9 and 10, Dkt. 47-1 at 173-231. But this does not show that the officers who arrested Reyes on October 24, 2021 knew he was a reporter or believed he was planning to disseminate his videos to the public. The video evidence shows Reyes accusing the officers of violating his constitutional rights, but at no point informing them that he is a reporter or that he is planning to disseminate the videos to the public. Reyes does not offer competent summary judgment evidence to show a violation of the PPA.

The record also supports the City’s argument that the suspect exception to the PPA applies because Reyes was filming while he used a voice amplifier in a public park, so the cameras seized contained evidence related to the offense for which he was arrested. *See* Dkt. 44-7 at 9 (police report stating that Reyes was arrested for disorderly conduct by noise and for using megaphone in public park and arresting officer “seized both cameras, and megaphone as evidence”); Dkt. 44-13 at 3 (affidavit for search warrant stating that Reyes was arrested for disorderly conduct and that “forensic analysis of the . . . video devices would provide evidence” of that offense). The Court finds that the suspect exception to the PPA applies. *See Sennett*, 667 F.3d at 536 (finding that suspect exception applied when government showed probable cause to believe that photojournalist was involved in acts of vandalism and photographic equipment seized was related to the vandalism). Even if knowledge that Reyes was employed by a newspaper could be imputed to the

arresting officers, the suspect exception to the PPA would apply because at the time of the seizure, there was probable cause to believe that Reyes was violating the law by using a bullhorn in the park. Journalists are not excluded from the PPA's suspect exception. *Id.* at 537. Reyes comes forward with no competent summary judgment evidence creating a genuine issue of material fact as to whether the suspect exception bars his claim.

2. January 4, 2019 Seizure

Reyes argues that the City has waived any argument it is entitled to summary judgment on his PPA claim for seizure of his cameras on January 4, 2019, because it did not address the January 4, 2019 seizure in its summary judgment motion. Dkt. 47 at 26. But in his Amended Complaint, Reyes mentions only the seizure of his cameras on October 24, 2021, not January 4, 2019. Dkt. 28 ¶ 10. Reyes has waived any claim that the January 4, 2019 seizure violated the PPA. *See Cutrera v. Bd. of Sup'rs of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) (“A claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court.”).

Even had Reyes not waived that claim, it would fail because he produces no summary judgment evidence that the officers who arrested him on that day knew he was a journalist or believed he was planning to disseminate his videos to the public. The video of Reyes' 2019 arrest shows that he did not identify himself as a reporter or tell the officers that he was filming the police with the intent to disseminate the videos to the public. Plaintiff's Ex. 13A, Dkt. 47-1 at 253. Because he comes forward with no evidence that the officers believed he was planning to distribute those videos to the public, he does not show a violation of the PPA. The record also shows that the suspect exception to the PPA would apply to this arrest because Reyes was filming before and while he was arrested, so the cameras seized contained evidence related to the offense for which he was arrested.

3. Waived Claim

For the first time in his response brief, Reyes argues that the City’s General Order 302 “violates the PPA, on its face, as to citizen and professional journalists.” Dkt. 47 at 25. He did not assert this claim in his Amended Complaint. Again, claims not raised in the complaint but only in response to a motion for summary judgment are not properly before the Court. *Cutrerera*, 429 F.3d at 113. The Court does not address this argument.

IV. Order

Defendant City of Austin’s Motion to Strike Plaintiff’s Summary Judgment Evidence (Dkt. 49) is **DENIED**.

V. Recommendation

This Magistrate Judge **RECOMMENDS** that the District Court **GRANT** Defendant City of Austin’s Motion for Summary Judgment (Dkt. 44) as to both of Plaintiff’s claims and enter a final judgment for the City of Austin.

VI. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm’n*, 834 F.2d 419, 421 (5th Cir. 1987). A party’s failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C.

§ 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on September 19, 2024.



SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
CITY OF AUSTIN, AUSTIN POLICE	§	Case No. 1:21-CV-00992-RP-SH
DEPARTMENT, TROY WISMAR,	§	
CHRISTOPHER CARLISLE,	§	
PATRICK WALSH, KYU SUK AN,	§	
SARAH FOSTER, GREG McCORMACK,	§	
and JOHN DOES, Individually and in	§	
their official capacities,	§	
Defendants.	§	

**PLAINTIFF JULIAN REYES' OBJECTIONS TO
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

TO THE HONORABLE ROBERT PITMAN:

Plaintiff Julian Reyes objects to the Order and Report and Recommendation of the United States Magistrate Judge ("Report and Recommendation") filed September 19, 2024 (Doc. 56) and would respectfully show:

I. Introduction and summary.

Mr. Reyes objects to the Magistrate Judge's Report and Recommendation because there are material issues of contested fact as to each of Mr. Reyes's claims. Contrary to the Report and Recommendation's conclusions, the evidence is not undisputed that there was probable cause to arrest Mr. Reyes when he was filming police activity, and even if there was, there is summary judgment evidence supporting a reasonable inference that those arrests were in retaliation for his exercise of his First Amendment right to record and criticize police conduct. There is evidence that Mr. Reyes's arrests constitute an informal custom, pattern, and practice of the City of Austin to arrest him because of, and in retaliation for, his exercise of those rights. Likewise, there is

summary judgment evidence supporting Mr. Reyes's claim that the City's seizure of his cameras and the recordings they contained violated his rights under the Privacy Protection Act of 1980, which precludes the seizure of journalists' work product and documentary materials except in very narrow circumstances not applicable here.

II. Case background.

A. Procedural history.

Plaintiff Julian Reyes, a citizen journalist, filed this lawsuit *pro se* against the City of Austin and several individuals because his repeated arrests while filming police activity violated his First Amendment rights. Doc. 1. The City moved to dismiss, Doc. 8, and the motion was referred to Magistrate Judge Susan Hightower. Doc. 9.

Judge Hightower recommended that Mr. Reyes's claims against the individuals be dismissed based on qualified immunity but concluded that Mr. Reyes had stated a claim against the City. Doc. 10. Judge Hightower noted that Mr. Reyes identified "two separate arrests and alleges that 'about 10 [or] so' additional arrests occurred under similar circumstances." Doc. 10 at 6. Based on those allegations, she concluded that Mr. Reyes had "made specific factual allegations allowing a reasonable inference that the City had a policy, practice or custom of arresting individuals to prevent them from filming police activities," and that Mr. Reyes stated a plausible claim that the City's policy was the "moving force" behind the violation of his constitutional rights. *Id.* at 8-10. The City did not object to the report and recommendation, which was adopted. Doc. 14.

After being granted appointed counsel, Doc. 19, Mr. Reyes filed a First Amended Complaint, alleging that Austin Police Department ("APD") officers have repeatedly and wrongfully arrested him while filming police interactions with unhoused people and others, and

that he has been repeatedly arrested and interfered with by APD officers while exercising his First Amendment rights. *Id.* at 2-3. He alleges that his arrests were without probable cause and/or were made in retaliation for his criticism of the police and to discourage him from further exercising his rights. *Id.* at 3. Mr. Reyes asserts causes of action under 42 U.S.C. § 1983 for violating his First and Fourteenth Amendment rights and under 42 U.S.C. § 2000aa, *et seq.*, for illegally seizing his journalist work product and documentary materials. *Id.* at 3-6.

The City did not move to dismiss Mr. Reyes’s Amended Complaint. The parties exchanged documents in discovery, and Mr. Reyes deposed the City’s 30(b)(6) witness and one of the officers who arrested Mr. Reyes. The City did not take Mr. Reyes’s deposition.

B. The City’s Motion for Summary Judgment and the Magistrate Judge’s Report and Recommendation.

The City moved for summary judgment on all of Mr. Reyes’s claims. Doc. 44. As to Mr. Reyes’s Section 1983 claims, the City argued that (1) his complaints of arrests before November 5, 2019 were barred by limitations; (2) he had no evidence that the City has a policy of arresting him for filming police; (3) the City’s policy was not the moving force behind his arrests; (4) the fact that the charges against him in every single arrest were dismissed was irrelevant; and (5) his claim that he was singled out for arrest was unsubstantiated. *Id.* at 12-17.

As to Mr. Reyes’s Privacy Protection Act claim, the City argued that (1) Mr. Reyes did not identify himself as a member of the press or provide “any evidence he had his cameras with him because he intended to record his activity and disseminate the material to the police;” (2) there was probable cause to arrest him; (3) there was probable cause to seize his cameras; and (4) APD sought a search warrant “before turning the cameras over to the Digital Forensics team” (but not before seizing them). Doc. 44. Mr. Reyes opposed the City’s summary judgment on each point and filed numerous exhibits in support. Doc. 47-1, Exs. 1-22.

Without hearing, Magistrate Judge entered a Report and Recommendation. Doc. 56. In her Report and Recommendation, Judge Hightower first denied the City’s motion to strike two of Mr. Reyes’s exhibits and ruled that the City had waived any limitations defense. Doc. 56 at 4-5, 7. She recommends that Mr. Reyes’s First Amendment claims be dismissed because “Reyes shows neither the absence of probable cause for any of his arrests or ‘objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.’” Doc. 56 at 17 (quoting *Nieves v. Bartlett*, 587 U.S. 391, 404, 407 (2019)). She also concluded that Mr. Reyes proffered no summary judgment evidence “that the City had a policy, custom, or practice” of arresting him for filming police activity. Doc. 56 at 17-20. Finally, she concluded in a single sentence that Mr. Reyes “identifies no municipal policymaker” responsible for the City’s policy and practice of arresting him, a ground for dismissal not raised by the City. *Id.* at 20. *See* Doc. 44 at 12-17.¹

III. Mr. Reyes submitted substantial summary-judgment evidence showing a long-standing City practice of singling him out for exercising his First Amendment rights.

The Report and Recommendation ignores much of the summary judgment evidence Mr. Reyes submitted, all of which was admitted. Respectfully, Mr. Reyes objects to the Report and Recommendation because it does not properly apply the Rule 56 standard for reviewing evidence. In particular, the Report and Recommendation does not “view the summary judgment in the light most favorable to” Mr. Reyes, and it fails to “draw all reasonable inferences” from that

¹ The Report and Recommendation should not have recommended the grant of summary judgment on the ground that there was no evidence of a policymaker because the Court did not give the Mr. Reyes notice that it would consider this ground *sua sponte*. *See* Fed. R. Civ. P. 56(f)(3) (“*After giving notice and a reasonable time to respond, the court may: ... consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.*” (emphasis added)). This Court should not grant summary judgment for the lack of evidence of a policymaker.

evidence in his favor “without making credibility determinations or weighing the evidence,” as required. *E.g., Kost v. Cotto*, 458 F. Supp. 3d 571, 582 (W.D. Tex. 2020).

As noted below, the Report and Recommendation ignores evidence from APD’s own files reflecting the City’s knowledge that Mr. Reyes wears press credentials and is employed as a journalist for the *Challenger Street Newspaper*; that the City knows he films police conduct for publication and criticism; that the APD labelled Mr. Reyes ANTI-POLICE in the database that all officers use, because of his speech; and that an APD supervisor called him a “loon” and “turd” in an email to his officers, based on Mr. Reyes’s criticism of APD’s treatment of homelessness. The Report and Recommendation fails to recognize clear evidence that the City and APD officers resent Mr. Reyes’s vocal criticism of their conduct and fails to draw the reasonable inference from that evidence, and from the video evidence of his arrests, that the City has allowed, encouraged, and ratified a policy, demonstrated in practice and in writing, of singling him out for disparate treatment, including arrest and seizure, based on his First Amendment-protected activity.

Because the Report and Recommendation omits so much evidence that Mr. Reyes contends is material to his claims, he provides a summary below.

A. Julian Reyes is a print and video journalist, homeless advocate, and vocal police critic.

In April 2013, an APD officer shot Mr. Reyes’s dog. Doc. 47-1, Ex. 1 ¶ 4. He sued the City *pro se* for killing his dog, this Court appointed counsel, and the City settled Mr. Reyes’s claim. *Id.* ¶ 5. Mr. Reyes was traumatized by this killing and became an advocate for improved training to reduce APD officers’ knee-jerk tendency to kill dogs. *Id.* ¶ 5-6.² Mr. Reyes is also an

² Mr. Reyes objects to the Report and Recommendation’s failure to reference this undisputed evidence or recognize that Mr. Reyes’s lawsuit against the City for police misconduct provided a reason for the City and APD officers to retaliate against him.

advocate for the homeless. Doc 47-1, Ex. 1 ¶ 7. He records APD officers' interactions, primarily in downtown and central Austin, with homeless individuals in an effort to keep APD publicly accountable. *Id.* He wears a clearly visible press badge issued by the *Challenger Street Newspaper*, which he joined about twelve years ago. *Id.* ¶ 2. His work has been published in the *Challenger* and he publishes video journalism on YouTube and Facebook. *Id.* ¶ 3.³

Mr. Reyes has been arrested over twenty times by APD while recording police or otherwise advocating for government accountability; *in each case*, the charges were no-billed, dismissed by the prosecuting officer, or Mr. Reyes was acquitted. Doc. 47-1, Ex. 1 at ¶ 8. Mr. Reyes has *never* been convicted on any of the charges brought against him by APD while engaged in First Amendment activity. *Id.* His arrests, however, have led to his hospitalization and PTSD. *Id.* at ¶¶ 8, 12.⁴

Mr. Reyes filed two federal civil rights lawsuits against the City prior to this one. *See* Doc. 19 at 3 & n.2. Mr. Reyes has submitted many complaints to the APD, the Office of Police Monitor/ Oversight, and the City about APD officers mistreating him and others. *Id.* at 10.⁵

³ Mr. Reyes objects to the Report and Recommendation's failure to reference the undisputed evidence of Mr. Reyes's publications and its failure to acknowledge that his extensive publications and vociferous criticism of APD conduct support a reasonable inference that ADP officers knew he is a citizen journalist, know he records their activity for publication, and have a reason to retaliate against him for exercising his First Amendment rights.

⁴ Mr. Reyes objects to the Report and Recommendation's failure to reference this extraordinary string of failed charges, except to briefly note two instances described in Mr. Reyes's pleading. Doc. 56 at 2. Mr. Reyes objects to the Report and Recommendation's failure to recognize that such an extended string of dismissed charges raises a reasonable inference that the arrests lacked probable cause or were illegally made in retaliation for Mr. Reyes's exercise of his constitutional rights.

⁵ Mr. Reyes objects to the Report and Recommendation's failure to reference this evidence and its failure to recognize that Mr. Reyes's repeated lawsuits against the City for police misconduct support an inference that his repeated arrests on charges that are consistently dismissed supports an inference of no probable cause or of retaliation.

B. The City, knowing Mr. Reyes is a citizen journalist, has branded him an “anti-police activist,” “loony,” and “turd” since he monitors and criticizes the police.

Beginning as early as February 2017, APD branded Mr. Reyes an “anti-police activist.” The City’s 30(b)(6) witness, *see* Doc 47-1, Ex. 7, admitted that it is “[k]nown by officers” that Mr. Reyes is supposedly “anti-police,” and suggested that the City gave Mr. Reyes the “anti-police activist” designation because “he films and follows officers and all law enforcement” and publishes videos and posts online. *See* Doc. 47-1, Ex. 8 at 63:25-66:10.⁶

The City’s files are filled with communications denigrating Mr. Reyes based on the content of his speech. For example, as early as February 16, 2017, a police report noted that he “is listed as CAUTION/ANTI-POLICE activist” in police records. Doc. 47-1, Ex. 2. *See also* Doc. 47-1, Ex. 3 at 2 (calling Mr. Reyes “a known Anti-Police subject” and noting that he complained that an APD officer obstructed his filming police activity “from the sidewalk” at “a distance”); Ex. 4 (calling Mr. Reyes “a known anti police advocate”); Ex. 5 (calling Mr. Reyes “a known anti-police activist”); Ex. 6 (“Reyes is known as an anti-police activist and self-styled citizen journalist” who “has associated with anti-police organization [sic] ‘Peaceful Streets Project’”).⁷

The City’s electronic database, accessible by all APD personnel, lists Mr. Reyes’s employer as the *Challenger Street Newspaper*, so the City *knows* he is a journalist. Doc. 47-1, Ex. 9. Mr. Reyes’s police profile states in all caps that he is an “ANTI-POLICE ACTIVIST.” *Id.* When anyone enters Mr. Reyes’s name into APD’s system, it will display this information:

⁶ Mr. Reyes objects to the Report and Recommendation’s failure to acknowledge this evidence or recognize that it supports an inference that the City and police are targeting and retaliating against him for his supposedly anti-police speech and viewpoint.

⁷ Mr. Reyes objects to the Report and Recommendation’s failure to acknowledge this evidence or recognize that it supports an inference that the City and police are targeting and retaliating against him for his supposedly anti-police speech and viewpoint.

<u>PERSON PARTICULARS</u>	
Place Of Birth	TEXAS
Occupation	LANDSCAPING
Employer	CHALLENGER STREET NEWSPAPER
Citizenship	AMERICAN
Ethnicity	NON-HISPANIC
Language(s) Spoken	ENGLISH
Height	5'08
Build	FAT
Eye Color	BROWN
Hair Color	BROWN
Additional Remarks	ANTI-POLICE ACTIVIST
Weight	200 LBS.
Complexion	MEDIUM
Hair Style	UNKEPT / SHAGGY

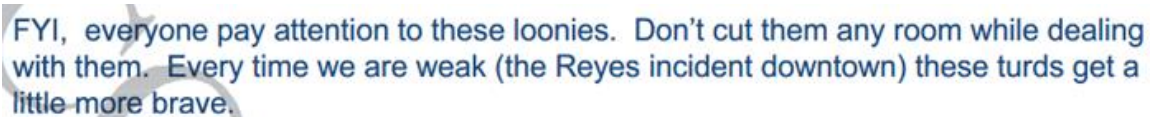
Doc. 47-1, Ex. 9 at 5; *see also* Doc. 47-1, Ex. 10 (containing multiple reports identifying Mr. Reyes as employed by the *Challenger Street Newspaper* and as an “ANTI-POLICE ACTIVIST”).⁸

The City’s Rule 30(b)(6) witness admitted that this profile, which identifies Mr. Reyes as a journalist and labels him as ANTI-POLICE is seen by City officers, detectives and supervisors. Doc. 47-1, Ex. 8 at 71:4-24. He admitted that the City labelled Mr. Reyes a “ANTI-POLICE ACTIVIST” for “informational” purposes, “[s]o when officers encounter Mr. Reyes, they have an understanding of ... his stance in regards with law enforcement.” *Id.* at 71:4-10. That is, the City has singled Mr. Reyes out based on his speech and viewpoint. APD officers notify each other of Mr. Reyes’s presence, using the “Anti Police Activist” label. For instance, on January 5, 2023, all APD Region 4 Supervisors were notified that “Julian Reyes 05/31/68 W/m, Anti Police Activist, has shown up again in DAVID sector,” “filming officers and an ME crew,” even though Mr. Reyes was simply exercising a clearly established First Amendment right. *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (“[A] First Amendment right to record the police does exist, subject only

⁸ Mr. Reyes objects to the Report and Recommendation’s failure to acknowledge this evidence or recognize that it supports an inference that Mr. Reyes’s speech and viewpoints are widely known at APD and that the City and APD are targeting and retaliating against him for his supposedly anti-police speech and viewpoint.

to reasonable time, place, and manner restrictions.”).⁹

A February 2020 email chain epitomizes the City’s knowledge of Mr. Reyes’s First Amendment activities. An APD Crime/Intelligence Analyst emailed an e-zine published by “Stop the Sweeps” to another analyst and to others, stating that the publication was “most likely” “penned by Julian Reyes.” Doc. 47-1, Ex. 12 at 2. The analyst claimed Mr. Reyes was “bashing” the City, calling APD Officer Yarger “a ‘bully’ who ‘escalates confrontations,’” and complaining about “[a]dditional anti-police sentiment is expressed on Pages 22-23.” *Id.* This email – targeting Mr. Reyes based on the content of his speech – was forwarded to an APD Commander and others, and a Sergeant then forwarded the e-zine to eleven more APD officers while calling Mr. Reyes a “loon[y]” and a “turd.”



FYI, everyone pay attention to these loonies. Don't cut them any room while dealing with them. Every time we are weak (the Reyes incident downtown) these turds get a little more brave.

Doc. 47-1, Ex. 12 at 1. The summary judgment record contains clear evidence of an APD supervisor directing officers to consider Mr. Reyes like excrement based on his speech; there is no evidence that this direction was ever countermanded or did not represent, in reality, the City’s true policy and practice and reflected APD’s singular focus on Mr. Reyes’s vocal criticism of APD. The Report and Recommendation simply ignores this clear evidence of APD antipathy towards Mr. Reyes and those who would criticize APD’s conduct.¹⁰

⁹ Mr. Reyes objects to the Report and Recommendation’s failure to acknowledge this evidence and the “turd” email, and the failure to recognize that it supports an inference that Mr. Reyes’s speech and viewpoints are widely known at APD and the City and that APD officers are targeting and retaliating against him for his supposedly anti-police speech and viewpoint. This omission is particularly glaring given the Report and Recommendation’s focus on Mr. Reyes’s use of (constitutionally protected) profanity.

¹⁰ Mr. Reyes objects to the Report and Recommendation for ignoring this direct proof, from City documents, that Mr. Reyes is known to APD for his speech and viewpoints and is disliked and disrespected because of them. Mr. Reyes objects to the Report and Recommendation’s failure to

IV. Mr. Reyes objects to the Report and Recommendation because multiple contested issues of fact preclude summary judgment on his First Amendment claims.

A. There are contested issues of fact as to whether probable cause supported Mr. Reyes's arrests and is ample evidence to support an inference that, even if there was probable cause, Mr. Reyes's arrests were in retaliation for the exercise of his First Amendment rights.

January 4, 2019, arrest. On January 4, 2019, Mr. Reyes was filming APD officers clearing homeless people from the sidewalk. Doc. 47-1, Ex. 13A. He recorded the group objecting to the officers' conduct. *Id.* Mr. Reyes began expressing his own views. *Id.* An officer told Mr. Reyes to step onto the curb, which he did. *Id.* at 00:04:20. Mr. Reyes sat down on the sidewalk, further away from the officer, *id.* at 00:05:35, but then a different officer ordered Mr. Reyes to stand up, move, or leave the scene, even though he posed no threat to anyone's safety and was not interfering with the officers' ability to write citations. *Id.* at 00:06:35. This officer claimed Mr. Reyes riled up the group, but the video and Mr. Reyes's affidavit contradict this, showing that they had been "riled up" before Mr. Reyes arrived by the police. *Id.* at 00:07:10. Nonetheless, Mr. Reyes was arrested, *id.* at 00:07:18, for "interfering with public duties," Doc. 47-1, Ex. 13B, even though Mr. Reyes was not obstructing any officer, but merely verbally criticizing their conduct. The City seized Mr. Reyes camera and cell phone. *Id.* at 7. The Travis County Attorney's Office dismissed the charges. Doc. 47-1, Ex. 13C.

It is well established that verbally criticizing police conduct is not probable cause to arrest for interference with public duties, under both Texas law and the First Amendment. Tex. Penal Code § 38.15(d) (providing defense to offense of "Interference with Public Duties" if "the interruption, disruption, impediment, or interference consisted of speech only."); *Freeman v. Gore*,

recognize that this evidence from the City's own files provide strong support for an inference that APD has targeted Mr. Reyes based on his speech, not on his conduct.

483 F.3d 404, 414 (5th Cir. 2007) (“yelling” and “screaming” at a police officer does not constitute probable cause to arrest for interference with public duties); *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (“Second, contrary to the city’s contention, the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”); *Pulliam v. Fort Bend Cnty, Tex.*, No. 4:22-CV-04210, 2024 WL 4068767, at * (S.D. Tex. Sept. 5, 2024) (“Cases where courts find probable cause for interference-with-public-duties arrests usually involve some sort of physical obstruction by the arrestee.”).¹¹ The Report and Recommendation credits, as true and uncontested, the APD report’s account of this arrest. Doc. 56 at 9-10. While the Report and Recommendation acknowledges that Mr. Reyes was told he was “interfering with police duties” simply because he was objecting to the police conduct, *id.* at 10, it fails to recognize that this was an incorrect statement of the law or that that Mr. Reyes’s speech was constitutionally protected and could not form the basis for an arrest for “interfering with public duties.” *Freeman*, 483 F.3d at 414. That is, even if there was “probable cause” under Texas law for Mr. Reyes’s arrest based on his critical speech, that arrest was illegal.

There is, therefore, summary evidence (even if contested) that Mr. Reyes’s arrest was unconstitutional and based on his speech and criticism of the police, not conduct that interfered with the officers’ ability to issue citations. APD cannot bootstrap itself into probable cause for an arrest by giving a citizen an unlawful order and then arresting them for failing to comply.

¹¹ APD General Order 302, entitled “Public Recording of Official Acts,” provides that “[a] person’s recording of officer’s activity from a safe distance, and **absent any attendant action that obstructs the activity or threatens the safety of the officers, does not constitute interference.**” Doc. 47-1, Ex. 21 (emphasis added). The order recognizes that “[a] person has the right to express criticism of the police activity being observed,” and that criticism does not constitute interference if it does not jeopardize the safety of others and “does not violate the law or incite others to violate the law.” *Id.* The summary judgment evidence shows, however, that the APD has an unwritten policy of ignoring General Order 302 as to Mr. Reyes, and instead discriminates and retaliates against him because he is a known, vocal critic of the City’s homeless policy and policing.

Therefore, even without showing that Mr. Reyes was treated differently than others on January 4, 2019, there is evidence that this arrest violated Mr. Reyes's First Amendment rights.

November 5, 2019. On November 5, 2019, Mr. Reyes was arrested while filming police for allegedly violating a City camping ordinance. Doc. 47-1, Ex. 14A. Although others were present filming the police, only Mr. Reyes was arrested. *Id.*, Ex. 14B. The police report shows that the officers knew Mr. Reyes is “a local activist who frequently follows police officer [sic] around documenting their actions and placing them on the internet for view,” *id.*, Ex. 14A at 10, calling him as “a self proclaimed member of the press and a local activist.” *Id.* at 15. During the arrest, APD Corporal Carlisle told Mr. Reyes he was being arrested for “your political views and beliefs.” Doc. 47-1, Ex. 1 ¶ 8(d). Afterwards, Lt. Christopher Gwaldo emailed the group “APD DTAC Supervisors” that Mr. Reyes had been arrested, unlike other “protestors present filming.” Doc. 47-1, Ex. 14B. That email was forwarded to eleven more individuals, reinforcing APD's knowledge that Mr. Reyes films and publishes police activities in Austin. Doc. 47-1, Ex. 14C.

The Report and Recommendation, while recognizing that “others were also filming police” who were not arrested, concludes that this proves Mr. Reyes was not “singled out because he was filming.” Doc. 56 at 12. This conclusion ignores Mr. Reyes's claim that *he personally* has been singled out by the City over twenty times for disparate treatment because the City has labeled him an “anti-police activist” who criticizes police conduct. The fact that Mr. Reyes alone was arrested *supports*, rather than refutes, his claim of retaliatory arrest. Such retaliation is actionable, even when an arrest is supported by probable cause, and even when it is a single arrest, if motivated by policy. *Lozman v. City of Riviera Beach*, 585 U.S. 87, 100-01 (2018). There is summary judgment evidence, therefore, that this arrest violated Mr. Reyes' First Amendment rights.

June 20, 2020. On June 20, 2020, Mr. Reyes was filming, from a safe distance, EMS personnel forcibly strapping a person in distress onto a stretcher on Sixth Street. *See* Doc. 47-1, Ex. 15A at 00:17:15. Mr. Reyes knew the woman and knew she did not like being restrained. *Id.*, Ex. 1 at ¶ 8. When a pedestrian intentionally blocked Mr. Reyes’s view, Mr. Reyes flicked the man’s hat off in frustration. *Id.* at 00:17:30. A second pedestrian then knocked Mr. Reyes’s camera out of his hands and into the street. *Id.* at 00:17:35. Rather than respond to this assault on Mr. Reyes, an APD officer approached only Mr. Reyes, pushing him toward a wall and demanding that Mr. Reyes stand back, even though he was not interfering with the police or EMS. *Id.* at 00:17:40; Ex. 15B at 00:18:00. Mr. Reyes took out another camera to record the officer’s conduct, but the officer continued to push him. *See id.*, Ex. 15B at 00:18:06. After several shoves, Mr. Reyes’s hand instinctively slapped the officer’s arm away. *Id.* After goading Mr. Reyes into that reaction, the officer then arrested him. *Id.*

The Report and Recommendation’s description of the video of Mr. Reyes’ arrest, at the very least, is debatable. The description omits the fact that the officer shoved Mr. Reyes multiple times, without apparent justification. *See* Doc. 47-1, Ex. 15B at 00:18:04-50. It states that “Reyes does not comply with Larned’s instructions and tries to leave,” Doc. 56 at 12-13, but the video does not appear to support this claim; Mr. Reyes made no apparent motion to leave; he held his camera to film and continued to explain to the officer that he was the victim of an assault until he was shoved again, reacted, and was arrested. *See* Doc. 47-1, Ex. 15B.

Here, too, even if there was probable cause to arrest, the Report and Recommendation sidesteps the illegality of a *retaliatory* arrest by defining the relevant group of similarly situated individuals at too high a level of generality. There were two, non-restrained citizens on the scene – one with a camera and one without. Notably, the man without the camera assaulted Mr. Reyes

by knocking the camera out of his hand was not arrested. APD attempted to excuse this differential treatment on the nonsensical claim that he was “acting in the defense of another.” Doc. 47-1, Ex. 15C at 12. Knocking a person’s camera into the street is not “legitimate defense of another.” This transparently false post-hoc excuse for treating a person who hindered Mr. Reyes’s effort to film police conduct more favorably supports the inference that the City was discriminating and retaliating against Mr. Reyes for his First Amendment-protected activity. As with every arrest at issue in this case, the charges against Mr. Reyes were dropped once they reached an unbiased party. Doc. 47-1, Ex. 15D, Ex. 15E.

Although video evidence can be useful, its value is limited. It should not be relied upon to grant summary judgment and deprive a plaintiff of his day in court if “one party’s version of evidence does not ‘blatantly contradict’ the recording.” *Kost*, 458 F. Supp. 3d at 582 (quoting *Ramirez v. Martinez*, 716 F.3d 369, 374 (5th Cir. 2013)). This is particularly true where there are *hours* of video evidence subject to different interpretations, as here, rather than a short clip showing whether a stoplight was red or green. The video evidence, at a minimum, does not disprove Mr. Reyes’s version, and thus does not support summary judgment.

July 22, 2020. On July 22, 2020, Mr. Reyes was arrested while filming City personnel conducting a homeless camp sweep, on public property from a safe distance, and without interfering with their actions. *See* Doc. 47-1, Ex. 16B at 00:01:55. A City employee and APD officers approached Mr. Reyes and demanded that he move further away. *Id.* at 00:03:20. Mr. Reyes defended his right to film where he was, but he did obey the unlawful order. Doc. 47-1, Ex. 16A at 00:03:20; Ex. 16B at 00:08:35. APD officers arrested Mr. Reyes, anyway, for “interference with public duties,” although the video evidence shows he was not interfering with

the officers in any way, other than filming from a safe distance and defending his right to do so. Doc. 47-1, Ex. 16A at 00:03:35; Ex. 16B at 00:08:48.

Despite the governing legal standard about drawing all reasonable inferences against the non-movant, the Report and Recommendation credits the APD's version of events and seems improperly concerned about the language Mr. Reyes used to defend his rights. Doc. 56 at 13-14. The Report and Recommendation does not identify any evidence, let alone uncontradicted proof, that Mr. Reyes was "interfering" with any APD officer's duties, other than not complying (fast enough) with their demand that he follow their arbitrary command to "move away." *Id.* The fact that others filming might have obeyed a police command is no evidence that Mr. Reyes committed an offense, let alone uncontested evidence that he interfered with police duties. As with each prior arrest, the charges against Mr. Reyes were dismissed. Doc., Ex. 16C.

There is a fact issue as to whether there was probable cause to arrest Mr. Reyes for "interference with public duties" on July 22, 2020, and even if there was probable cause, the APD's treatment of Mr. Reyes previously and that day supports a reasonable inference that his arrest was in retaliation for his speech, viewpoint, and filming police in violation of the First Amendment.

December 23, 2023. On December 23, 2023, Mr. Reyes was filming, from a considerable distance and without interfering, ADP officers who had two individuals handcuffed against a patrol car. Doc. 47-1, Ex. 18A at 00:00:24. Two pedestrians are clearly seen walking directly past the police and the two handcuffed individuals, much closer than Mr. Reyes, without being confronted by the police in any way. *Id.* at 00:00:43. Mr. Reyes asked an officer near him whether he could use the sidewalk as those other people were doing, but was told he could not, without reason. *Id.* at 00:01:05. After the police placed the two suspects in a patrol car, another couple walked past the police vehicles, again quite close, and again without any interference by APD. *Id.* at 00:01:10.

Only Mr. Reyes and his companion, who was also filming, were prevented from getting any nearer to the police vehicles. *Id.*

After the suspects were in the patrol car, Officer Yarger inserted himself into the situation. Officer Yarger had received Sgt. Breckenridge's email calling Mr. Reyes a "turd" and urging officers not to be "weak" when dealing with him. Doc. 47-1, Ex. 12. Officer Yarger had been identified by name in the "Stop the Sweeps" publication, which had warned that he was a bully who escalated situations. *Id.* at 10. Officer Yarger has received oral and written reprimands, including a reprimand for being rude and failing to maintain an impartial attitude, and has been suspended for misconduct. Doc. 47-1, Ex. 20 at 18:3-20:13.

For no apparent reason, Officer Yarger charged at Mr. Reyes, yelling at him to move further away, despite the suspects already being in the patrol car and other individuals having been permitted to get much closer to the police. Doc. 47-1, Ex. 18A at 00:001:35. The City admits it is not lawful to demand that a citizen move off a public sidewalk that is not within a crime scene or work zone. Doc. 47-1, Ex. 8 at 101:19-22. Nevertheless, Officer Yarger gave Mr. Reyes a single instruction to back up, and while Mr. Reyes was doing so, but apparently not fast enough for Officer Yarger, Officer Yarger violently seized Mr. Reyes and arrested him. Doc. 47-1, Ex. 18A at 00:001:35.

Again, the Report and Recommendation credits the City's version of events and ignores contradictory evidence and reasonable interpretations of the evidence. The Report and Recommendation states that Mr. Reyes was arrested "for interfering with a police investigation and public duties," that "he attempted to interfere with a police investigation and willfully violated police orders," and that he was in a "crime scene." Doc. 56 at 15. Respectfully, the evidence simply does not support these conclusions, and certainly does not establish them conclusively.

There is no evidence the location was a “crime scene.” There was no police tape or police cordon, just two individuals handcuffed against a police car for reasons that do not appear in the record. There is no evidence that any crime had taken place in the location. Moreover, other citizens were allowed to walk directly past the suspects – much closer than Mr. Reyes ever approached – without police interference. At the time Mr. Reyes was arrested, the suspects were contained within a patrol car. While the Report and Recommendation states that “[t]he video shows no other pedestrians failing to comply with police orders to move away from a crime scene [sic],” Doc. 56 at 15, *no other pedestrians were ordered to do so*, even those who approached the arrestees directly and passed by them within a few feet. There is substantial evidence that Mr. Reyes was not interfering with police duties and that he was arrested by an APD officer with a disciplinary history who had been instructed by a superior not to be “weak” when dealing with this “turd.” This evidence supports a reasonable inference that Mr. Reyes was singled out for disparate treatment because of his perceived anti-police viewpoint and First Amendment activity of filming the police. A reasonable factfinder could conclude that Officer Yarger was targeting Mr. Reyes specifically, as he required things of Mr. Reyes that he required of no one else and gave him no reasonable opportunity to comply with an improper order before arresting him.

March 8, 2024. As a final example, on March 8, 2024, Mr. Reyes was filming a small protest in Downtown Austin when he saw Jeff Zavala, another citizen journalist, being arrested by APD officers. Doc. 47-1, Ex. 19A at 00:05:30. As the officers took Mr. Zavala to a City vehicle, Mr. Reyes asked why he was being arrested. *Id.* at 00:06:50. As Mr. Reyes filmed his co-journalist’s arrest, police officers used their bicycles as a barricade between the sidewalk and street. *Id.* at 00:07:40. Officers had also blocked the lane of traffic closest to the sidewalk. *Id.* at 00:08:00. Mr. Reyes walked closer to the bicycle barricade to get a better view, criticizing the officers’

actions; he did not cross the barricade or interfere with them. *Id.* at 00:08:50. Despite posing no threat to anyone's safety, police officers demanded Mr. Reyes move back to the sidewalk. *Id.* Mr. Reyes obliged. *Id.* at 00:09:13; Doc. 47-1, Ex. 19B at 00:06:41. Nonetheless, an APD Lieutenant commanded his officers, "Grab Julian; he's going to jail," Doc. 47-1, Ex. 19C at 00:19:10, again reflecting ADP's knowledge of Mr. Reyes. Mr. Reyes was arrested "for Pedestrian on a roadway," although the roadway was closed where Mr. Reyes had stood, and although Mr. Reyes had returned to the sidewalk as directed, which is clearly shown on an officer's body cam. Doc. 47-1, Ex. 19B at 00:06:57.

The Report and Recommendation inaccurately states that Mr. Reyes was arrested "for blocking a hotel driveway," Doc. 56 at 16, contrary to the police report. The Report and Recommendation cites "Dkt. 37" to support this assertion, *id.*, but that document is the Agreed Motion for Entry of Scheduling Order Deadlines, which does not refer to this arrest. *See* Doc. 37. The Report and Recommendation also states that Mr. Reyes was arrested because he "failed to comply" with the officer's orders, Doc. 56 at 16, when the video shows that he *did* comply by moving from the roadway to the sidewalk, and that he was arrested while *on the sidewalk*. Doc. 47-1, Ex. 19A at 00:9:31; Ex. 19B at 06:30. Another person who was behind Mr. Reyes filming from the hotel driveway in a business suit was not arrested. *Id.*

Mr. Reyes objects to the Report and Recommendation's conclusion that the evidence is undisputed that there was probable cause for his arrest. The summary judgment evidence, like that of his prior arrests, supports a conclusion that APD officers know who Mr. Reyes is (he was addressed by his first name) and knew that he was filming police as a journalist, a fact contained in the APD database. The fact that "a woman also was arrested while standing in the driveway but not filming" does not conclusively prove that Mr. Reyes was not singled out, as the Report and

Recommendation suggests, Doc. 56 at 16, because Mr. Reyes was arrested while on the sidewalk after complying with the officer's order, not on the driveway.

B. There is summary judgment evidence supporting an inference that the City has a pattern or practice of violating Mr. Reyes's First Amendment rights and retaliating against him for exercising them.

Section 1983 provides a right of action against municipalities for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The Fifth Circuit has held unequivocally that "First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions." *Turner*, 848 F.3d at 688. "Filming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy." *Id.* at 689.

Gathering information about government officials in a form that can be readily disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.' ... This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties. Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.

Id. at 689-90 (quoting *Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011) (citations omitted)).

A municipality is liable under Section 1983 when (1) an official policy or practice; (2) promulgated or knowingly tolerated by a municipal policymaker; (3) was the moving force behind the violation of the plaintiff's constitutional rights. *Webb v. Town of Saint Joseph*, 925 F.3d 209, 214 (5th Cir. 2019).

An official policy need not be written; it may constitute "a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy."

Alvarez v. City of Brownsville, 904 F.3d 382, 390 (5th Cir. 2018). “That is, the existence of a persistent pattern of illegal conduct, tolerated by municipal policy makers, tends to show that the subject conduct ... represents the realization of an unlawful policy.” *Milam v. City of San Antonio*, 113 F. App’x. 622, 625 (5th Cir. 2004)).

[T]he failure to take disciplinary action in response to an illegal arrest, when combined with other evidence, could tend to support an inference that there was a preexisting de facto policy of making illegal arrests: the policymaker did not discipline the employee because, in the policymakers’ eyes, the employee’s illegal conduct actually conformed with municipal policy.

Id. The City acknowledged that there was no discipline or training of police officers and no changes in APD policy. Doc. 47-1, Ex. 8 at 88:10-15, 89:11-22; 90:12-23; 95:21-96:5, 102:12-103:9.

The summary judgment evidence is more than sufficient to support a finding that the City’s repeated arrests of Mr. Reyes reflect an unwritten policy to prevent, disrupt, or retaliate against Mr. Reyes’s exercise of his First Amendment rights.

1. The City confirmed that APD’s arrests of Julian Reyes while filming police activities are fully consistent with its policy.

The City produced a Rule 30(b)(6) witness, Assistant Chief Eric Miesse, to testify as to (1) the City’s policy and practice regarding arrests of individuals filming police activity; (2) whether APD’s arrests of Mr. Reyes were consistent with the City’s policy and practice; and (3) whether any officer received any correction or discipline due to the nature of Mr. Reyes’s arrests. Doc. 47-1, Ex. 7. Assistant Chief Miesse testified that he read the arrest reports and watched the available video(s) for every arrest from January 2019 to January 2024. Doc. 47-1, Ex. 8 at 85:13-22. He then testified, on the City’s behalf, that each arrest was pursuant to City policy. *Id.* at 86:1-2; 88:6-9; 89:8-10; 90:9-11; 95:18-20; 102:9-11. He confirmed that the City

did not discipline or re-train any of the involved officers and made no changes in APD policy as a result. *Id.* at 88:10-15; 89:11-22; 90:12-23; 95:21-96:5; 102:12-103:9.

2. Probable cause does not defeat Julian Reyes’s claims, and even if it did, there are fact issues as to whether the City had probable cause to arrest him.

It is uncontested that the City’s charges against Mr. Reyes are routinely dismissed, and that every arrest of Mr. Reyes while filming police resulted in a no-bill, dismissal, or acquittal. While probable cause may defeat a one-off First Amendment claim against an individual officer, *see Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), probable cause does *not* defeat a First Amendment claim against a municipality for a pattern of discriminatory and retaliatory arrests. *Lozman*, 585 U.S. at 100. “[W]hen retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.” *Id.* at 100-01. Where “a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been,” probable cause becomes immaterial. *Buehler v. Dear*, 27 F.4th 969, 993-94 (5th Cir. 2022). Recently, the Supreme Court clarified that the *Nieves* exception does not “demand for virtually identical and identifiable comparators.” *Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024).

There is ample summary judgment evidence that APD is retaliating against Mr. Reyes. As noted above, Mr. Reyes was repeatedly arrested while filming police even though others who were filming but not considered “turds” by the APD, or who were not filming, were left alone:

- On November 5, 2019, officers only arrested Mr. Reyes despite other individuals present filming the event;
- On June 20, 2020, APD officers arrested Mr. Reyes for assault, but let the man who knocked Mr. Reyes’s camera out of his hands walk away;

- On December 23, 2023, Officer Yarger arrested Mr. Reyes but let others who were not filming approach the “crime scene” much more closely without ordering them to move; and
- On March 8, 2024, officers arrested Mr. Reyes for blocking a driveway despite him obeying an order to return to the sidewalk.

Moreover, the City’s probable cause to arrest Mr. Reyes is in dispute. While the dismissal of any single charge may not show the lack of probable cause, the routine dismissal of charges lodged against Mr. Reyes calls into question the City’s practice of routinely arresting him while filming police and supports a reasonable inference, and thus a fact issue, that Mr. Reyes has been subject to arbitrary arrests while filming or criticizing the police based on his speech and viewpoint, not conduct.¹²

3. There is ample evidence that the City has singled Julian Reyes out for discrimination and retaliation for exercising his First Amendment rights.

Mr. Reyes objects to the Report and Recommendation because it overlooks substantial summary judgment evidence that APD, with the City’s approval and ratification, targeted Mr. Reyes because of his speech critical of APD. APD has officially and continuously labeled Mr. Reyes as an anti-police activist based on his viewpoint. *See* Doc. 47-1, Ex. 8 at 63:25-64:10; Ex. 9 at 5; Ex. 10.

This is viewpoint discrimination: the City does not label “pro-police activists.” Doc. 47-1, Ex. 8 at 76:3-6. Viewpoint discrimination is “an egregious form of content discrimination.”

¹² Although *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979), notes that a suspect’s later acquittal does not mean there was no probable cause for their arrest, *DeFillippo* does not address the question presented here, which is whether the repeated dismissal of charges before trial supports an inference that the arrests lacked probable cause or were made pursuant to a constitutionally impermissible policy or practice.

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). The City has encouraged its officers to commit viewpoint discrimination by labelling Mr. Reyes according to his expressed opinions about APD. There is substantial summary judgment evidence that the City treats Mr. Reyes differently than other citizens, whether they are filming or not. Doc. 47-1, Ex. 14B (noting Mr. Reyes was the only person arrested, despite other protesters filming); Doc. 47-1, Ex. 15C at 12 (declining to arrest the person who knocked away Mr. Reyes’s camera); Doc. 47-1, Ex. 16A (arresting only Mr. Reyes, despite another individual filming). APD has singled out Mr. Reyes based on his speech since at least 2017. Doc. 47-1, Ex. 3 at 2; Ex. 4; Ex. 5; Ex. 6; Ex. 14A at 10. Mr. Reyes objects to the Report and Recommendation because it fails to recognize the substantial summary judgment evidence supporting Mr. Reyes’s claim of discriminatory and retaliatory treatment by ADP due to his speech.

V. Mr. Reyes objects to the Report and Recommendation’s conclusion that he submitted “no evidence” that the City violated the Privacy Protection Act.

1. The Privacy Protection Act.

In 1979, the Supreme Court held that reporters have no First Amendment right to be free from searches and seizures of “evidence” they may have gathered while newsgathering. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1979). In response, Congress enacted the Privacy Protection Act of 1980 (“the PPA”), which prohibits federal and state governments, except in narrow circumstances, from seizing publishers’ work product and documentary materials – with or without a search warrant. 42 U.S.C. § 2000aa. Congress provided a civil remedy for those aggrieved by a search or seizure in violation of the PPA. 42 U.S.C. § 2000aa-6(a)(1); (f). Governmental units may not assert the purported immunity or good faith of the officer who conducted the search and seizure. 42 U.S.C. § 2000aa-6(c). *See Binion v. City of St. Paul*, 788 F. Supp. 2d 935, 948 (D.

Minn. 2011) (fact issues precluded summary judgment on PPA claim against City, which lacked immunity for illegal seizure of internet journalist’s videos).

The PPA prohibits “a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or similar form of public communication” 42 U.S.C. § 2000aa(a). “Work product materials” include materials “prepared, produced, authored, or created” “in anticipation of communicating such materials to the public” that are possessed for that purpose and include “mental impressions, conclusions, opinions, or theories” of the person who prepared them. 42 U.S.C. § 2000aa-7(b).

The PPA also prohibits officers from searching or seizing “documentary materials,” which include “written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs” 42 U.S.C. § 2000aa(b); § 2000aa-7(a).

“Work product” and “documentary materials” may be searched for or seized if “there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate,” but not when “the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein” 42 U.S.C. § 2000aa(a)(1); (b)(1).¹³

¹³ The other exceptions are not relevant here: national defense, classified information, restricted data, child pornography, child sex trafficking, to prevent death or serious bodily injury, to prevent destruction, alteration, or concealment, or after a court order produced in response to a subpoena has been defied. *See* 42 U.S.C. § 2000aa(a)(1)(2); (b)(1)-(4).

2. The Report and Recommendation fails to recognize contested issues of fact that preclude summary judgment on Mr. Reyes’s Privacy Protection Act claims.

The City’s motion addressed only the October 24, 2021, seizure of Mr. Reyes’s journalistic materials. Doc. 44 at 18-19. The City ignored its seizure of Mr. Reyes’s cameras and materials conducted on January 4, 2019. *See* Doc. 47-1, Ex. 13B at 7. Because the City’s motion did not address the second seizure, Mr. Reyes did not address it in his response. Yet, the Report and Recommendation concluded Mr. Reyes waived his claim as to the second seizure. The Report and Recommendation should not have recommended the grant of summary judgment as to the January 4, 2019 seizure because the Court did not give Mr. Reyes notice that it would rule on this seizure *sua sponte*. *See* Fed. R. Civ. P. 56(f)(3) (“After giving notice and a reasonable time to respond, the court may: ... consider summary judgment on its own *after identifying for the parties material facts that may not be genuinely in dispute*.” (emphasis added)); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1398 (5th Cir. 1994) (“[W]e have vacated summary judgments and remanded for further proceedings where the district court provided no notice prior to granting summary judgment *sua sponte*, even where ‘summary judgment may have been proper on the merits.’” (quoting *Judgwin Props. Inc. v. U.S. Fire Ins. Co.*, 973 F.2d 432, 437 (5th Cir. 1992))). In any case, the Report and Recommendation erroneously recommends dismissal of both claims.

First, the assertion that Mr. Reyes “did not identify himself as a member of the press,” and did not “provide[] any evidence he had his cameras with him because he intended to record his activity and disseminate the material to the public,” Doc. 44 at 18, Doc. 56 at 23, 25, ignores both the facts and the law. Since 2017, the City had flagged Mr. Reyes as an “anti-police *activist*,” indicating it knew he was engaging in constitutionally protected activities by criticizing police

conduct. *E.g.*, Ex. 2. The City knows he works for the *Challenger Street Newspaper*; it is in the City's profile of Mr. Reyes available to every APD officer. In any case, the PPA is not limited to "the press;" it applies whenever a person is "reasonably believed" to "have a purpose to disseminate to the public" materials. 42 U.S.C. § 2000aa(a). Steve Jackson Games was not "the press;" it published role playing game books, yet Judge Sparks correctly held that its work product materials were protected from seizure by the Secret Service, even pursuant to a search warrant. *Steve Jackson Games, Inc. v. U.S. Secret Service*, 816 F. Supp. 432, 437-38 (W.D. Tex. 1993). The City *admitted* that Mr. Reyes has "told officer that he was recording his [sic] activities." Doc. 44 at 19. *See Garcia v. Montgomery County, Md.*, 145 F. Supp. 3d 492, 524-25 (D. Maryland 2015) (denying summary judgment on PPA claim where journalist identified himself as a member of the press, "a self-identification that would support the reasonable belief that [he] intended to disseminate his recording to the public"). Therefore, the summary judgment record contains not only direct evidence that the City knew Mr. Reyes is a journalist who disseminates his film material online, but the evidence also raised a fact question whether a reasonable officer would believe so by the simple fact that Mr. Reyes was actively filming, let alone all the APD's accumulated and disseminated knowledge about Mr. Reyes's long-standing practice of filming police for publication and criticism.

Second, whether the City had probable cause to arrest Mr. Reyes is in dispute, as noted above. It is also not dispositive, because the purported existence of probable cause to arrest Mr. Reyes did not provide the City justification to seize his journalistic materials. Those materials did not relate to the purported offense – unless the City arrested Mr. Reyes *for* filming the police, and his recordings was evidence of *that* "offense." If so, that would be admitting to a violation of the First Amendment. *Turner*, 848 F.3d at 690. In any case, the factual disputes in this case over

probable cause precludes summary judgment. *E.g.*, *Basler v. Barron*, No. H-15-2254, 2015 WL 477573, at *12 (S.D. Tex. Feb. 6, 2017) (PPA applies to arborist by profession who contributes to internet publications critical of police; denying summary judgment due to fact issue on probable cause for arrest); *Dunn v. City of Fort Valley*, 464 F. Supp. 3d 1347, 1369 (M.D. Ga. 2020) (citizen stated claim under PPA when he was arrested without probable cause while filming inside courthouse); *Madaio v. Roden*, No. CV-06-BE-0904-S, 2007 WL 9697592, at *4 (N.D. Ala. May 9, 2007) (denying summary judgment on PPA claim where probable cause and photographer's consent to search were in dispute).

Third, Mr. Reyes was not “recording his own actions,” Doc. 44 at 19, he was recording *the police officer's* actions. He does not point the camera at himself; he records and publishes police conduct.

Because there are, at a minimum, fact issues as to whether the City's seizure of Mr. Reyes's work product and documentary materials violated the PPA, summary judgment should be denied.

VI. Conclusion and prayer.

For these reasons, Plaintiff Julian Reyes requests that the Court sustain his objections to the Report and Recommendation, deny the City of Austin's Motion for Summary Judgment, and grant such other and further relief to which he may be entitled.

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

Respectfully submitted,

By: /s/ Peter D. Kennedy
Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5600 (Phone)
(512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on October 10, 2024, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy
Peter D. Kennedy



Peter D. Kennedy
Board Certified, Civil Appellate Law
Texas Board of Legal Specialization

512.480.5764
512.536.9908 (fax)
pkennedy@gdhm.com

401 Congress Avenue, Suite 2700
Austin, TX 78701-3790

October 23, 2024

Honorable Robert Pitman
District Judge
U.S. District Court for the Western District of Texas
501 West 5th Street, Suite 5300
Austin, Texas 78701

by electronic filing

Re: *Reyes v. City of Austin, et al*, Cause No. 1:21-CV-000992-RP.

**Supplemental Authority in Support of Objections to
Magistrate Judge's Report and Recommendation**

Dear Judge Pitman:

On October 15, 2024, after Plaintiff Julian Reyes filed his Objections to Magistrate Judge's Report and Recommendation (Doc. 60), the U.S. Supreme Court issued a ruling in the much-watched "La Gordiloca" case from Laredo, *Villarreal v. Alaniz*, where, as here, a citizen journalist alleges retaliatory arrest in violation of the First Amendment.

The Fifth Circuit, in a sharply divided decision that drew four dissents, had affirmed the dismissal of Ms. Villarreal's case because she purportedly had offered no evidence that she was arrested while similarly situated individuals who were not engaged in First Amendment-protected activity were not. *Villarreal v. City of Laredo*, 94 F.4th 374, 398 (5th Cir. 2024) (en banc).

Last week, the Supreme Court granted Ms. Villarreal's petition for certiorari and vacated the Fifth Circuit's ruling, remanding the case "for further consideration in light of *Gonzalez v. Trevino*, 602 U.S. [653] (2024) (per curiam)." *Villarreal v. Alaniz*, – S.Ct. –, 2024 WL 4486343 (Oct. 15, 2024).

In *Gonzalez*, the Supreme Court rejected the Fifth Circuit's "overly cramped view of *Nieves* [*v. Bartlett*, 587 U.S. 391 (2019)]." 602 U.S. at 658. *Nieves* recognized an exception to the general rule that probable cause defeats a First Amendment retaliatory arrest claim. In *Gonzalez*, the Supreme Court held that the Fifth Circuit erred when it interpreted *Nieves* as requiring "very specific comparative evidence" of other individuals who engaged in identical conduct as the plaintiff but were not arrested. *Id.* The Court held that "the demand for virtually identical and identifiable comparators goes too far." *Id.*

The Court clarified that, to fall within the *Nieves* exception, a plaintiff need only show that their arrest happened under "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* (quoting *Nieves*, 587 U.S. at 406). The

Honorable Robert Pitman

October 23, 2024

Page 2

only express limitation the Court “placed on such evidence is that it must be objective in order to avoid ‘the significant problems that would arise from reviewing police conduct under a purely subjective standard.’” *Id.* (quoting *Nieves*, 587 U.S. at 407).

The Supreme Court’s disposition of *Villarreal* (as well as *Gonzalez* and *Nieves*) supports Mr. Reyes’s objections to the Report and Recommendation’s finding that he failed to submit objective evidence that his arrests by the Austin Police Department were retaliatory. As set forth in the Objections, Mr. Reyes submitted objective evidence of the APD’s animus towards him and his work as a citizen journalist, Doc. 60 at 7-9, and objective evidence that Mr. Reyes was arrested while others who were not engaged in First Amendment-protected activity (or who were not the target of APD’s animus) were not arrested. Doc. 60 at 10-19.

Mr. Reyes believes the Report and Recommendation, like the Fifth Circuit in *Villarreal* and *Gonzalez*, takes a “too cramped” view of the *Nieves* exception.

Sincerely,

GRAVES, DOUGHERTY, HEARON & MOODY
A Professional Corporation

By: /s/ Peter D. Kennedy
Peter D. Kennedy

CERTIFICATE OF SERVICE

I certify that on October 23, 2024, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Mark A. Stahl
Mark A. Stahl

4706790.v1

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff,

v.

**CITY OF AUSTIN, INC., AUSTIN
POLICE DEPARTMENT, TROY
WISMAR, CHRISTOPHER
CARLISLE, PATRICK WALSH, KYU
SUK AN, SARAH FOSTER, GREG
MCCORMACK, JOHN DOES,
individually and in their official
capacities,
Defendants.**

§
§
§
§
§
§
§
§
§
§
§
§

CASE NO. 1:21-CV-0992-DII-SH

**DEFENDANT CITY OF AUSTIN'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO
MAGISTRATE'S REPORT AND RECOMMENDATIONS**

TO THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE:

COMES NOW Defendant City of Austin and files this response to Plaintiff's objections to the Magistrate Judge's Report and Recommendations as follows:

No First Amendment Violation

The Magistrate Judge correctly recommended that the Court grant the City's motion for summary judgment on the Plaintiff's First Amendment retaliation claim. First, Plaintiff failed to establish that there was no probable cause for the arrests which are the subjects of the retaliation claim. Generally, a plaintiff bringing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest. *Nieves v. Bartlett*, 587 U.S. 391, 404 (2019). Plaintiff failed to do so here.

Here, the Magistrate Judge applied the proper standards in evaluating whether APD officers had probable cause to arrest Plaintiff in each of the previous incidents Plaintiff relies

upon to support his claim. The Magistrate Judge's Report and Recommendation provides a detailed and thorough analysis of each incident and correctly concluded that there was probable cause for each arrest. The Report and Recommendation contravenes Plaintiff's arguments on the probable cause issue with no need for the City to merely echo the Magistrate's reasoning here.

Second, Plaintiff also failed to prove that the narrow exception to the requirement of an absence of probable cause applies. This exception applies only if the plaintiff produces "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 587 U.S. at 407. The Magistrate Judge correctly analyzed each incident in which Plaintiff was arrested and determined that Plaintiff had not produced the required objective evidence.

In Plaintiff's Supplemental Authority in Support of his Objections (Doc. 62), he argues that the Magistrate Judge's Report and Recommendation takes a "too cramped" view of the *Nieves* exception. Plaintiff relies on the U.S. Supreme's Court's decision in *Gonzales v. Trevino*, 602 U.S. 653 (2024) where the Court clarified the type of evidence needed to meet the *Nieves* exception. The Court in *Gonzales* noted that although the *Nieves* exception is "slim," a requirement that a plaintiff demonstrate "virtually identical and identifiable comparators goes too far." *Gonzales v. Trevino*, 602 U.S. 653, 658 (2024). Instead, the Court held that to fall within the *Nieves* exception, a plaintiff must produce objective evidence to prove that his arrest occurred in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.*, quoting *Nieves*, 587 U.S. at 406. The Court in *Gonzales* found that the plaintiff there met that requirement when she produced evidence of a survey of the county's misdemeanor and felony data for the past decade which demonstrated

that no one had ever been arrested for engaging in similar conduct to the plaintiff's which made it more likely that an officer had in fact declined to arrest someone for engaging in such conduct in the past. *Gonzales*, 602 U.S. at 658.

Justice Alito's concurring opinion in *Gonzales* provides further guidance on the scope of the *Nieves* exception. Justice Alito stated that "a plaintiff...must surmount a very high bar when the official can point to the existence of probable cause underpinning an arrest." *Gonzales*, 602 U.S. at 666. Justice Alito noted that "courts must remember that the exception is just that—an exception, and a narrow one at that." *Id.* The concurrence also provided two hypothetical examples of the type of "powerful evidence" that is required to meet the *Nieves* exception. One example is a plaintiff charged with a particular crime who proffers an affidavit from an officer testifying that no one has been prosecuted in the jurisdiction for engaging in similar conduct. *Id.* at 667. A second example would be that same plaintiff producing a statistical survey corroborating the officer's affidavit. *Id.* Justice Alito also clarified that evidence that tends to show only that a plaintiff's constitutionally protected speech was a "substantial or motivating factor" behind the adverse actions should not be considered unless and until the plaintiff can provide other evidence to satisfy the *Nieves* exception. *Id.*, quoting *Lozman v. Riviera Beach*, 585 U.S. 87, 98 (2018).

Here, the Magistrate Judge did not err in concluding probable cause existed for the APD officers to arrest Plaintiff in each of the incidents and the detailed reasons for the existence of probable cause are set out in full in the Report and Recommendation. Thus, Plaintiff must surmount "a very high bar" to demonstrate that the *Nieves* exception applies, and Plaintiff has not done so. He has produced no evidence similar to the survey evidence the plaintiff in *Gonzales* submitted to demonstrate that officers typically exercise their discretion

not to make arrests in similar circumstances. He has not met his burden to prove that he engaged in the type of conduct that is unlikely to result in arrest or prosecution. Thus, the *Nieves* exception does not apply, and the Magistrate Judge did not err in recommending dismissal of Plaintiff's First Amendment retaliation claim.

PRAYER

For the above stated reasons, Defendant City of Austin respectfully requests that the Court overrule Plaintiff's objections to the Magistrate Judge's Report and Recommendations.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION

/s/ H. Gray Laird

H. Gray Laird
Assistant City Attorney
State Bar No. 24087054
gray.laird@austintexas.gov
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78767-1546
Telephone: (512) 974-1342
Facsimile: (512) 974-1311

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on October 31, 2024 I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ H. Gray Laird
H. Gray Laird

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Julian Reyes

vs.

City of Austin, Inc.

§
§
§
§
§

CIVIL NO:

AU:21-CV-00992-RP

ORDER RESETTING BENCH TRIAL

IT IS HEREBY ORDERED that the above entitled and numbered case is reset for **BENCH TRIAL** in Courtroom 4, on the Fifth Floor, United States Courthouse, 501 West Fifth Street, Austin, TX, on **Monday, January 13, 2025 at 09:30 AM**.

IT IS SO ORDERED this 26th day of November, 2024.

A handwritten signature in blue ink, appearing to read 'Rob Pitman', is written over a horizontal line.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-cv-0992-RP

DEFENDANT’S PRE-TRIAL SUBMISSIONS

TO THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin files these pre-trial documents pursuant to Local Rule CV-16(e) and the scheduling order in this case:

- I. Joint Stipulation of Facts
- II. Defendants’ Exhibit List
- III. Witness List
- IV. Defendants’ Proposed Findings of Fact and Conclusions of Law
- V. Estimated Length of Trial

I. Joint Stipulation of Facts

None at this time. The parties will continue to evaluate potential stipulations and will supplement the pre-trial submissions accordingly.

II. Defendant’s Exhibit List

A. Expected Exhibits

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
D-1.	COA 0001-0021- GO 19-3090412			
D-2.	COA 3148-3150 IA 2020-0154			
D-3.	COA 9332-9342 APD Retention Schedule			

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
D-4.	COA 0058-0059 - Arrest Affidavit 19-3090412			
D-5.	Affidavit of Richard Jennings – APD Internal Affairs			
D-6.	COA 0049-0054 - CAD 21-2970640			
D-7.	COA 0022-0042 - GO 21-2970640			
D-8.	GO 21-2970640 – Spitler BWC 21-2970640			
D-9.	COA 2828-2830 - Arrest Affidavit 21-2970640			
D-10.	COA 3200-3201- IA 2021-1084			
D-11.	COA 3202-3204 – IA 2021-1095			
D-12.	Affidavit of Ashley Edwards – APD Training Division			
D-13.	COA 3049-3052- SW Affidavit 21-2970640			
D-14.	COA 2387-2408 - GO 20-0340571			
D-15.	COA 6553 200330774 McCameron BWC			
D-16.	COA 3037(C) 200710611 Visi BWC			
D-17.	COA 3163-3165 – IA 2020-1164			
D-18.	COA 3138-3141 – IA 2020-0135			
D-19.	COA 2409-2420 GO 20-380587			
D-20.	COA 3036(A) 200380587 Holland BWC			
D-21.	COA 3144-3147- IA 2020-0153			
D-22.	COA 2430-2458 - GO 20-1711715			
D-23.	COA 3038(B) Larned BWC 20-1711715			
D-24.	COA 3237-3240 – IA 2022-1047			
D-25.	COA 2656-2671 GO 22-2350929			
D-26.	COA 3041(A) Ramos BWC 22-2350929			
D-27.	COA 3229-3230 – IA COA 3229-3230			
D-28.	COA 2718-2733 GO 23-70037			
D-29.	COA 3045 (A) Pierron BWC 23-70037			
D-30.	COA 3045 (B) Pierron BWC 23-70037			
D-31.	COA 9848-9849- IA 2023-0222			
D-32.	COA 6066 (K) Tuminelli BWC 23-1651442			
D-33.	COA 6029-6065 GO 23-1651442			
D-34.	COA 6066 (T) Smart BWC 23-1651442			

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
D-35.	COA 9467-9478 GO 23-3570148			
D-36.	COA 9467-9478 Yarger BWC 23-3570148			
D-37.	COA 9479-9507 GO 24-681181			
D-38.	COA 9878 Juusola BWC 24681181			
D-39.	Affidavit of Daniel Ellis Affidavit – OPO Complaint Supervisor			
D-40.	Declaration of Robin Henderson – APD Interim Chief of Police			
D-41.	Turner v. Driver Training Bulletin			
D-42.	Plaintiff's Responses to Interrogatories			
D-43.	COA 3231-3233 IA 2022-1044			
D-44.	Affidavit of Renee Moore – APD Records Custodian			
D-45.	COA 1782-1798 GO Report 2014-1530165			
D-46.	GO Report Narratives (Not arrested) (Ex 2 Doc 50)			
D-47.	COA 2196-2213 GO Report 19-41140			
D-48.	Affidavit of Brandon Gilstrap			
D-49.	COA 0972-0974 APD GO 302			

III. Defendant's Witness List

The witnesses listed below have previously been identified to all parties.

A. May call:

- Eric Miesse, Assistant Chief, Austin Police Department
- Det. Gadiel Alas, Austin Police Department
- Patrick Walsh,
- Det. Travis Larned, Austin Police Department
- Det. Richard Spitler, Austin Police Department
- Lt. Christopher Juusola, Austin Police Department
- Det. Daniel McCameron, Austin Police Department
- Joshua Visi,
- Officer Lewis Holland, Austin Police Department
- Officer Jay Ramos, Austin Police Department
- Officer Jackson Pierron, Austin Police Department
- Det. Thomas Tuminelli, Austin Police Department
- Officer Gavin Smart, Austin Police Department
- Sgt. Brian Yarger, Austin Police Department

- Defendant may call any and all witnesses identified by Plaintiff.

IV. Defendant's Proposed Findings of Fact and Conclusions of Law

Attached as Exhibit A.

V. Estimated Length of Trial

Defendant estimates that the trial of this case will require two days.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

/s/ H. Gray Laird III
H. GRAY LAIRD III
State Bar No. 24087054
City of Austin
P. O. Box 1546
Austin, Texas 78767-1546
gray.laird@austintexas.gov
Telephone (512) 974-1342
Facsimile (512) 974-1311

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this the 5th day of December, 2024.

/s/ H. Gray Laird III
H. GRAY LAIRD III

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CASE NO. 1:21-CV-0992-RP

**DEFENDANT CITY OF AUSTIN'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Defendant City of Austin files its Proposed Findings of Fact and Conclusions of Law¹ as follows:

I. SECTION 1983 CLAIM

Plaintiff Julian Reyes contends that his arrests by APD officers violated his First Amendment right to observe and record police activities, and that his arrests were in retaliation for exercising his First Amendment rights. Reyes asserts a claim under 42 U.S.C. §1983 against the City for those alleged constitutional violations.

The general contours of municipal liability for the conduct of its employees under 42 U.S.C. §1983 are well-defined in the Fifth Circuit. A city may not be held liable if the court finds that the plaintiff's constitutional rights were not violated. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003). Even if a city employee or police officer violated a plaintiff's constitutional rights, a city may not be found liable under §1983 under a theory of *respondeat superior*. *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978); *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force*, 379 F.3d

¹ The City's Proposed Findings of Fact and Conclusions of Law are based largely on the Magistrate Judge's Order and Report and Recommendations. (Doc. 56)

293, 308 (5th Cir. 2004). Cities are almost never liable under §1983 for the isolated actions of their employees, and they can only be held liable for acts that are directly attributable to it “through some official action or imprimatur.” *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

To establish municipal liability under §1983, a plaintiff must show: (1) an official policy (2) promulgated by the municipal policy maker (3) which was the moving force behind the violation of a constitutional right. *Id.* A policy or custom is official only “when it results from the decision or acquiescence of the municipal officer or body with final policymaking authority over the subject of the offending policy.” *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989); *Peterson v. City of Fort Worth, Texas*, 588 F.3d 838, 847 (5th Cir. 2009). To establish the “moving force” element, a plaintiff must show a direct causal link between the policy and the constitutional violation. *Piotrowski*, 237 F.3d at 580; *Peterson*, 588 F.3d at 848.

The City cannot be liable under Section 1983 unless Reye’s constitutional rights were violated. *Windham v. Harris Cnty., Tex.*, 875 F.3d 229, 243 (5th Cir.2017). The First Amendment protects freedom of speech and freedom of the press. *Turner v. Lt. Driver*, 848 F.3d 678, 688 (5th Cir. 2017). The First Amendment also generally prohibits government officials from subjecting an individual to retaliatory actions, such as arrest for engaging in protected speech. *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019). A plaintiff bringing a retaliatory arrest claim generally must plead and prove the absence of probable cause for the arrest. *Id.* at 404. There is a narrow exception to this rule if the plaintiff produces “objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” *Id.* at 407.

Probable cause for a warrantless arrest exists when all facts known by a police officer are sufficient for a reasonable person to conclude that the suspect had committed, or was committing, an offense. *Espinal v. City of Houston*, 96 F.4th 741, 745 (5th Cir. 2024). Probable cause “is not a high bar.” *Kaley v. United States*, 571 U.S. 320, 338 (2014). “A ‘fair probability’ that the suspect has committed a crime is enough to establish probable cause. The likelihood that he has done so ‘need not reach [even] the fifty percent mark.’” *Espinal*, 96 F.4th at 745 (quoting *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999)).

Reyes produced evidence that he was arrested seven times by APD officers allegedly without probable cause. The record demonstrates that Reyes’s First Amendment rights were not violated.

a. January 4, 2019

APD officers arrested Reyes on January 4, 2019 for interference with public duties, a Class B misdemeanor. The police report states that Reyes was arrested after he interfered with APD officers trying to hand out citations to three homeless individuals for violating a City ordinance banning camping in public areas such as City sidewalks. Austin, Tex., Austin City Code, § 9-4-11. APD Officer Gadiel Alas states in his report that Reyes “inject[ed] himself into my lawful stop and began antagonizing the group of violators which caused them to become less cooperative with police.” (Ex. D-47, Alas Report 2019-41140). Alas states that he was writing a citation “and I had to stop and address Julian about his behavior which was disruptive and impeding my public duties.” *Id.* Alas then asked Reyes several to move away from him so he could finish fulfilling his duties, but Reyes refused to comply. *Id.* at 60-61. Alas then arrested him. *Id.* at 61.

Reyes argues that he was arrested not for interfering with public duties but because he was filming police activities. Reyes claims that the video from his camera shows that he was singled out and arrested because he was recording the police. The video evidence does not support his allegations; instead, it confirms Alas' police report. The video shows two APD officers attempting to cite four homeless individuals camping on a City sidewalk for violating the City camping ban ordinance. Dkt. 47-1 at 252(Plaintiff's Video Ex. 13A). Reyes approaches one of the APD officers while filming and says the officers should be arrested for harassing and bullying the individuals. (Ex. 13A at 0:02:27-50). As the other individuals argue with the officers about the ordinance, one of the officers asks Reyes to move farther away and tells him he is interfering with police duties. *Id.* at 0:04:29. A few minutes later, the officer again asks Reyes to move away from the area, but he does not comply and tells the officer: "I am not going to do anything you tell me to do." *Id.* at 0:06:18. Reyes then is arrested.

While Reyes claims he was singled out and the only one arrested because he was filming police activities, the video shows he was the only individual failing to comply with police orders and interfering with their duties. The other individuals argued with the officers about the fairness of the City camping ban ordinance, but the video does not show them failing to comply with police orders or interfering with their duties. *Nieves*, 587 U.S. at 407.

The video shows that the officers had probable cause to arrest Reyes for interference with public duties. Section 38.15(a)(1) of the Texas Penal Code provides: "A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with . . . a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law." Probable cause exists when a person does not follow instructions necessary for an officer to perform their duties. *See Spiller v. Harris Cnty., Tex.*, ---

F.4th ----, 2024 WL 4002382, at *4 (5th Cir. Aug. 30, 2024) (finding that officer had probable cause to arrest plaintiff for interference with public duties when he failed to comply with instructions to move away from a crime scene); *Westfall v. Luna*, 903 F.3d 534, 544 (5th Cir. 2018) (finding that officer had probable cause to arrest plaintiff for interfering with his duties when she did not follow his instructions not to go into a home); *Childers v. Iglesias*, 848 F.3d 412, 415 (5th Cir. 2017) (finding that officer had probable cause to arrest plaintiff for violating officer's instructions when plaintiff "did more than just argue with police officers; he failed to comply with an officer's instruction, made within the scope of the officer's official duty and pertaining to physical conduct rather than speech").

b. November 5, 2019

Reyes was arrested on November 5, 2019 for violating the City's camping ban ordinance. In the police report, APD Officer Patrick Walsh states he observed Reyes standing in front of a blue tent set up in a public area in downtown Austin. (Ex. D-4) Walsh repeatedly asked Reyes to take down the tent down because he was violating the City's camping ban ordinance and that his tent was too close to a roadway, where there was substantial risk that Reyes or others could be hit by a car. *Id.* Walsh states that he arrested Reyes "after all options were exhausted and Reyes continued to disregard our commands to disassemble the tent." *Id.*

Reyes does not deny that he violated the City's camping ban ordinance and refused to comply with Walsh's instructions but argues that his arrest was pretextual because he was a member of the press filming police activity. But, as he acknowledges, others "were also filming the police" and were not arrested. Dkt. 47 at 10. Reyes does not show the absence of probable cause or that he was singled out because he was filming. *Nieves*, 587 U.S. at 407; *Childers*, 848 F.3d at 415.

c. June 20, 2020

Reyes was arrested on June 20, 2020 for assaulting a police officer and assault with injury. (Ex. D-22 at 11-14). Reyes claims he was arrested not because he assaulted a police officer, but because he was filming police activities. Video from APD Officer Travis Larned's body-worn camera shows Larned asking a non-responsive individual sleeping on a sidewalk in downtown Austin to get up and move. (Ex. D-23 at 0:01:38). After she does not respond, Larned calls emergency medical services, who arrive and put her on a stretcher. While she is being strapped to the stretcher by Travis County EMS, Reyes can be heard in the background yelling at Larned: "You be fucking nice to her," "she doesn't want to be strapped down," and "she doesn't need you pigs holding her down." *Id.* at 0:17:30-40. Reyes then approaches Larned and tells him that a pedestrian walking by had knocked Reyes' camera out of his hands and into the street. *Id.* at 0:18:09. Larned tells Reyes that he saw Reyes assaulting the pedestrian. Reyes denies that he assaulted the pedestrian and tells Larned he is going to go get his camera from the street. *Id.* at 18:55. Larned tells Reyes not to move and that he is being detained. *Id.* at 18:57. Reyes does not comply with Larned's instructions and tries to leave. When Larned puts his hand on Reyes to stop him, Reyes strikes Larned's arm with his hand. *Id.* at 0:18:59. Larned then arrests Reyes. *Id.* at 0:19:15.

The video shows that Larned had probable cause to arrest Reyes for disregarding his instructions and assaulting him. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *United States v. Watson*, 423 U.S. 411, 418 (1976) ("[A] peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence."); Tex. Penal

Code § 22.01(b)(1) (“An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against . . . a person the actor knows is a public servant while the public servant is lawfully discharging an official duty.”).

Reyes argues that he was singled out because he was filming Larned’s activities, but the video shows that no other pedestrian assaulted Larned or refused to comply with his orders. Reyes does not show that his First Amendment rights were violated. *Nieves*, 587 U.S. at 407.

d. July 22, 2020

Reyes was arrested on July 22, 2020 for interfering with public duties. Reyes argues that he was arrested for recording police activities, while other pedestrians who did not record police activities were not arrested. Reyes’ video evidence contradicts his allegations.

In Reyes’ video, two APD officers ask him to move away from a construction road work zone because they are concerned that he may get injured. Dkt. 47-1 at 347 (Plaintiff’s Video Ex. 16B at 0:06:34-08:15). Reyes tells the officers to “go fuck yourself and get out of my face,” that they have no right to tell him to move, and that he is placing them “under citizen’s arrest.” *Id.* at 07:15-38. After Reyes repeatedly fails to comply with the officers’ instructions to move away, the officers arrest him for interfering with public duties. *Id.* at 0:08:57. The video shows that the officers had probable cause to arrest Reyes for interfering with their duties. *Westfall*, 903 F.3d at 544; *Childers*, 848 F.3d at 415. Another individual who appeared to be complying with the officers’ instructions and who was also filming the APD officers was not arrested. *Id.* at 0:08:58. Reyes fails to show he was singled out for filming police activities. *Nieves*, 587 U.S. at 407.

e. October 24, 2021

Reyes was arrested on October 24, 2021 for disorderly conduct for making unreasonable noise in a public park, in violation of Texas Penal Code § 42.01(1)(5) (prohibiting individuals from intentionally or knowingly making “unreasonable noise in a public place”). In the video from APD Officer Richard Spitler’s body-worn camera, Reyes can be seen and heard walking in and next to Republic Square Park in downtown Austin, using a megaphone to amplify his voice and a recording in which he repeats more than thirty times: “Fuck the police. All cops are bastards. All cops belong in a fucking jail cell.” (Ex. D-8 at 0:02:14-03:05, 43:15-49:59) APD officers reported that “[t]he volume on the megaphone was so loud it could be heard a block away from where Reyes was using it.” (Ex. D-13 at 3) City of Austin Ordinance § 9-2-11 requires individuals to obtain a permit to operate sound equipment “audible to the public.”

Reyes continued to use the bullhorn for more than an hour, during which the officers received many complaints from people at and near the park about the noise and profanities from his hand-held amplifier. (Ex. D-8 at 43:14) APD officers then told Reyes he was violating the City Ordinance by using his amplifier in the park without a permit. *Id.* The video shows Reyes arguing with the officers and informing them that he was not violating the City Ordinance at that time because he was standing on the street next to the park. He continues to use his amplifier to play his profanity-laced recording and to shout expletives at the officers. *Id.* at 43:15-49:59. About 20 minutes later, Reyes reenters the park and again can be heard using his amplifier. *Id.* at 1:12. A few minutes later, APD officers approach Reyes and tell him he is being arrested for using the megaphone in a public park. *Id.* at 1:15:30. The officers take Reyes into custody and seize his cameras and the amplifier. *Id.* at 1:19:19-25.

The video shows the officers had probable cause to arrest Reyes for using an amplifier in violation of the City Ordinance and disorderly conduct for making unreasonable noise in a public place in violation of Texas Penal Code § 42.01(1)(5) (prohibiting individuals from intentionally or knowingly making “unreasonable noise in a public place”). *Atwater*, 532 U.S. at 354. Reyes also does not show he was singled out for the arrest because he was filming the police. The video shows another person also filming the police while yelling profanities, but she was not using a bullhorn and was not arrested. Defendant’s Video Ex. 8 at 1:19:19-25; *Nieves*, 587 U.S. at 407.

f. December 23, 2023

Reyes again was arrested on December 23, 2023 for interfering with a police investigation and public duties. He argues that he was singled out and arrested because he was filming police activity, but evidence from his video camera shows that he attempted to interfere with a police investigation and willfully violated police orders. Dkt. 47-1 at 422 (Plaintiff’s Video Ex. 18A at 0:01:50-00). The video shows that APD officers arrest Reyes after they direct him to walk around a crime scene, but he does not comply and argues with the officers. *Id.* The video shows no other pedestrians failing to comply with police orders to move away from a crime scene. *Id.*

Failure to comply with a police officer’s instruction to move away from a crime scene is not protected speech and gives the officer probable cause for arrest under Texas Penal Code § 38.15. *See Spiller*, 2024 WL 4002382, at *4 (finding that officer had probable cause to arrest plaintiff for interference with public duties when plaintiff refused to leave crime scene when asked to do so); *Duncantell v. State*, 230 S.W.3d 835, 842 (Tex. App.—Houston [14th Dist.] 2007, pet. ref’d). The Court finds that officers had probable cause to arrest Reyes for violating

their instructions to move away from a crime scene, and that Reyes does not show he was singled out for recording the police. *Nieves*, 587 U.S. at 407.

g. March 8, 2024

Reyes was arrested on March 8, 2024 during a protest rally in downtown Austin for blocking a hotel driveway. Again, Reyes argues he was arrested for filming police activity. Again, the video evidence again refutes his allegation. Video from APD Officer Christopher Juusola’s body-worn camera shows that Reyes and others were told repeatedly to move their protest to a sidewalk rather than blocking a hotel driveway. (Ex. D-38 at 0:13:00) After they failed to comply, several individuals were arrested, including Reyes. *Id.* at 0:19:13-31. The Fifth Circuit has found that a police officer had probable cause to arrest an individual for violating the officer’s instructions in similar circumstances. *See Childers*, 848 F.3d at 415 (finding that officer had probable cause to arrest plaintiff when he failed to comply with instructions to move his truck blocking police officers’ entry to property). While Reyes and two other individuals arrested were filming at the time, the video shows that a woman also was arrested while standing in the driveway but not filming. *Id.* at 0:14:49. Reyes does not show he was singled out because he was filming police activity. *Nieves*, 587 U.S. at 407.

Because Reyes shows neither the absence of probable cause for any of his arrests nor “objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been,” he does not show a violation of his First Amendment rights. *Nieves*, 587 U.S. at 404, 407. There can be no liability against the City. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Windham*, 875 F.3d at 243.

Even if Reyes had proven that his First Amendment rights were violated, he fails to show that the City had a policy, custom or practice of violating First Amendment rights by arresting

individuals for filming police activity. The undisputed evidence is that APD has a policy, in the form of written General Order 302, prohibiting officers from arresting or otherwise impeding members of the public from recording police activity “unless such recordings interfere with police activity.” (Ex. D-49)

Reyes also has not established any pattern that could constitute official policy. A pattern amounts to an official policy “when it is so common and well-settled as to constitute a custom that fairly represents municipal policy.” *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (internal quotes and citations omitted). To establish that prior incidents constitute a pattern, a plaintiff must show that the incidents have occurred for so long or with such frequency that policymakers must know that the improper conduct is the ordinary and accepted practice of the employees. *Id.* A pattern will not be established based on isolated incidents. Instead, the pattern must be composed of incidents that are numerous and similar to the specific violation alleged. *Id.* at 850-851. Reyes has not demonstrated a persistent pattern of conduct that constitutes a City policy, custom or practice.

Additionally, Reyes has not proven a causal link between the City’s alleged policy, custom or practice and his arrests. Reyes must prove that his filming of police activity was the moving force behind his arrests. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) citing *Monell v. Dep’t. of Social Services*, 436 U.S. 658, 694 (1978). Reyes has not demonstrated that any alleged policy, custom or practice of the City was the moving force of his arrests. Accordingly, Reyes has not met his burden to show a material fact to meet the third prong of a §1983 claim. For the above reasons, the Court finds that Plaintiff’s Section 1983 claim should be dismissed.

II. Privacy Protection Act Claims

Reyes also asserts that the seizures of his cameras, videos, and other materials during his arrests on January 4, 2019 and October 24, 2021 violated the Privacy Protection Act (“PPA”), 42 U.S.C. § 2000aa. The PPA “generally prohibits government officials from searching for and seizing documentary materials possessed by a person in connection with a purpose to disseminate information to the public.” *Citicasters v. McCaskill*, 89 F.3d 1350, 1353 (8th Cir. 1996). To prevail on a claim of unlawful seizure of work product and documentary materials, a plaintiff must show that (1) he was a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce, and (2) that there was no probable cause to believe he had committed an offense to which the materials relate. 42 U.S.C. §2000aa.

The PPA “carves out various exceptions to the prohibition against searches and seizures of materials intended for public dissemination.” *Sennett v. United States*, 667 F.3d 531, 535 (4th Cir. 2012). Under the “suspect exception,” the police can avoid the constraints of the PPA “when the person possessing the materials is a criminal suspect, rather than an innocent third party.” *Id.* (cleaned up). For the government to take advantage of that exception, there must be “probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” 42 U.S.C. § 2000aa(a)(1). The materials exempted under the suspect exception “must relate to the offense.” *Guest*, 255 F.3d at 341.

1. October 24, 2021 Seizure

Reyes alleges that he was arrested without probable cause by APD officers on October 24, 2021, “while exercising his free speech rights on a public sidewalk” and as “a pretext to stop Reyes from recording the police.” Dkt. 28 ¶¶ 10-11. He alleges that during this arrest his

cameras, “which are his primary work equipment, were seized by APD,” and that his cameras “contained work product and documentary materials that he intended to publish to the public.”

Reyes’s PPA claim fails because APD officers did not have a reasonable belief that Reyes was a member of the press who intended to disseminate the video recordings to the public as required by 42 U.S.C. §2000aa(a). The video evidence shows Reyes accusing the officers of violating his constitutional rights, but at no point informing them that he is a reporter or that he is planning to disseminate the videos to the public. Moreover, the suspect exception to the PPA applies because Reyes was filming while he used a voice amplifier in a public park, and the cameras seized contained evidence related to the offense for which he was arrested.

2. January 4, 2019 Seizure

The video of Reyes’ 2019 arrest shows that he did not identify himself as a reporter or tell the officers that he was filming the police with the intent to disseminate the videos to the public. Doc. 47-1 at 253. Because he comes forward with no evidence that the officers believed he was planning to distribute those videos to the public, he does not show a violation of the PPA. The record also shows that the suspect exception to the PPA would apply to this arrest because Reyes was filming before and while he was arrested, so the cameras seized contained evidence related to the offense for which he was arrested.

For the above reasons, the Court finds that Plaintiff’s claims under the Privacy Protection Act, 42 U.S.C. § 2000aa, should be dismissed.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION

/s/ H. Gray Laird
H. Gray Laird

Assistant City Attorney
State Bar No. 24087054
gray.laird@austintexas.gov
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78767-1546
Telephone: (512) 974-1342
Facsimile: (512) 974-1311

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on December 5, 2024 I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ H. Gray Laird
H. Gray Laird

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,

Plaintiff,

v.

CITY OF AUSTIN,

Defendant.

§
§
§
§
§
§
§
§

1:21-CV-992-RP

ORDER

Before the Court is the Defendant City of Austin’s (“City of Austin”) Motion for Summary Judgment. (Dkt. 44). Plaintiff Julian Reyes (“Reyes”) filed a response brief, (Dkt. 47), to which the City of Austin replied, (Dkt. 50). The Court referred the motion to United States Magistrate Judge Susan Hightower for a report and recommendation pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. (Dkt. 9). Judge Hightower issued her report and recommendation, (Dkt. 56), to which Reyes objected, (Dkts. 61, 62). The City of Austin filed a response to Reyes’ objections. (Dkt. 64). Having considered the parties’ arguments, the factual record, and the relevant law, the Court will adopt the report and recommendation in part and reject it in part, and will deny the City of Austin’s motion for summary judgment as to the existence of a Privacy Protection Act Violation on January 4, 2019, and grant it in all other respects.

I. BACKGROUND

Reyes is a self-described citizen journalist and advocate for homeless Austinites. (R & R, Dkt. 56, at 1, 6). Reyes has frequently filmed police activity and several times has been arrested by the Austin Police Department (“APD”). (*Id.*). Reyes alleges that (1) he been arrested or interfered with on at least thirteen occasions between June 2014 and March 2023 without probable cause and

as a pretext to stop him from recording police, to retaliate against him, and to discourage him from doing so in the future, and (2) APD, by January 2017, had labeled Reyes as an “anti-police activist” based on his repeated activities filming the police. (Dkt. 61, at 1–2). Based on these allegations, Reyes sued the City of Austin under 42 U.S.C. § 1983 (“Section 1983”) for violating his First and Fourteenth Amendment rights. (Dkt. 28, at 1). More specifically, Reyes alleges that there is evidence his arrests “constitute an informal custom, pattern, and practice of the City of Austin to arrest him because of, and in retaliation for, his exercise of” his First Amendment rights. (Dkt. 61, at 1). Reyes also brought claims under the Privacy Protection Act, (“PPA”), 42 U.S.C. § 2000aa, et seq., for illegal seizure of his journalist work product and documentary materials. (*Id.* at 23–24; Dkt. 28, at 1).

Reyes submits several pieces of evidence that he is known to the police and described as anti-police in the APD’s internal communications. For example:

- As of February 2017, the APD internally labeled him as an “anti-police activist.” (Dkt. 61, at 7). More specifically, a police report noted he is listed as “CAUTION/ANTI-POLICE activist.” (*Id.*). Other internal records call him a “known Anti-Police subject,” “a known anti police advocate,” and “a known anti-police activist.” (*Id.*).
- When anyone enters Reyes’ name into the APD system, it displays as part of his profile that he is an “anti-police activist.” (*Id.* at 8). The City of Austin’s 30(b)(6) witness acknowledged that this label is seen by City officers, detectives, and supervisors and that the label functions to ensure officers “have an understanding of . . . his stance in regards with law enforcement.” (*Id.*).
- An internal analyst at the APD emailed a publication written by Reyes to others in the department and said Reyes “bash[es]” the City of Austin. A sergeant forwarded the same publication to other officers and called Reyes, among others, a “loonie[]” and a “turd[].” (*Id.* at 9). The sergeant told the other officers: “FYI, everyone pay attention to these loonies. Don’t cut them any room while dealing with them. Every time we are weak (the Reyes incident downtown) these turds get a little more brave.” (*Id.*).
- Upon review by the county attorney, all of the charges underlying his arrests have been no-billed, dismissed by the prosecuting officer, or resulted in acquittal of Reyes. (*Id.* at 6).

The City of Austin agrees that Reyes has been arrested at least ten times between November 5, 2019, and March 8, 2024, but argues that each time he was arrested for violating the law, not in retaliation for his First Amendment-protected views. (Dkt. 44, at 6).

Out of the arrests alleged, seven are discussed in the briefing on the Motion for Summary Judgment, report and recommendation, and objections. (Dkt. 56, at 9–16). Reyes’ account as to each arrest is briefly summarized below.

- **January 4, 2019:** By Reyes’ account, he was filming officers removing a group of homeless individuals from the sidewalk, and was verbally criticizing the police officers, along with other members of the public, when he was told to leave and then arrested. (Dkt. 61, at 10).
- **November 5, 2019:** By Reyes’ account, he was arrested while protesting Austin’s camping ban ordinance when others were present and filming, but not arrested. (*Id.* at 12).
- **June 20, 2020:** By Reyes’ account, he was protesting EMS personnel who were forcibly strapping a person in distress into a vehicle when he was arrested; before his arrest, Reyes acknowledges he slapped a police officer. (*Id.* at 13).
- **July 22, 2020:** By Reyes’ account, he was protesting on public property as City of Austin personnel conducted a homeless camp sweep. (*Id.* at 14–15). The report and recommendation notes Reyes told the police officers he was placing them “under citizen’s arrest,” (Dkt. 56, at 13), which he does not dispute. He was then arrested.
- **October 24, 2021:** The report and recommendation finds Reyes was arrested for disorderly conduct in a public park for using a bullhorn for over an hour, with an amplifier and over noise complaints, in violation of Texas Penal Code § 42.01(1)(5), (Dkt. 56 at 14–15). Reyes alleges in his declaration that others were present and making similar noise, but not arrested. (Dkt. 47-1, at 10).
- **December 23, 2023:** By Reyes’ account, he was on a public sidewalk filming police officers who had two individuals handcuffed against a car. (Dkt. 61, at 15–16). Reyes says he was told by the officers to move farther away from the police vehicles and then arrested despite complying with the order. (*Id.*).
- **March 8, 2024:** By Reyes’ account, he was filming a protest and saw others being arrested. He went up to the officer to ask why, criticized his actions, and shouted at him. The police demanded he walk away, an order with which Reyes alleges he complied. Reyes was arrested, along with others. Reyes alleges that a police officer referenced him by name and said, “Grab Julian, he’s going to jail.” (*Id.* at 17–18).

Reyes asserts in his amended complaint that he had been repeatedly arrested for his filming from June 2014 to March 2023 and that the “seizures of [his] cameras, videos, and other materials constituted the unlawful seizure of work product materials” and of “documentary materials” violating the PPA. (Dkt. 28, at 5–6). Two examples of such seizure are addressed in the summary judgment briefing: Reyes alleges that the APD took his video equipment in the course of an arrest, on January 4, 2019 and on October 24, 2021. (Dkt. 47, at 26). In the October 24, 2021 incident, Reyes alleges in his amended complaint that he was arrested without probable cause by APD officers, “while exercising his free speech rights on a public sidewalk” and as “a pretext to stop Reyes from recording the police.” (Dkt. 28, at 3). He alleges that during this arrest his cameras, “which are his primary work equipment, were seized by APD,” and that his cameras “contained work product and documentary materials that he intended to publish to the public.” (*Id.*). Reyes alleges in a declaration attached to his summary judgment briefing that his “video included raw footage of police activity reflecting what I considered of interest to film and intended to edit and publish,” and that “I was not the only person using a megaphone or filming that day,” “[b]ut I was the only one targeted and arrested.” (Dkt. 47-1, at 10). On January 4, 2019, Reyes asserts in his declaration, he “was arrested while recording APD officers using threats and coercion” against homeless individuals and that his “camera was seized by APD officers, despite containing raw footage of APD activities” that he “intend[ed] to publish.” (Dkt. 47-1, at 8).

II. LEGAL STANDARD

A. Report and Recommendations

The Federal Rules of Civil Procedure authorize magistrate judges to make findings and recommendations for dispositive motions. Fed. R. Civ. P. 72(b)(1). For dispositive motions, parties are entitled to *de novo* review of any part of a magistrate judge’s report and recommendation that has been properly objected to. Fed. R. Civ. P. 72(b)(3). A party may serve and file specific, written

objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b)(1)(C). The district judge has the discretion to "accept, reject, or modify the recommended disposition." *Id.*; *see also* Fed. R. Civ. P. 72(b)(3). Because Reyes objected to the report and recommendation, the Court reviews the report and recommendation *de novo*.

B. Summary Judgment

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). "A fact issue is 'material' if its resolution could affect the outcome of the action." *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2021).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Wise v. E.I. DuPont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). After the nonmovant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted. *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000).

C. Section 1983

Reyes argues that his arrests by APD officers violated his First Amendment right to observe and record police activities and that his arrests were in retaliation for exercising his First

Amendment rights. Reyes argues that the City of Austin is liable for those constitutional violations under 42 U.S.C. § 1983 because they constitute a municipal custom, policy, or practice.

As an initial matter, the City of Austin cannot be liable under Section 1983 unless Reyes' constitutional rights were violated. *Windham v. Harris Cnty., Tex.*, 875 F.3d 229, 243 (5th Cir. 2017) (“We have stated time and again that without an underlying constitutional violation, an essential element of municipal liability is missing.”) (quoting *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 866–67 (5th Cir. 2012)) (cleaned up). The First Amendment protects freedom of speech and freedom of the press, and protects the right to record the police, subject only to reasonable time, place, and manner restrictions. *Turner v. Lt. Driver*, 848 F.3d 678, 688 (5th Cir. 2017).

The First Amendment also generally prohibits government officials from subjecting an individual to retaliatory actions, such as arrest for engaging in protected speech. *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019). A plaintiff bringing a retaliatory arrest claim generally must plead and prove the absence of probable cause for the arrest. *Id.* at 404.¹ There is an exception to this rule if the plaintiff produces “objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” *Id.* at 407.

The Supreme Court issued an opinion mandating that the Fifth Circuit interpret the *Nieves* exception more widely in June 2024, after the parties submitted their summary judgment briefing. *Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024). As such, the United States Magistrate Judge did not have the benefit of full briefing on the widened *Nieves* exception, an issue the parties addressed in their Objections and responses thereto. (Dkts. 62, 63). In *Gonzalez*, the Supreme Court rejected the

¹ In addition, a “plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.” *Nieves*, 587 U.S. 391, 404 (citation omitted). The City of Austin did not address the substantial or motivating factor ground in its Motion, so the Court does not address it.

Fifth Circuit’s “overly cramped view of *Nieves*.” 602 U.S. at 658. It held that the Fifth Circuit erred when it interpreted *Nieves* as requiring “very specific comparative evidence” of other individuals who engaged in identical conduct as the plaintiff but were not arrested. *Id.* “[T]he demand for virtually identical and identifiable comparators goes too far.” *Id.* Rather, showing “circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so” using “objective” evidence sufficed to meet the *Nieves* exception. *Id.*² “The only express limit [the Supreme Court] placed on the sort of evidence a plaintiff may present for that purpose is that it must be objective” to avoid “the significant problems that would arise from reviewing police conduct under a purely subjective standard.” *Id.* at 653 (quoting *Nieves*, 587 U.S. at 407).

To summarize, to show retaliatory arrest even where probable cause existed, a plaintiff may produce evidence either of similarly situated individuals who were not arrested, or other objective evidence that circumstances existed where “officers have probable cause to make arrests, but typically exercise their discretion not to do so.” *Gonzalez*, 602 U.S. at 658; *see also Ballentine v. Tucker*, 28 F.4th 54, 62 (9th Cir. 2022) (evidence of similarly situated individuals who were not arrested sufficed under *Nieves* exception). By contrast, arrests for aggravated assault charges have been held to have probable cause with no *Nieves* exception applicable, because officers would routinely exercise their discretion to make an arrest in circumstances of potential aggravated assault. *See Thomas v. Cassia Cnty.*, 491 F. Supp. 3d 805, 812–138 (D. Idaho 2020), *aff’d*, No. 20-35862, 2022 WL 1223705 (9th Cir. Apr. 26, 2022). Courts have treated threats of physical violence similarly, including after

² Similarly, the Supreme Court recently confirmed that it had changed the Fifth Circuit’s applicable rule when it granted a petition for certiorari and vacated the Fifth Circuit’s ruling in *Villarreal v. City of Laredo*, 94 F.4th 374, 398 (5th Cir. 2024) (en banc). *Villarreal v. Alaniz*, – S.Ct. –, 2024 WL 4486343 (Oct. 15, 2024). In *Villareal*, the Fifth Circuit had affirmed the dismissal of Villareal’s case because, the court found, the plaintiff had offered no evidence of similarly situated individuals who were not arrested. *Villarreal*, 94 F.4th at 398. The Supreme Court remanded for “further consideration in light of *Gonzalez*.” *Villareal*, 2024 WL 4486343.

Gonzalez. See *Morales v. Maxwell*, No. CV 21-07263 (ZNQ) (RLS), 2024 WL 4651757, at *10 (D.N.J. Nov. 1, 2024).

To the second part of the Section 1983 analysis, the existence of a custom, policy, or practice, the Court briefly reiterates the legal standard as correctly described by the United States Magistrate Judge. In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that a municipality “can be found liable under Section 1983 only where the municipality *itself* causes the constitutional violation at issue.” *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). “Respondeat superior or vicarious liability will not attach under § 1983. It is only when the execution of the government’s policy or custom inflicts the injury that the municipality may be held liable under § 1983.” *Id.* (cleaned up). As such, to succeed on a Section 1983 claim against the City of Austin, Reyes must establish that (1) the City had an official policy, practice, or custom of unlawfully arresting him for filming police activities, (2) promulgated by a municipal policymaker, (3) that was the moving force behind the constitutional violation. *Monell*, 436 U.S. at 694; *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

Official policy establishes culpability and can arise in various forms. It usually exists in the form of written policy statements, ordinances, or regulations, but it may also arise in the form of a widespread practice that is “so common and well-settled as to constitute a custom that fairly represents municipal policy.” *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 848 (5th Cir. 2009) (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984)). A plaintiff can also show a policy or custom in limited circumstances where a municipality fails to train or supervise its police officers which amounts to deliberate indifference or fails to discipline officers for committing constitutional violations that amounts to ratification of a policy. *Id.*

D. Privacy Protection Act Claim

The Court also reiterates the legal standard for the claim under the PPA as correctly described by the United States Magistrate Judge. The PPA “generally prohibits government officials from searching for and seizing documentary materials possessed by a person in connection with a purpose to disseminate information to the public.” *Citicasters v. McCaskill*, 89 F.3d 1350, 1353 (8th Cir. 1996). Congress passed the PPA in response to *Zurcher v. Stanford Daily*, 436 U.S. 547, 567–68 (1978), in which the Supreme Court held that the Fourth Amendment does not prohibit the search of a newspaper office for photographs revealing the identities of individuals who assaulted police officers during a demonstration, even though no one employed by the newspaper was suspected of involvement. *See Guest v. Leis*, 255 F.3d 325, 340 (6th Cir. 2001) (“[T]he PPA was enacted to afford the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment.”). First, the PPA provides that “it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.” 42 U.S.C. § 2000aa(a). “Work product materials” include those “prepared, produced, authored, or created” “in anticipation of communicating such materials to the public” that are possessed for that purpose and include “mental impressions, conclusions, opinions, or theories” of the person who prepared them. 42 U.S.C. § 2000aa-7(b). Second, the PPA provides that “it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce. 42 U.S.C. §

2000aa(b). “[D]ocumentary materials” include “written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs.” 42 U.S.C. § 2000aa-7(a).

The PPA “carves out various exceptions to the prohibition against searches and seizures of materials intended for public dissemination.” *Sennett v. United States*, 667 F.3d 531, 535 (4th Cir. 2012). Under the “suspect exception,” the police can avoid the constraints of the PPA “when the person possessing the materials is a criminal suspect, rather than an innocent third party.” *Id.* (cleaned up). For the government to take advantage of that exception, there must be “probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” 42 U.S.C. § 2000aa(a)(1) & (b)(1). The materials exempted under the suspect exception “must relate to the offense.” *Guest*, 255 F.3d at 341.

Section 2000aa-6 of the PPA creates a private right of action for damages resulting from a search or seizure of materials that violates the statute. 42 U.S.C. § 2000aa-6(a). A “person aggrieved” by such an unlawful search or seizure may bring suit “against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this chapter, or against any other governmental unit.” *Id.*

III. DISCUSSION

A. Section 1983 Claim

After reviewing Reyes’ objections as to each arrest *de novo*, the Court finds that a factfinder could reasonably conclude that the City of Austin arrested him without probable cause or where the *Nieves* exception applies, in some instances, but that Reyes has not met his burden to show a material existence of fact as to a custom, policy, or practice of First Amendment violations, as is required. As such, the Court will grant summary judgment to the City of Austin as to Reyes’ Section 1983 claim.

1. First Amendment Violation

As an initial matter, Reyes must show that his arrests violated the First Amendment to prove his Section 1983 claim. Reyes provides evidence of several arrests where he alleges that either (1) there was no probable cause, as supports a finding of retaliatory arrest, or, (2) the *Nieves* exception applies, because other similarly situated individuals were not arrested or based on other evidence. Taking each arrest in turn, the Court finds that Reyes met his burden to show a disputed material fact as to some, but not all, of his arrests. As such, the Court will modify the report and recommendation to find the existence of a material dispute of fact as to the violation of his First Amendment rights in these instances. The Court notes, again, that these issues were not fully briefed for the Court until the Objections to the report and recommendation.

On January 4, 2019, Reyes presents evidence, including a video and affidavit, that probable cause did not exist because he was verbally criticizing the officers' conduct but not otherwise interfering with their work. (Dkt. 47, at 9–10; Dkt. 61, at 10); *see Freeman v. Gore*, 483 F.3d 404, 413–14 (5th Cir. 2007) (“yelling and screaming” at police officers does not constitute probable cause for arresting an individual for interference with public duties); *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (“The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”); *Pulliam v. Fort Bend Cnty., Tex.*, No. 4:22-CV-04210, 2024 WL 4068767, at *11 (S.D. Tex. Sept. 5, 2024) (“Cases where courts find probable cause for interference-with-public-duties arrests usually involve some sort of physical obstruction by the arrestee.”). A factfinder could infer from the evidence submitted that Reyes was arrested without probable cause and the arrest was retaliatory.³

³ The Court adopts the finding of the United States Magistrate Judge that the City of Austin has waived the affirmative defense, (Dkt. 44, at 12 (citing TEX. CIV. PRAC. & REM. CODE § 16.003(a))), that Reyes' arrests before November 5, 2019 are barred by the Texas statute of limitations for personal injury claims,

On November 5, 2019, too, Reyes argues that he was arrested while filming police when others were present and behaving similarly. Reyes cites several pieces of summary evidence in his objections, including a police report and an email highlighting Reyes' arrest specifically and noting that others present were not arrested, as well as his own affidavit describing the scene. (Dkt. 61, at 12). Here, the Court finds that Reyes has met his burden to show a material dispute of fact as to whether the arrest was retaliatory—a reasonable factfinder could infer that because others present at the scene were not arrested, and because the APD police characterized Reyes alone in subsequent documents as an activist, the *Nieves* exception applies, and the arrest was retaliatory. *See Ballentine*, 28 F.4th at 62.

Also, the report and recommendation addresses Reyes' arrest on October 24, 2021 and finds that Reyes was arrested with probable cause for violating a city noise ordinance. (Dkt. 56, at 14–15). The report and recommendation found that Reyes neither showed the police officers lacked probable cause for arresting him, nor provided evidence that others similarly situated were not arrested. (Dkt. 56, at 15). Reyes did not submit an objection on this point. Reyes alleges in his declaration, (Dkt. 47-1, at 5), however, that others were also using a megaphone but not arrested, as would support the application of the *Nieves* exception.

Next, on December 23, 2023, Reyes argues he was arrested while on a public sidewalk, where he was filming police from a considerable distance and not interfering with their activities. (Dkt. 61, at 14–15). Reyes cites summary evidence which could be found to show that there was either no probable cause or the *Nieves* exception applies. He argues that two other pedestrians are

because the City did not plead this defense in its Answer. Rule 8(c) requires: “In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . statute of limitations.” If the affirmative defense of a statute of limitations is not included in the answer, it is waived. *Davis v. Huskypower Outdoor Equip. Corp.*, 936 F.2d 193, 198 (5th Cir. 1991). Once the defendant has waived that defense, it cannot revive it in a memorandum in support of a motion for summary judgment. *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91, 96 (5th Cir. 1976).

seen in the video walking closer to the police but were not arrested, that the particular officer who arrested him had received an email from an APD Sergeant calling Reyes a “turd” and urging officers not to be “weak” with him, and that the officer had also been the subject of prior reprimands for acting partially toward suspects. (Dkt. 61, at 16). Taking all inferences in the light most favorable to Reyes, a reasonable factfinder may conclude that there was a retaliatory arrest.

Finally, on March 8, 2024, Reyes alleges he was filming APD officers conducting an arrest and asked officers why the arrest was happening; that officers asked him to walk away and move onto the sidewalk, which he did; and then he was arrested. (Dkt. 61, at 17–18). Reyes argues, citing video evidence, that the officers lacked probable cause for his arrest because he was on the sidewalk as the officer requested at the time of his arrest. (*Id.*). Reyes also alleges that the officers on the scene knew him by name. (*Id.*). The Court finds that a factfinder could reasonably conclude no probable cause existed for this arrest, and even if a factfinder concluded probable cause existed for his arrest, it could also conclude that Reyes was arrested when others on the scene were not arrested, as would warrant application of the *Nieves* exception and a finding of retaliatory arrest. (*Id.*).

As such, a reasonable factfinder could find that in five instances, APD officers arrested Reyes in retaliation for First Amendment protected activities. Reyes does not provide a material dispute of facts as to all arrests, however, and the Court adopts the recommendation of the United States Magistrate Judge as to all other arrests not described above.

First, Reyes brings forth summary judgment evidence about two more arrests in his briefing and Objections, but he does not meet his burden to show a dispute as to the existence of a First Amendment violation as to either instance. On June 20, 2020, Reyes was arrested, but he concedes that he hit a police officer before being arrested. (Dkt. 61, at 13 (Reyes agrees he “slapped the officer’s arm away”)). Assault constitutes probable cause to arrest someone, and nothing in the record suggests an officer would typically exercise their discretion to not arrest someone in the case

of assault, so Reyes has not provided evidence that creates a material dispute of fact as to this arrest. *Cf. Thomas*, 491 F. Supp. 3d at 812 (aggravated assault constituted probable cause for purposes of retaliatory arrest and *Nieves* exception did not apply because officers routinely arrest people for assault). So too, on July 22, 2020, Reyes does not dispute that he told an officer he was placing him “under citizen’s arrest” while protesting an officer’s actions. (Dkt. 56, at 13). Reyes does not cite evidence tending to show that an officer would typically exercise their discretion to not arrest someone in similar circumstances. In other words, a person could assault another person or threaten to do so while filming, shouting their political views, or otherwise expressing their First Amendment rights, and even when taking a wide view of the *Nieves* exception, it cannot be reasonably said that the police arresting someone for assault, or interference with public duties where an individual has made threats of physical violence, is in retaliation for their protected First Amendment activity.

Finally, while Reyes references over thirteen arrests, (Dkt. 28, at 3), Reyes only discusses seven arrests in his response brief to the Motion for Summary Judgment and Objections and does not provide evidence tending to show the existence of a First Amendment violation as to any other arrest. (Dkt. 56, at 9). The Court adopts the report and recommendation and finds no material dispute of fact as to any other arrests as a result.

2. Existence of Official Policy, Practice, or Custom

Reyes having demonstrated a material dispute of fact as to whether his First Amendment rights were violated on a maximum of five instances, the Court’s analysis now proceeds to whether the City of Austin violated his First Amendment rights by way of a policy, custom, or practice. *Peterson*, 588 F.3d at 848. The Court finds that Reyes has not demonstrated a material dispute of fact as to the existence of such a policy, custom, or practice and adopts the report and recommendation of the United States Magistrate Judge to grant summary judgment to the City of Austin on the Section 1983 claim.

The Court credits the analysis of the United States Magistrate Judge on this point and responds to Reyes' objections. Reyes acknowledges that there is no official written or otherwise specifically articulated policy on which he can rely. As the City emphasizes, it has a written policy that "its officers shall not arrest people for or otherwise prevent people from recording police activity." (Dkt. 44, at 2). Given the lack of an official or written policy violating his rights, Reyes advances two alternate theories of municipal liability. First, Reyes alleges that his repeated arrests by APD officers while he was filming police activity were part of a "persistent pattern of illegal conduct" that was so common and well-known to policymakers that it constitutes a custom that fairly represents official policy. (Dkt. 47, at 18). Second, he also alleges the City is liable because it ratified the illegal conduct by failing to discipline the APD officers involved in his arrests. (*Id.*).

To Reyes' first argument, the existence of a pattern, the Court finds that he has not alleged so many instances that a reasonable jury could find City of Austin liable based on the existence of a persistent pattern. "A pattern is tantamount to official policy when it is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Peterson*, 588 F.3d at 850 (quoting *Webster*, 735 F.2d at 841). When prior incidents are used to prove a pattern, they "must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." *Id.* (quoting *Webster*, 735 F.2d at 842). "It is thus clear that a plaintiff must demonstrate a pattern of abuses that transcends the error made in a single case." *Id.* at 850–51 (quoting *Piotrowski*, 237 F.3d at 582)).

A pattern also requires "sufficiently numerous prior incidents," as opposed to "isolated instances." *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir.1989). In *Pineda v. City of Houston*, 291 F.3d 325 (5th Cir. 2002), eleven incidents of warrantless entry did not support a pattern of unconstitutional warrantless entry. Rather, "[e]leven incidents each ultimately offering equivocal

evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation’s largest cities and police forces.” *Id.* at 329. Similarly, “27 incidents of excessive force over a period of four years do not reflect a pattern that can be said to represent official policy of condoning excessive force so as to hold the City liable for the acts of its employees’ unconstitutional conduct. To hold otherwise would be effectively to hold the City liable on the theory of respondeat superior, which is expressly prohibited by *Monell*.” *Peterson*, 588 F.3d at 852. Similarly, three incidents over the course of three-and-a-half years were found in *Davidson v. City of Stafford, Texas* insufficient to constitute a pattern as would support *Monell* liability. 848 F.3d 384, at 397 (5th Cir. 2017).

As described above, Reyes has produced summary evidence to show a material dispute of fact as to the existence of a First Amendment violation in a maximum of five instances. The Court notes that *Pineda* and *Peterson* are not directly applicable, as they refer to a city-wide set of incidents instead of incidents as to a specific individual. But Reyes also has not produced authority showing that a pattern existed showing the City has a policy to arrest him in retaliation to his views. *See Shepherd v. Dallas Cnty.*, 591 F.3d 445, 452 (5th Cir. 2009) (“Proving a pattern is a heavy burden, one that has rarely been met in our caselaw.”); *see also Sanchez v. Young Cnty.*, 956 F.3d 785, 793 (5th Cir. 2020) (“Showing a pervasive pattern is a heavy burden.”). If twenty-seven incidents in *Peterson* and eleven in *Pineda* were insufficient to show a pattern of First Amendment violations, the Court finds that five alleged violations—even if all were found to reflect a First Amendment violation—as to Reyes cannot demonstrate repetition so pervasive within the entire City of Austin as to create a pattern. Rather, Reyes has shown the existence of potential “isolated instances” that cannot give rise to municipal liability. *McConney*, 863 F.2d at 1184.

Reyes also does not give examples of the City of Austin having a practice persistent and widespread *beyond* his case, as would support a showing of a custom, policy, or practice of First Amendment retaliatory arrest. “To plead a practice ‘so persistent and widespread as to practically

have the force of law,’ a plaintiff must do more than describe the incident that gave rise to his injury.” *Peña v. City of Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018) (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)); *see also Piotrowski*, 237 F.3d at 582 (“As is the case with allegations of failure to adequately screen prospective police officers, it is nearly impossible to impute lax disciplinary policy to the City without showing a pattern of abuses that transcends the error made in a single case.”); *Barkai v. Nuendorf*, No. 21-CV-4060 (KMK), 2023 WL 2691712, at *35 (S.D.N.Y. Mar. 29, 2023) (“Plaintiff does not point to any instance of Rockland County allegedly implementing this widespread practice beyond his own case. This alone would be fatal to Plaintiff’s *Monell* claim, even if he had asserted a viable underlying Constitutional violation.”).

In his Objections, Reyes reiterates evidence of the City of Austin’s internal labelling of him in its system, police reports, and emails as “anti-police,” and shows that the APD officers can see that labelling widely. (Dkt. 61, at 6–9). But Reyes does not cite any authority showing that an internal labelling of an individual as having anti-police views, or emails criticizing a person’s actions and warning other officers about an individual, create a custom, policy, or practice of retaliatory arrest as would incur liability to the City of Austin under *Monell*. The evidence Reyes brings forward shows that the APD was critical of him and labelled him anti-police, and that some officers described him to others using inappropriate language, but the evidence does not create a reasonable inference that the APD had a widespread policy or custom of arresting him or others in retaliation for his views. For those reasons, the Court finds that Reyes does not show a persistent pattern of conduct that gives rise to a City of Austin custom, practice, or policy.

To support his ratification theory, Reyes argues that the City had a policy of making illegal arrests of individuals who film police activity because the City did not discipline the officers involved in his arrests. “[I]f the authorized policymakers approve a subordinate’s decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.”

Peterson, 588 F.3d at 848 (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)). But Fifth Circuit “precedent has limited the theory of ratification to ‘extreme factual situations.’” *Id.* (quoting *Snyder v. Trepagnier*, 142 F.3d 781, 798 (5th Cir. 1998); *see also Davidson*, 848 F.3d at 395 (quoting *Peterson*, 588 F.3d at 848)). Here, the underlying conduct by the officers involved in Reyes’ arrests was insufficiently extreme for a finding of ratification. *Compare Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) (finding reasonable inference of ratification after reckless use of deadly force against innocent individual, where “the evidence prove[d] repeated acts of abuse” “by several officers in several episodes, tending to prove a disposition to disregard human life and safety so prevalent as to be police policy or custom”), with *Davidson*, 848 F.3d at 395–96 (finding that arresting abortion protester without probable cause “while unconstitutional, was not sufficiently extreme to qualify for a finding of ratification”). Also, a policymaker who defends conduct that is later shown to be unlawful does not necessarily ratify that conduct as would incur *Monell* liability. *Peterson*, 588 F.3d at 848; *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 169 (5th Cir. 2010) (no ratification when a municipality defended the constitutionality and propriety of its officers’ actions despite the court’s later determination that the officers’ actions violated the Fourth Amendment). Reyes relies on 30(b)(6) testimony from the City of Austin stating that the arrests were consistent with their policy, (Dkt. 61, at 20), but consistent with the Fifth Circuit’s holding in *Zarnow* and *Peterson*, a municipality defending the constitutionality of its officers’ actions in litigation does not itself constitute “ratification.” *Peterson*, 588 F.3d at 848; *Zarnow*, 614 F.3d at 171; *see also Davidson*, 848 F.3d at 397.

For those reasons, the Court finds that Reyes does not show a persistent pattern of conduct or ratification that gives rise to a City of Austin unwritten custom, practice, or policy. Because the Court finds that Reyes has not shown a material dispute of fact as to the existence of a policy, custom, or practice in the City of Austin, it need not consider the moving force factor. *Zarnow*, 614 F.3d at 171.

Finally, the report and recommendation found that even if Reyes established all other elements of municipal liability, he identifies no municipal policymaker who could be held responsible, through actual or constructive knowledge, for enforcing an unconstitutional policy, as is required. *Piotrowski*, 237 F.3d at 579 (“This is not an opaque requirement: several Supreme Court cases have discussed the policymaker criterion for municipal liability.”). Reyes objects to the report and recommendation on the grounds that the United States Magistrate Judge should not have recommended the grant of summary judgment on this basis, because the Court did not give the Reyes notice that it would consider this ground *sua sponte*. (Dkt. 61 at 4 (citing Fed. R. Civ. P. 56(f)(3) (“After giving notice and a reasonable time to respond, the court may: ... consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.” (emphasis added)))). However, upon submitting his timely objection to the report and recommendations, Reyes had notice that the Court was considering this ground, and a reasonable time to respond, but still did not cite evidence of a municipal policymaker responsible for the City’s policy and practice of arresting him in his objections. The Court adopts the report and recommendations of the United States Magistrate Judge on this point because Reyes, having been given notice through the report and recommendations, still has not identified a municipal policymaker responsible for his labelling as anti-police or the differential treatment by policy he alleges.

For the foregoing reasons, the Court will adopt the recommendation of the United States Magistrate Judge as to the lack of a custom, policy, or practice of violating Reyes’ First Amendment rights. The Court will grant summary judgment to the City of Austin on Reyes’ Section 1983 claim.

A. Privacy Protection Act Claim

Upon *de novo* review, the Court will reject the report and recommendation and deny summary judgment as to the PPA claim. As set forth above, the PPA “generally prohibits

government officials from searching for and seizing documentary materials possessed by a person in connection with a purpose to disseminate information to the public.” *Citicasters*, 89 F.3d at 1353. To prevail on a claim of unlawful seizure of work product and documentary materials, Reyes must show that (1) he was a person reasonably believed to have a purpose to disseminate to the public one of the eligible forms of public communication, in or affecting interstate or foreign commerce, and (2) that there was no probable cause to believe he had committed an offense to which the materials relate. 42 U.S.C. §2000aa.

The Court finds that Reyes has met his burden to show that a reasonable jury could find that the APD officers “reasonably believed” him to have a purpose to disseminate to the public a form of public communication. As Reyes pointed out in his Objections, a person need not be an identified member of the press for their materials to be protected under the PPA, nor does a person with those materials need to be a journalist in a traditional sense. Rather, other electronic mediums designated for public communication can be protected by the PPA. *See Steve Jackson Games, Inc. v. U.S. Secret Service*, 816 F. Supp. 432, 437–38 (W.D. Tex. 1993) (role playing game books protected from seizure under PPA). So too, record evidence could be found to show that Reyes was actively filming when the police arrested him, such that they were aware he was filming. *See Garcia v. Montgomery County, Md.*, 145 F. Supp. 3d 492, 524-25 (D. Maryland 2015) (denying summary judgment on PPA claim where journalist identified himself as a member of the press, as would “support the reasonable belief that [he] intended to disseminate his recording to the public”). Finally, Reyes has also met his burden to show a material dispute of fact as to whether the APD officers he encountered reasonably believed him to be a member of the press, for instance, because his APD internal profile shows that he is a local activist and works with the Challenger Street Newspaper, and is widely available to police. (Dkt. 61, at 8). Based on Reyes’ evidence that he was filming at the time his camera was seized, and the knowledge within APD of his general status as an

activist and citizen journalist who records and disseminates videos of the APD, the Court finds a reasonable factfinder could conclude the PPA applied in his case.

On the other hand, citing a police report, the City of Austin claims it did not seize Reyes' documentary materials on this date. (Dkt. 50, at 5). So, the existence of a seizure on January 4, 2019 violating the PPA is a fact in dispute based on the summary judgment briefing.

The Court next turns to the existence of probable cause for the arrests as would support the suspect exception to the PPA. The Court also finds that, for the reasons described above, whether the City had probable cause to arrest Reyes on January 4, 2019 is a fact in dispute because Reyes has cited summary evidence that he was not interfering with public duties as the City of Austin alleges, but was rather only verbally criticizing them. *See Freeman*, 483 F.3d 404, 414 (5th Cir. 2007) (yelling at or verbally criticizing at a police officer does not constitute probable cause to arrest for interference with public duties); *Gorsky v. Guajardo*, No. 20-20084, 2023 WL 3690429, at *8 n.16 (5th Cir. 2023) (“[M]erely arguing with police officers about the propriety of their conduct . . . falls within the speech exception to [Texas interference with public duties statute] and thus does not constitute probable cause to arrest someone for interference”); *Pulliam*, 2024 WL 4068767, at *11 (S.D. Tex. Sept. 5, 2024) (probable cause for interference-with-public-duties arrests typically involve some sort of physical obstruction by the arrestee) (collecting cases).

As to the October 24, 2021 arrest and seizure of Reyes' materials he alleges occurred on that date, that seizure falls within the suspect exception, because probable cause existed for his arrest on that date. The report and recommendation found that Reyes was arrested with probable cause for violating Texas Penal Code § 42.01(1)(5), which prohibits individuals from intentionally or knowingly making “unreasonable noise in a public place.” Reyes alleges that others were not arrested who were also making noise, (Dkt. 47-1, at 5), but has not provided evidence showing that he was arrested on October 24, 2021 without probable cause for violating a noise ordinance. Similarly, the

suspect exception to the PPA has been held to apply where the government showed probable cause that a journalist was involved in acts of vandalism, to which the photographic equipment seized was related. *See Sennett*, 667 F.3d at 536.

For the foregoing reasons, as to the January 4, 2019 seizure of documentary materials, the Court finds that Reyes has shown a material dispute of fact as to whether there was a violation of the PPA. As discussed above, Reyes submits summary evidence that he was arrested without probable cause on that date, and that his materials were seized; the City of Austin rebuts this evidence. A reasonable factfinder could find that the police knew he was filming when he was arrested and may have reasonably believed he would disseminate the materials to the public, as would violate the PPA, and that the suspect exception did not apply. *Citicasters*, 89 F.3d at 1353. Finally, the Court also does not find that the PPA claim as to January 4, 2019 was waived, (Dkt. 56, at 25), because Reyes' amended complaint included the claim of a Privacy Protection Act violation and alleged incidents on multiple occasions over a time period including 2019, (Dkt. 28, at 3, 5–6), as was required to plead his PPA claim. The City of Austin also did not argue in its Motion or reply that Reyes waived the PPA claim as to a seizure on January 4, 2019. (Dkts. 44, 50).

For those reasons, the existence of a PPA violation on January 4, 2019 is an issue appropriate for resolution at trial.

IV. CONCLUSION

For the reasons given above, **IT IS ORDERED** that the City of Austin's Motion for Summary Judgment is **DENIED** as to the existence of a Privacy Protection Act violation on January 4, 2019 and **GRANTED** as to all other claims.

SIGNED on December 12, 2024.

A handwritten signature in blue ink, appearing to read "R. Pitman", is written above a horizontal line.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-cv-0992-RP

DEFENDANT’S AMENDED PRE-TRIAL SUBMISSIONS

TO THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin files these amended pre-trial documents pursuant to Local Rule CV-16(e) and the scheduling order in this case:

- I. Joint Stipulation of Facts
- II. Defendants’ Exhibit List
- III. Witness List
- IV. Defendants’ Proposed Findings of Fact and Conclusions of Law
- V. Estimated Length of Trial

I. Joint Stipulation of Facts

None at this time. The parties will continue to evaluate potential stipulations and will supplement the pre-trial submissions accordingly.

II. Defendant’s Exhibit List

A. Expected Exhibits

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
D-1.	COA 2196-2213 APD GO 19-41140 (Ex 3 to Doc 50)			
D-2.	Reyes 00299			
D-3.	COA 0189-0191 APD GO 302 (2019)			

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
D-4.				

III. Defendant's Witness List

The witnesses listed below have previously been identified to all parties.

A. May call:

- Eric Miesse, Assistant Chief, Austin Police Department
- Det. Gadiel Alas, Austin Police Department
- Ofc. Corey Hale, Austin Police Department
- Defendant may call any and all witnesses identified by Plaintiff.

IV. Defendant's Proposed Findings of Fact and Conclusions of Law

Attached as Exhibit A.

V. Estimated Length of Trial

Defendant estimates that the trial of this case will require one day.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

/s/ H. Gray Laird III
H. GRAY LAIRD III
State Bar No. 24087054
City of Austin
P. O. Box 1546
Austin, Texas 78767-1546
gray.laird@austintexas.gov
Telephone (512) 974-1342
Facsimile (512) 974-1311

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this the 13th day of December, 2024.

/s/ H. Gray Laird III
H. GRAY LAIRD III

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
CITY OF AUSTIN, AUSTIN POLICE	§	Case No. 1:21-CV-00992-RP-SH
DEPARTMENT, TROY WISMAR,	§	
CHRISTOPHER CARLISLE,	§	
PATRICK WALSH, KYU SUK AN,	§	
SARAH FOSTER, GREG McCORMACK,	§	
and JOHN DOES, Individually and in	§	
their official capacities,	§	
Defendants.	§	

PLAINTIFF JULIAN REYES' PRE-TRIAL SUBMISSIONS

TO THE HONORABLE ROBERT PITMAN:

Plaintiff Julian Reyes files these pre-trial documents pursuant to Local Rule CV-16 and the Scheduling Order in this case:

- 1. Estimated length of trial**
One to two days.
- 2. Case Statement for Jury**
Not applicable for this bench trial.
- 3. Voir Dire Questions**
Not applicable for this bench trial.
- 4. Proposed Jury Charge**
Not applicable for this bench trial.
- 5. Motions in Limine**
Not applicable for this bench trial.

6. Stipulated Facts

None at this time. The parties will make good-faith efforts at conferring now that the scope of the issues for trial have been defined by the Court.

7. Page-Line Designations

Eric Miesse, Rule 30(b)(6) representative of Defendant City of Austin:

Page 6, line 1 – Page 25.

Page 12, line 10 – Page 14, line 13.

Page 29, line 19 – Page 30, line 19.

Page 36, lines 1-24.

Page 43, line 21 – Page 44, line 25.

Page 50, line 6 – Page 57, line 12.

Page 58, lines 6-19.

Page 60, line 12 – Page 61, line 12.

Page 61, line 21 – Page 66, line 9.

Page 66, lines 2-10.

Page 70, line 1 – Page 72, line 12.

Page 73, line 13 – Page 74, line 12.

Page 85, lines 4-18.

Page 98, lines 1-21.

8. Proposed Findings of Fact and Conclusions of Law

Please see attached.

9. Witness List

Plaintiff may call the witnesses below and reserves the right to call any witnesses identified by the City.

- Julian Reyes
- Eric Miesse (by deposition)
- Gadiel Alas
- APD Officer Hale, #7850
- Individuals ticketed on January 4, 2019, if located.
- Any witness designated by Defendant The City of Austin

10. Exhibit List.

Please see attached.

Respectfully submitted,

By: /s/ Peter D. Kennedy
Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdham.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdham.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdham.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5600 (Phone)
(512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on December 13, 2024, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy

Peter D. Kennedy

**PLAINTIFF JULIAN REYES' PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Plaintiff Julian Reyes is a citizen journalist. For at over twelve years, he has been publishing videos, articles, and other written work on various outlets on the internet for public reading and viewing.

2. Mr. Reyes's work as a journalist began when he joined *The Austin Advocate* about fourteen years ago and *The Challenger Street Newspaper* about twelve years ago.

3. Mr. Reyes's work has been published on *The Challenger Street Newspaper's* website. He also publishes his own work on a personal YouTube channel and Facebook account.

4. Since Austin Police Department officer shot and killed his dog "Shiner" in 2013, Mr. Reyes began recording police activities and publishing his videos online for public viewing. He has also become an advocate for the homeless, recording police interactions with homeless individuals in an effort to keep police officers accountable and their activities transparent to public view.

5. Mr. Reyes has been ticketed and arrested by APD many times while he was recording police activity and advocating for government accountability. He has never been convicted on any charge resulting from those arrests.

6. On January 4, 2019, Mr. Reyes was arrested by APD officers who were using threats and coercion to make homeless individuals move from a sidewalk they were standing on in the middle of the day. Mr. Reyes was filming the officers using his cellphone and a video camera. He intended to publish those videos to the public. APD officers seized his cellphone and video camera and the videos contained on them. At no time did APD issue a warrant to obtain those videos.

7. Mr. Reyes is well known to APD officers who work in and around downtown Austin as a person who records police activity for publication. Officers frequently refer to him by his name.

8. APD's internal profile of Mr. Reyes has long labeled him an "anti-police activist." He was labeled such based on the content that he has posted online about Austin police officers. APD's label of Mr. Reyes as an "anti-police activist" is contained in his arrests reports and is read by APD officers, detectives, and supervisors.

9. APD's internal profile of Mr. Reyes also identifies him as an employee of The Challenger Street Newspaper, which is an online publication that publishes stories about Austin's homeless population and the City's and APD's treatment of them.

10. Before Mr. Reyes was arrested by APD on January 4, 2019, he was videoing police interactions with several people on a sidewalk in downtown Austin near the ARCH facility. It was

readily apparent that he was videoing the police which was seen by the officers at the scene. The officers who arrested Mr. Reyes knew or reasonably believed at the time of his arrest that he was filming their activities and possessed video of their activities with a purpose to disseminate to the public a broadcast or similar form of public communication.

11. The materials seized by the City of Austin on February 4, 2019, were possessed by Mr. Reyes in connection with the purpose of disseminating to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.

12. The seized materials consisted of materials upon which information was recorded, and including motion picture films, video and audio recordings, and mechanically, magnetically, or electronically recorded media. The materials were not contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.

13. There was no probable cause to believe that Mr. Reyes had committed a criminal offense to which the materials related; no reason to believe that the immediate seizure of such materials was necessary to prevent the death of, or serious bodily injury to, a human being; no reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials; and no court order directing compliance with a subpoena duces tecum.

14. The City of Austin's seizure of Mr. Reyes's cameras and videos on January 4, 2019, therefore constituted an unlawful seizure of documentary materials as defined in 42 U.S.C. § 2000aa-7(a), in violation of 42 U.S.C. § 2000aa(b).

15. Mr. Reyes is therefore entitled to recover \$1,000 in statutory damages, his actual damages, and reasonable attorney's fees and costs.

PLAINTIFF JULIAN REYES' EXHIBIT LIST

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
1.	Excerpt of February 2017 police report. MSJ Response Exhibit 2.			
2.	May 2, 2018 email from Julian Reyes. COA 7636-38.			
3.	August 2018 police report. COA2143-2151.			
4.	Excerpt of September 2018 police report. MSJ Response Exhibit 3.			
5.	December 19, 2019 email from Julian Reyes. COA 7483-84.			
6.	Excerpt of December 2020 police report. MSJ Response Exhibit 4.			
7.	Excerpt of Document from the Austin Regional Intelligence Center. MSJ Response Exhibit 6.			
8.	Excerpts of police reports identifying Mr. Reyes as employed by the Challenger Street Newspaper and as an ANTI-POLICE ACTIVIST and employee of Challenger Street Newspaper. MSJ Response Exhibit 10.			
9.	February 2020 Email. MSJ Response Exhibit 12.			
10.	Video of January 4, 2019 arrest by Julian Reyes. MSJ Response Exhibit 13A.			
11.	Video of January 4, 2019 arrest by Julian Reyes. REYES 299.			
12.	Second Video of January 4, 2019 arrest by Julian Reyes. REYES304.			

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
13.	Video of scene of January 4, 2019 arrest, filmed by Julian Reyes on January 5, 2019. REYES305.			
14.	Arrest Report for January 4, 2019 arrest. MSJ Response Exhibit 13B.			
15.	Court docket sheet for charge filed based on January 4, 2019 arrest. MSJ Response Exhibit 13C.			
16.	Motion to Dismiss filed in Travis County Court at Law No. 9, Cause No. C-1-CR-19-200182. REYES306.			
17.	Probable cause affidavit of January 4, 2019, arrest [if available].			
18.	Body camera videos of January 4, 2019, arrest [if available]			
19.	March 15, 2024 letter from the City of Austin.			
20.	General Order 303. COA 8601.			
21.	City of Austin Records Control Schedule. COA 9332.			
22.	Federal Rule of Civil Procedure 30(b)(6) Deposition Notice to City of Austin. MSJ Response Exhibit 8.			
23.	Deposition excerpts of City of Austin's Rule 30(b)(6) Designee, Eric Miesse			
24.	Miesse Deposition Exhibit No. 3			
25.	APD General Order 302.			

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-cv-0992-RP

DEFENDANT’S OBJECTIONS TO PLAINTIFF’S TRIAL EXHIBITS

TO THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin, pursuant to Local Rule CV-16(e), files its Objections to Plaintiff’s Trial Exhibits, contained in Plaintiff’s Pretrial Filings [Doc. 71].

No.	Plaintiff’s Exhibit	Defendants’ Objection
P-1	Excerpt of February 2017 police report	FRE 401-403--Relevance
P-2	May 2, 2018 email from Julian Reyes. COA 7636	FRE 401-403--Relevance
P-3	August 2018 police report, COA2143-2151	FRE 401-403--Relevance
P-4	Excerpt of September 2018 police report	FRE 401-403--Relevance
P-5	December 19, 2019 email from Julian Reyes. COA 7483-84.	FRE 401-403--Relevance
P-6	Excerpt of December 2020 police report	FRE 401-403--Relevance
P-7	Excerpt of Document from the Austin Regional Intelligence Center	FRE 401-403--Relevance

No.	Plaintiff's Exhibit	Defendants' Objection
P-8	Excerpts of police reports identifying Mr. Reyes as employed by the Challenger Street Newspaper and as an Anti-Police Activist and employee of Challenger Street Newspaper	FRE 401-403—Relevance; FRE 801, 802--Hearsay
P-9	February 2020 Email	FRE 401-403—Relevance
P-11	Video of January 4, 2019 arrest by Julian Reyes. REYES 299	Duplicative
P-12	Second Video of January 4, 2019 arrest by Julian Reyes. REYES 304.	Not produced in discovery until 12-13-24; Duplicative
P-13	Video of scene of January 4, 2019 arrest, filmed by Julian Reyes on January 5, 2019. REYES 305	Not produced in discovery until 12-13-14
P-16	Motion to Dismiss filed in Travis County Court at Law No. 9, Cause No. C-1-CR-19-200182.	FRE 401-403--Relevance
P-19	March 15, 2024 letter from the City of Austin	FRE 401-403--Relevance
P-22	FRCP 30(b)(6) deposition notice to City of Austin	FRE 401-403--Relevance

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
MEGHAN RILEY, CHIEF OF LITIGATION

/s/ H. Gray Laird III

H. Gray Laird III
Assistant City Attorney
State Bar No. 24087054
gray.laird@austintexas.gov
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78767-1546
Telephone: (512) 974-1358
Facsimile: (512) 974-1311
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this the 16th day of December, 2024.

/s/ H. Gray Laird III
H. GRAY LAIRD III

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
CITY OF AUSTIN, AUSTIN POLICE	§	Case No. 1:21-CV-00992-RP-SH
DEPARTMENT, TROY WISMAR,	§	
CHRISTOPHER CARLISLE,	§	
PATRICK WALSH, KYU SUK AN,	§	
SARAH FOSTER, GREG McCORMACK,	§	
and JOHN DOES, Individually and in	§	
their official capacities,	§	
Defendants.	§	

PLAINTIFF'S AMENDED WITNESS AND EXHIBIT LISTS

TO THE HONORABLE ROBERT PITMAN:

Plaintiff Julian Reyes files these Amended Witness and Exhibit Lists in preparation for the bench trial set for January 13, 2025.

PLAINTIFF'S AMENDED WITNESS LIST

1. Julian Reyes.
2. Eric Miesse, Assistant Chief, Austin Police Department (by deposition).
3. Detective Gadiel Alas, Austin Police Department.
4. Officer Corey Hale, Austin Police Department.

PLAINTIFF'S AMENDED EXHIBIT LIST

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
1.	Plaintiff's Second Amended Notice of Intention to Take the Deposition of the Rule 30(b)(6) Representative of the City of Austin. MSJ Response Exhibit 7.			
2.	Deposition excerpts of City of Austin's Rule 30(b)(6) Designee, Eric Miesse.			
3.	<i>Shiner's Story</i> , by Julian Reyes, The Challenger Street Newspaper, July 1, 2013. REYES 00138-40.			
4.	May 2, 2018, Public Information Act request from Julian Reyes to City of Austin. COA 7636-38.			
5.	August 2018 police report reflecting City's knowledge of Julian Reyes's employment by Challenger Street Newspaper. COA 2143-51.			
6.	Excerpt of May 7, 2020, document from the Austin Regional Intelligence Center reflecting City's knowledge that Julian Reyes is a citizen journalist. COA 7361.			
7.	Excerpts of police reports identifying Julian Reyes as an "ANTI-POLICE ACTIVIST" and employee of Challenger Street Newspaper. COA 002122, COA 002134, COA 002176.			
8.	February 2020 City of Austin email chain reflecting City's knowledge that Julian Reyes is a journalist. COA 7093-7109.			
9.	Camcorder video of Julian Reyes's January 4, 2019, arrest. REYES 299.			
10.	iPhone video of Julian Reyes's January 4, 2019 arrest. REYES 304.			
11.	APD report of Julian Reyes's January 4, 2019 arrest. COA 002196-2213.			
12.	APD Training Bulletin, Interference with Public Duties. COA 6482-83.			

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
13.	Docket sheet for charge filed based on Julian Reyes's January 4, 2019, arrest. MSJ Response Exhibit 13C.			
14.	Order dismissing charges filed based on Julian Reyes's January 4, 2019, arrest. REYES 306.			
15.	APD General Order 302 re Public Recording of Official Acts. COA 8598-8600.			

Respectfully submitted,

By: /s/ Peter D. Kennedy

Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5600 (Phone)
(512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on January 11, 2025, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy

Peter D. Kennedy

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-cv-0992-RP

DEFENDANT’S OBJECTIONS TO PLAINTIFF’S AMENDED TRIAL EXHIBITS

TO THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin, pursuant to Local Rule CV-16(e), files its Objections to Plaintiff’s Amended Trial Exhibits as follows:

No.	Plaintiff’s Exhibit	Defendants’ Objection
P-1	FRCP 30(b)(6) deposition notice to City of Austin	FRE 401-403--Relevance
P-3	<i>Shiner’s Story</i> , by Julian Reyes, REYES 00138-40	FRE 401-403--Relevance
P-4	May 2, 2018, Public Information Act request; CPA 7636-38	FRE 401-403--Relevance
P-5	August 2018 police report, COA 2143-51	FRE 401-403--Relevance
P-6	Excerpt of May 7, 2020 document from Austin Regional Intelligence Center	FRE 401-403--Relevance

No.	Plaintiff's Exhibit	Defendants' Objection
P-7	Excerpts of police reports identifying Mr. Reyes as employed by the Challenger Street Newspaper and as an Anti-Police Activist and employee of Challenger Street Newspaper; CPA 002122, COA 002134, COA 002176	FRE 401-403—Relevance; FRE 801, 802--Hearsay
P-8	February 2020 City of Austin email chain, CPA 7093-7109	FRE 401-403—Relevance

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
SARA SCHAEFER, ACTING LITIGATION
DIVISION CHIEF

/s/ H. Gray Laird III
H. Gray Laird III
Assistant City Attorney
State Bar No. 24087054
gray.laird@austintexas.gov
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78767-1546
Telephone: (512) 974-1358
Facsimile: (512) 974-1311
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this the 10th day of January, 2025.

/s/ H. Gray Laird III
H. GRAY LAIRD III

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-cv-0992-RP

**DEFENDANT CITY OF AUSTIN’S MOTION FOR
JUDGMENT AS A MATTER OF LAW**

TO THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, files its Motion for Judgment as a Matter of Law as follows:

INTRODUCTION

Plaintiff Julian Reyes has been fully heard on his claims against the City of Austin and has rested his case. During the Plaintiff’s case in chief, he failed to produce sufficient evidence to show that Defendant City of Austin violated the Privacy Protection Act (“PPA”), 42 U.S.C. §2000aa. Plaintiff’s claim fails because he failed to meet his burden of proof that the officers who arrested him on January 4, 2019 knew he was a journalist or believed he was planning to disseminate his videos to the public and wrongfully searched or seized his work product materials. Moreover, the “suspect exception” to the PPA’s prohibition against searches and seizures of materials intended for public dissemination applies to this incident since the officers had probable cause to believe that Plaintiff had committed or was in the process of committing the criminal offense to which the materials relate. As a result, Plaintiff’s claim under the PPA fails as a matter of law.

STANDARD OF REVIEW

A motion for judgment as a matter of law should be granted if, “after a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may ...grant a motion for judgment as a matter of law.” FED. R. CIV. P. 50(a); *Weisgram v. Marley Co.*, 528 U.S. 440, 447-48 (2000). A party has been fully heard when it rests its case. *Echeverria v. Chevron U.S.A., Inc.*, 391 F.3d 607, 610 (5th Cir. 2004). Once a party has been fully heard, the court should grant a motion for judgment as a matter of law against the non-moving party where the facts and inferences point so strongly in favor of the moving party that reasonable jurors could not arrive at a contrary verdict.” *Wallace v. Methodist Hospital Sys.*, 271 F.3d 212, 219 (5th Cir. 2001). A mere scintilla of evidence is insufficient to raise a question of fact for the jury. *Id.*

ARGUMENT AND AUTHORITIES

Plaintiff has been fully heard and has failed to raise a substantial conflict in the evidence that would permit a reasonable factfinder to rule in his favor.

I. Plaintiff’s Privacy Protection Act Claim Should Be Dismissed.

To prevail on a claim of unlawful seizure of work product and documentary materials under the PPA, a plaintiff must show that (1) he was a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce, and (2) that there was no probable cause to believe he had committed an offense to which the materials relate. 42 U.S.C. §2000aa. The PPA states that “this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if... there is probable cause to believe that the person possessing such materials has committed

or is committing the criminal offense to which the materials relate.” 42 U.S.C. §2000aa.

a. Plaintiff’s claim that his cameras are work product and documentary materials fails.

Plaintiff’s claim that his arrest on January 4, 2019 violated the PPA fails because he produced insufficient evidence that the arresting officers either knew that he was a journalist or believed that he was planning to disseminate the videos to the public. Plaintiff’s video of the incident demonstrates that he did not identify himself as a journalist or tell the officers that he was filming the police with the intent to disseminate the videos to the public. Plaintiff has not met his burden to prove that the officers believed he was planning to distribute those videos to the public, and thus has not proven a violation of the PPA.

b. The “suspect exception” to the PPA applies to Plaintiff’s January 4, 2019 arrest and thus his PPA claim fails.

The PPA “carves out various exceptions the prohibition against searches and seizures of materials intended for public dissemination.” *Sennett v. United States*, 667 F.3d 531, 535 (4th Cir. 2012). Under the “suspect exception,” the police can avoid the constraints of the PPA “when the person possessing the materials is a criminal suspect, rather than an innocent third party.” *Id.* (cleaned up). For this exception to apply, there must be probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate. 42 U.S.C. §2000aa(a)(1) & (b)(1). The materials exempted under the suspect exception must relate to the offense. *Id.*

The video of the January 4, 2019 incident demonstrates that the officers had probable cause to arrest Plaintiff for interference with public duties. Section 38.15(a)(1) of the Texas Penal Code provides: “A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with...a peace officer while the peace

officer is performing a duty or exercising authority imposed or granted by law.” Probable cause exists when a person does not follow instructions necessary for an officer to perform their duties. *See Bailey v. Ramos*, No. 23-50185 (5th Cir., Jan. 10, 2025)(officer could reasonably believe he had probable cause to arrest suspect for interference with public duties when suspect ignored officer’s instructions to stay away from crime scene); *Spillers v. Harris Cnty., Tex.*, ---F.4th---, 2024 WL 4002382, at *4 (5th Cir. Aug. 30, 2024)(finding that officer had probable cause to arrest plaintiff for interference with public duties when he failed to comply with instructions to move away from a crime scene); *Westfall v. Luna*, 903 F.3d 534, 544 (5th Cir. 2018)(finding that officer had probable cause to arrest plaintiff for interfering with his duties when she did not follow his instructions not to go into a home); *Childers v. Iglesias*, 848 F.3d 412, 415 (5th Cir. 2017)(finding that officer had probable cause to arrest plaintiff for violating officer’s instructions when plaintiff “did more than just argue with police officers; he failed to comply with an officer’s instruction, made within the scope of the officer’s official duty and pertaining to physical conduct rather than speech.”); *Haggerty v. Texas Southern University*, 391 F.3d 653, 657 (5th Cir. 2004)(reasonable officer could have believed with fair probability that arrestee had interfered with officer’s duties when arrestee ignored officer’s warnings to step back).

The video of the January 4, 2019 incident demonstrates that officers repeatedly instructed Plaintiff to “step back,” “move over there,” “stand right over there,” “stand up and stand by that wall,” and “stand up and go over there.” Plaintiff heard and understood these lawful orders, and it is undisputed that he did not follow these orders. In fact, Plaintiff repeatedly told the officers that he was not going to do anything that the officers told him to do. As a result, probable cause existed for the officers to arrest Plaintiff for interference with public duties. The record also demonstrates that the materials seized relate to the offense since Plaintiff was filming before and

while he was arrested. Since the officers had probable cause to arrest Plaintiff and the seized materials relate to the offense, the “suspect exception” to the PPA applies, and Plaintiff’s PPA claim fails as a matter of law. As a result, Defendant is entitled to judgment as a matter of law, and the Court should dismiss Plaintiff’s claim with prejudice.

PRAYER

For the above reasons, Defendant City of Austin respectfully requests that the Court grant this motion and enter judgment as a matter of law in favor of the Defendant City of Austin and dismiss Plaintiff’s claims with prejudice. Defendant further requests any additional relief to which it is entitled.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
SARA SCHAEFER, ACTING LITIGATION
DIVISION CHIEF

/s/ H. Gray Laird III

H. Gray Laird III

Assistant City Attorney

State Bar No. 24087054

gray.laird@austintexas.gov

City of Austin Law Department

P.O. Box 1546

Austin, Texas 78767-1546

Telephone: (512) 974-1358

Facsimile: (512) 974-1311

ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this the 13th day of January, 2025.

/s/ H. Gray Laird III
H. GRAY LAIRD III

FILED

January 13, 2025

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BY: Christian Rodriguez
DEPUTY

Julian Reyes

vs.

City of Austin, Inc.

§
§
§
§
§

CIVIL NO:
AU:21-CV-00992-RP

LIST OF WITNESSES

BY PLAINTIFF

- | | |
|-----|--------------|
| 1. | Julian Reyes |
| 2. | Gadiel Alas |
| 3. | |
| 4. | |
| 5. | |
| 6. | |
| 7. | |
| 8. | |
| 9. | |
| 10. | |
| 11. | |
| 12. | |
| 13. | |
| 14. | |
| 15. | |

FOR DEFENDANT

- | |
|-----|
| 1. |
| 2. |
| 3. |
| 4. |
| 5. |
| 6. |
| 7. |
| 8. |
| 9. |
| 10. |
| 11. |
| 12. |
| 13. |
| 14. |
| 15. |

BY: Christian Rodriguez
DEPUTY

⌘ ⌘ ⌘ ⌘

AU:21-CV-00992-RP

EXHIBITS

[illegible]

PLAINTIFF'S AMENDED EXHIBIT LIST

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
1.	Plaintiff's Second Amended Notice of Intention to Take the Deposition of the Rule 30(b)(6) Representative of the City of Austin. MSJ Response Exhibit 7.			
2.	Deposition excerpts of City of Austin's Rule 30(b)(6) Designee, Eric Miesse.	✓	none	✓
3.	<i>Shiner's Story</i> , by Julian Reyes, The Challenger Street Newspaper, July 1, 2013. REYES 00138-40.	✓	obj/or	✓
4.	May 2, 2018, Public Information Act request from Julian Reyes to City of Austin. COA 7636-38.	✓	obj/or	✓
5.	August 2018 police report reflecting City's knowledge of Julian Reyes's employment by Challenger Street Newspaper. COA 2143-51.	✓	obj/or	✓
6.	Excerpt of May 7, 2020, document from the Austin Regional Intelligence Center reflecting City's knowledge that Julian Reyes is a citizen journalist. COA 7361.	✓	obj/or	✓
7.	Excerpts of police reports identifying Julian Reyes as an "ANTI-POLICE ACTIVIST" and employee of Challenger Street Newspaper. COA 002122, COA 002134, COA 002176.	✓	obj/or	✓
8.	February 2020 City of Austin email chain reflecting City's knowledge that Julian Reyes is a journalist. COA 7093-7109.	✓	obj/or	✓
9.	Camcorder video of Julian Reyes's January 4, 2019, arrest. REYES 299.	✓	none	✓
10.	iPhone video of Julian Reyes's January 4, 2019 arrest. REYES 304.	✓	none	✓
11.	APD report of Julian Reyes's January 4, 2019 arrest. COA 002196-2213.	✓	none	✓
12.	APD Training Bulletin, Interference with Public Duties. COA 6482-83.	✓	none	✓

NO.	DESCRIPTION	OFFERED (Y/N)	OBJECTION (Y/N)	ADMITTED (Y/N)
13.	Docket sheet for charge filed based on Julian Reyes's January 4, 2019, arrest. MSJ Response Exhibit 13C.	✓	none	✓
14.	Order dismissing charges filed based on Julian Reyes's January 4, 2019, arrest. REYES 306.	✓	none	✓
15.	APD General Order 302 re Public Recording of Official Acts. COA 8598-8600.	✓	none	✓

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
CITY OF AUSTIN, AUSTIN POLICE	§	Case No. 1:21-CV-00992-RP-SH
DEPARTMENT, TROY WISMAR,	§	
CHRISTOPHER CARLISLE,	§	
PATRICK WALSH, KYU SUK AN,	§	
SARAH FOSTER, GREG McCORMACK,	§	
and JOHN DOES, Individually and in	§	
their official capacities,	§	
Defendants.	§	

**PLAINTIFF JULIAN REYES' RESPONSE TO
DEFENDANT CITY OF AUSTIN'S MOTION FOR
JUDGMENT AS A MATTER OF LAW**

TO THE HONORABLE ROBERT PITMAN:

Plaintiff Julian Reyes hereby responds to Defendant City of Austin's Motion for Judgment as a Matter of Law (Doc. 76) and would respectfully show:

I. Introduction and summary.

For the first time in any document – pleading, motion, or discovery response – the City alleges in a post-trial motion that it is not liable under the Privacy Protection Act of 1980 for its seizure of Plaintiff Julian Reyes' documentary and work product materials because it had probable cause to arrest him for interference with public duties. *See* Doc. 76.

The “suspect exception” to the PPA that the City belatedly raises is a statutory limitation on liability, and therefore is an “avoidance or affirmative defense” that must be pled under Federal Rule of Civil Procedure 8(c) or is waived. The City waived this affirmative defense by not raising it until after trial. The City offers no excuse for failing to plead this defense, and it should not be

permitted to do so after trial.

Even if the City had not waived the “suspect exception” defense, it failed to meet its burden of proof because there was no probable cause to arrest Mr. Reyes for interference with public duties. And if the Texas statute does reach Mr. Reyes’s conduct, it violates the First Amendment and cannot support a “suspect exception” defense to the City’s PPA violation.

II. Julian Reyes proved his Privacy Protection Act claim.

The City’s Motion begins with an assertion that, because Mr. Reyes supposedly did “not identify himself as a journalist or tell the officers that he was filming the police with the intent to disseminate the videos to the public,” he “produced insufficient evidence that the arresting officers either knew that he was a journalist or believed that he was planning to disseminate the videos to the public.” Motion at 3. This is the City’s *only* argument that Mr. Reyes did not prove the elements of a PPA claim, and it fails for three reasons.

First, Mr. Reyes did not need to prove this element because he is suing over the City’s seizure of his *documentary materials* – the video recordings he planned to, and did, publish online.

The PPA provides that

Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, *to search for or seize documentary materials, other than work product materials*, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce

42 U.S.C. § 2000aa(b) (emphasis added).

Mr. Reyes testified, without contradiction, that he possessed his cameras and their content in connection with a purpose to disseminate them publicly on his YouTube channel. That’s all Section 2000aa(b) requires. There is no “reasonably believed” element in the definition of an illegal seizure of *documentary materials*. *Id.* That element is present only in the definition of an

illegal seizure of *work product materials*. 42 U.S.C. § 2000aa(a). *See Binion v. City of St. Paul*, 788 F. Supp. 2d 935, 948 (D. Minn. 2011) (noting that “subsection (b), which protects ‘documentary materials,’ does not contain” the “reasonably believed” element).

Second, even if Mr. Reyes was required to prove that the arresting officers “reasonably believed” he was filming them in order to publish, Mr. Reyes *did*, in fact, inform the arresting officers that he was a journalist. He testified, without contradiction, that he was wearing a Press pass issued to him by *The Challenger Street Newspaper*, and on one of the videos introduced at trial, Mr. Reyes can be heard telling the arresting officers “I’m a member of the press.” Plaintiff’s Ex. 9 at 13:50. This was more than enough to put the officers on reasonable notice that he was a publisher protected by the Privacy Protection Act. *Binion*, 788 F. Supp. 2d at 948 (evidence that plaintiff was “wearing press credentials and carrying a camera and videotapes” sufficient to put arresting officers on notice that she intended to disseminate videos to the public); *Basler v. Barron*, No. H-15-2254, 2017 WL 477573, at *12 (S.D. Tex. Feb. 6, 2017) (arresting officer who was “fully aware of web sites where civilians disseminate films of police activity to the public” means he “likely knew or had reason to know Basler was filming him for the purpose of disseminating the film to the public”).

Third, Officer Alas testified that before he arrested Mr. Reyes on January 4, 2019, he knew who Mr. Reyes was, knew that Mr. Reyes videoed police interacting with citizens, knew about the Peaceful Streets Project, and knew Mr. Reyes’s videos were likely published online. His police report confirmed he knew that Mr. Reyes was filming when he was arrested. *See* Plaintiff’s Ex. 11 at 5 (“Julian was in possession of a small camera which appeared he was utilizing.”). In addition, the Court admitted documentary evidence showing that the City and APD knew, before his January

2019 arrest, that Mr. Reyes was an activist who wrote for *The Challenger Street Newspaper*. Plaintiff's Exs. 4, 5, 6, & 7.

Even though Mr. Reyes did not need to prove the element, the evidence was overwhelming that the arresting officers knew or "reasonably believed" he was filming in connection with his citizen journalism.

III. The City waived its "suspect exception" defense.

A defendant must affirmatively plead in its answer "any avoidance or affirmative defense." Fed. R. Civ. P. 8(c). Failure to plead an avoidance or affirmative defense constitutes waiver. *Davis v. Huskipower Outdoor Equip. Corp.*, 936 F.2d 193, 198 (5th Cir. 1991). Once an affirmative defense is waived, it cannot be revived by later motion for judgment. *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91, 96 (5th Cir. 1976). *See also* Doc. 56 at 7 (holding that City of Austin could not raise unpled defense of limitations in its summary judgment motion).

The City did not plead the "suspect exception" in its answer. *See* Doc. 29 at 4-5. It did not seek summary judgment on that defense (or any other ground) as to its January 4, 2019, seizure of Mr. Reyes's cameras. *See* Doc. at 18-19. It did not mention the defense its initial or pretrial disclosures. The City first raised the "suspect exception" in a motion for judgment filed after evidence had closed. *See* Doc. 76 (filed 1:04 p.m. on January 13, 2025). The City therefore waived the "suspect exception" because it is an avoidance or affirmative defense under Rule 8(c) and circuit precedent.

As the Fifth Circuit explained almost forty years ago, Rule 8(c) encompasses "a substantial number of additional defenses which must be timely and affirmatively pleaded," including any "statutory limitation on liability" or "statutory exemption." *Ingraham v. United States*, 808 F.2d 1075, 1078 (5th Cir. 1987). When a statutory exception "allows the defendant to avoid liability

even if the plaintiff meets his burden of proof,” the defendant must plead the exception and then prove that it applies. *Oden v. Oktibbeha Cnty.*, 246 F.3d 458, 467 (5th Cir. 2001).

In *Oden*, the Fifth Circuit held that the defendants waived the “staff exception” to Title VII liability when they raised that exception “for the first time in their motion for judgment as a matter of law,” filed after the close of evidence. 246 F.3d at 467. Title VII sets out the plaintiff’s burden of proof:

It shall be an unlawful employment practice for an employer ... to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2(a)(2). The statute then carves out liability for discrimination against certain employees in a “staff exception:”

An “employee” means an individual employed by an employer, *except that the term “employee” shall not include* any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, *or any person chosen by such officer to be on such officer’s personal staff ...*

42 U.S.C. § 2000e(f) (emphasis added). Because the Title VII staff exception “allows the defendant to avoid liability even if the plaintiff meets his burden of proof,” it is an affirmative defense that the defendant must plead or waive. *Oden*, 246 F.3d at 467.

Similarly, in *Ingraham*, the Fifth Circuit held that Texas’s statutory cap on damages in medical malpractice cases is an “avoidance” that Rule 8(c) requires be pled. “An avoidance in pleadings is an ‘allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading, shows cause why they should not have their ordinary legal effect.’” 808 F.2d at 1079 (quoting *Avoidance*, Black’s Law Dictionary (5th ed. 1979)). Because the statutory damages cap acts to defeat, in part, a plaintiff’s otherwise proven

claim, it is an “avoidance” that must be pled to avoid waiver. *Id.*¹

The PPA’s structure is the same as the statutes in *Oden* and *Ingraham*. Mr. Reyes must show that a government agent seized documentary materials he intended to publish:

[I]t shall be unlawful for a government officer or employees, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate commerce.

42 U.S.C. § 2000aa(b). This provision states the elements of a PPA claim. “The plain language of the statute makes it unlawful for a government officer or employee to ‘search for or seize’ documentary materials ‘in connection with the investigation or prosecution of a criminal offense.’” *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, No. 5:04CV2329, 2006 WL 1705009, at *5 (N.D. Ohio June 16, 2006), *aff’d*, 499 F.3d 553 (6th Cir. 2007). *See also Hoi v. Tex. Dep’t of Hous.*, No. 3:06-CV-0385-P, 2007 WL 9711737, at *2-3 (N.D. Tex. July 16, 2007) (stating elements of PPA claim).

After stating the elements of a claim, the PPA then identifies, in four subsections, exceptions to liability for the seizure of documentary materials, including the “suspect exception.” 42 U.S.C. § 2000aa(b)(1)-(4). These exceptions do not controvert the elements of the plaintiff’s claim, but rather require proof of additional facts that defeat the claim. *Id.* Under *Oden*, *Ingraham*, and Rule 8(c), therefore, these exceptions are avoidances or affirmative defenses that must be pled.

Counsel has found no case requiring a plaintiff to *disprove* each exception in order to state

¹ *See also Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990) (Louisiana statutory limitation of liability on malpractice claims is an avoidance within the meaning of Rule 8(c) because prevents the plaintiff’s claim from having its “ordinary legal effect”) (citing *Ingraham*, 808 F.2d at 1079); *Reed v. Columbia St. Mary’s Hosp.*, 915 F.3d 473, 477-78 (7th Cir. 2019) (religious exemption in Title III of ADA is an “affirmative defense because it assumes the plaintiff can prove everything she must to establish her claim but may still act to defeat her claim”).

a PPA claim. To the contrary, numerous cases treat the “suspect exception” as a defense the defendant must prove. For instance, the Eighth Circuit in *Citicasters v. McCaskill*, expressly defined the exceptions in § 2000aa(b)(2) and (3) as affirmative defenses. 89 F.3d 1350, 1353 (8th Cir. 1996). Similarly, the Ninth Circuit treated the “suspect exception” as an affirmative defense or avoidance, noting that it “bars a PPA claim if ‘there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.’” *Am. News and Info. Servs., Inc. v. Gore*, 778 Fed. Appx. 429, 431 (9th Cir. 2019) (emphasis added). Other courts have likewise treated the “suspect exception” as a defense to a PPA claim. See *Berglund v. City of Maplewood*, 173 F. Supp. 2d 935, 949 (D. Minn. 2001) (PPA’s suspect exception “applies to defeat Plaintiffs’ claims”), *aff’d w/o opinion*, 50 F. App’x 805 (8th Cir. 2001); *Madaie v. Roden*, No. CV-06-BE-0904-S, 2007 WL 9697592, at *3 (N.D. Ala. May 9, 2007) (“If, after additional discovery, the FBI can show that it could have established probable cause at that time, its search and seizure of Mr. Madaio’s computers likely would fall within the exception to the PPA.”) (emphasis added).

Mr. Reyes made his PPA claim in his Amended Complaint filed June 26, 2023, more than a year and a half before trial. Doc. 28 at 5-6. The City provides no excuse for its failure to plead the suspect exception in its answer or at any time before evidence closed at trial. Civil rights cases are hard enough for ordinary citizens like Mr. Reyes to prove without having to deal with late-raised defenses by capably represented government subdivisions with large legal departments. The Court should not entertain the City’s unexcusedly belated defense.

IV. Even if the City had not waived the suspect exception, it failed to prove it because there was no probable cause to arrest Mr. Reyes for interference with public duties.

Mr. Reyes was arrested for interference with public duties under Texas Penal Code § 38.15, which provides, in relevant part:

(a) A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with (1) a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law ...

(c) It is a defense to prosecution under this section that the interruption, disruption, impediment, or interference alleged consisted of speech only.

In order to violate this statute, “a person’s interference must consist of more than speech alone.” *Voss v. Goode*, 954 F.3d 234, 239 (5th Cir. 2020). “[M]erely arguing with police officers about the propriety of their conduct, including about whether they have the legal authority to conduct a search, falls within the speech exception of section 38.15.” *Freeman v. Gore*, 483 F.3d 404, 414 (5th Cir. 2007). For example, the Fifth Circuit held that arguing with deputies about whether they had the right to search the arrestee’s home, even though it delayed their efforts to locate a suspect, fell within the speech exception. *Id.* Likewise, the Austin Court of Appeals held that arguing with officers, even though it delayed the execution of a search warrant, fell within the speech exception when the arrestee was not obstructing officers’ way. *Carney v. State*, 31 S.W.3d 392, 398 (Tex. App. – Austin 2000, no pet.).

The evidence at trial showed that Mr. Reyes’s alleged interference with public duties, if any, was through speech alone. On January 4, 2019, Mr. Reyes approached a scene where officers were confronting a group of individuals who Officer Alas claims were violating the City’s “no sit, lie, or camp” ordinance, even though none of them were sitting, lying, or camping. *See* Plaintiff’s Ex. 10 at 07:05. While filming, Mr. Reyes read the officers’ names and badge numbers to himself for documentation. *Id.* at 08:10, 08:20. After documenting the group arguing with the officers

that they were not violating the ordinance, Mr. Reyes began expressed his own views. *Id.* at 00:09:33. Even as Mr. Reyes spoke, Officer Alas continued to interact with the individuals and fill out his citation book. *Id.* at 00:11:00. Mr. Reyes approached Officer Hale to learn his name. *Id.* at 00:11:40. Officer Hale told Mr. Reyes to step back, and Mr. Reyes complied. *Id.* at 00:11:44. Officer Hale did not give Mr. Reyes any further instructions nor claim Mr. Reyes was interfering with anyone's duties. *Id.* at 00:12:15.

Mr. Reyes sat down in a location that did not impede the officers' access to the individuals and continued filming. Plaintiff's Ex. 10 at 00:13:00. Thirty seconds later, Officer Alas approached Mr. Reyes and told him to stand up. *Id.* at 00:13:30. Mr. Reyes demurred. *Id.* at 13:32. Officer Alas ignored Mr. Reyes and continued to write a citation, unobstructed by Mr. Reyes. *Id.* at 13:40. Mr. Reyes remained seated. *Id.* at 00:13:50.

Mr. Reyes did continue to verbally criticize the officers' actions. Plaintiff's Ex. 10 at 00:13:55. However, only after Mr. Reyes declared that the officers, not the individuals, were "breaking the law" did Officer Alas abruptly turn on Mr. Reyes and claim he was "interfering." *Id.* at 00:13:57. Although Mr. Reyes, accurately, told Officer Alas that he was "not physically doing anything," Officer Alas told Mr. Reyes to move to "where the crack is" and to "stand right over there." *Id.* at 00:14:03. He did not tell Mr. Reyes that he was in a crime scene. *Id.* He did not tell Mr. Reyes that he was "interfering" because of where he was sitting, but rather because what he was *saying* was supposedly riling up the group, *id.* at 00:14:13, even though the video shows they were riled up before Mr. Reyes said anything. *See id.* at 00:09:00. Officer Alas then arrested Mr. Reyes. *Id.* at 00:14:40. Contrary to the City's suggestion at trial, Officer Alas did not give Mr. Reyes multiple warnings, but rather arrested him almost immediately after claiming that he was "interfering" by "riling them up" with his words. *Id.* at 00:14:38. Less than one minute

– 42 seconds – elapsed from the time Officer Alas told Mr. Reyes that he was “interfering” and telling him he was under arrest. *Id.* at 00:13:58-00:14:40. Because Mr. Reyes was *not* “riling up” the group or physically interfering, there were no grounds to order him to move, and because the alleged “riling up” was through speech alone, there was no probable cause to arrest Mr. Reyes for interference with public duties.

The City cites four cases in support of its claim there was probable cause to arrest Mr. Reyes, none of which are on point. Significantly, each case addressed whether the defendant officer *was entitled to qualified immunity for an arrest*, a lower standard than probable cause. Officers enjoy qualified immunity even if they are *wrong* about the existence of probable cause, so long as they “reasonably but mistakenly conclude probable cause is present.” *Bailey v. Ramos*, – F.4th –, 2025 WL 66320, at *5 (5th Cir. Jan. 10, 2025). In such cases, “[t]here must ‘not even arguably be probable cause for the ... arrest for the immunity to be lost,’” a burden the plaintiff must meet. *Id.* Here, in contrast, the City must prove that probable cause in fact existed, not just that its officers were reasonably mistaken. Moreover, each of the City’s cases is distinguishable on its facts.

In *Bailey*, officers told the arrestee that he was in an active crime scene and should therefore stand back, and the arrestee did not comply as quickly as others at the scene and therefore, whether or not probable cause to arrest actually existed, the officers could reasonably believe it did. 2025 WL 66320, at *5.

In *Childers v. Iglesias*, 848 F.3d 412, 415 (5th Cir. 2017), an officer ordered the plaintiff to move his truck, which was blocking the entrance to the plaintiff’s ranch and therefore physically impeding the officer’s investigation, and the plaintiff failed to do so. *Id.* at 413. The Court found qualified immunity, not because there was probable cause in fact, but because “a reasonable officer

could have believed that there was a fair probability” the plaintiff violated the law by refusing to move his truck, a physical act, not speech. *Id.* at 414-15.

In *Spiller v. Harris County*, 113 F.4th 573, 579 (5th Cir. 2024), Spiller’s girlfriend was involved in a single-vehicle accident on a dangerous, elevated expressway. The Court held that “[a] reasonably competent officer could have believed that probable cause existed for [Spiller’s] arrest” because he impeded the officers’ investigation into whether the driver was impaired by answering questions for her, and then he failed to leave the elevated expressway after his girlfriend left with other officers. *Id.* at 579.

In *Westfall v. Luna*, 903 F.3d 534 (5th Cir. 2018), yet another qualified immunity case, the Fifth Circuit held that a reasonable officer could have concluded (even if mistaken) that the plaintiff had interfered with public duties when she failed to follow the officers’ instructions not to enter her house – where they were searching for illegal drugs – and put her hand on the doorknob to enter. *Id.* at 544. Notably, however, the Court reversed the trial court’s grant of summary judgment for three of the officers because their warrantless entry into the plaintiff’s home may have been illegal, and if so, the plaintiff could not have interfered with the officers’ “official duties,” as a matter of law. *Id.* at 546.

Lastly, in *Haggerty v. Texas Southern University*, 391 F.3d 653 (5th Cir. 2004), the Fifth Circuit, over a dissent, found an officer entitled to qualified immunity for arresting a professor for interfering with public duties where there had been the report of a fight among students, the situation was “potentially explosive,” and the professor, rather than step back, took steps towards the officers. *Id.* at 656-57. As in each of the other cases, the Court did not make a probable cause determination, but only that a reasonable officer could have believed, even if mistaken, that there was probable cause to arrest for actions beyond speech. *Id.* at 657-58.

Mr. Reyes's conduct is like conduct where courts concluded officers had no probable cause to arrest or reversed a conviction. In *Carney v. State*, the Austin Court of Appeals reversed a conviction of Mr. Carney for interference for public duties. 31 S.W.3d 392 (Tex. App.—Austin 2000, no pet.). There, officers appeared at Mr. Carney's home with a search warrant and a warrant for his wife's arrest. *Id.* at 397. Although Mr. Carney argued with officers and questioned the validity of their authority, Mr. Carney ultimately told officers he would let them into his home and began leading them through his garage. *Id.* Impatient, officers shoved Mr. Carney and arrested him for interference. *Id.* at 398. Although the court acknowledged that Mr. Carney delayed officers' entry into the home, it reversed the conviction because there was no evidence that Mr. Carney blocked officers' entry into the home and his speech alone was insufficient for conviction. *Id.* In *Freeman*, officers arrested Ms. Freeman after she argued with the officers when they told her that they could search her home despite lacking authority to do so. 483 F.3d at 414. The Fifth Circuit held that the officers lacked probable cause to arrest Ms. Freeman for interference with public duties as her conduct consisted of speech alone, noting that yelling and screaming is protected by the speech exception. *Id.* Like *Carney*, Mr. Reyes' speech at most delayed Officer Alas from completing the citation he was writing. Like *Freeman*, Mr. Reyes was simply disputing Officer Alas's authority to issue citations and to order Mr. Reyes to move. And like both cases, there is no evidence that Mr. Reyes prevented Officer Alas from performing an official duty.

Cases in a different procedural posture also support Mr. Reyes position. In *Pulliam v. Fort Bend County*, Pulliam was filming police conduct a welfare check and an officer asked Pulliam to move across the street. No. 4:22-CV-04210, 2024 WL 4068767, at *2 (S.D. Tex. Sept. 5, 2024), *report and recommendation adopted* 2024 WL 4282088 (S.D. Tex. Sept. 24, 2024). The officer

arrested Pulliam after Pulliam argued with the officer instead of moving. *Id.* The district court denied a motion for summary judgment on qualified immunity because fact issues remained over the existence of probable cause, noting (1) that Pulliam did not obstruct the officer from carrying out his job, (2) that Pulliam did not instruct anyone else to obstruct the officer, and (3) that more information on the location of others at the scene was relevant to determine whether the order to move was necessary for security purposes. *Id.* at *11. Here, we know that Mr. Reyes did not obstruct Officer Alas from carrying out his job and that Mr. Reyes did not instruct anyone else to obstruct Officer Alas or Officer Hale. In addition, there is no evidence that Mr. Reyes's seated position was a security concern or that it hindered the officers' ability to move freely and carry out their duties. The evidence presented at trial establishes that Officer Alas lacked probable cause to arrest Mr. Reyes. *See also Novak v. Sheets*, No. 6:05-CV-252, 2006 WL 8441114, at *8 (E.D. Tex. May 25, 2006) (denying summary judgment on qualified immunity because "[a]ll reasonable officials in the defendant's circumstances should have then known that the defendant's conduct in arresting Kimberly when she was merely 'mouthing off' did not constitute an actionable offense.").

V. If there was probable cause under the Texas statute to arrest Mr. Reyes, the statute violates the First Amendment as applied to him, and therefore cannot support a PPA suspect exception defense.

"The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Houston v Hill*, 482 U.S. 451 (1987). Indeed, the "freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-62. "Speech is often provocative and challenging ... [but it] is nevertheless protected against censorship or punishment, unless shown likely to produce *a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.*" *Terminiello*

v. Chicago, 337 U. S. 1, 4 (1949) (emphasis added). *See also Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974) (ordinance prohibiting “any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty” was unconstitutionally overbroad because it punished speech only and was not limited to fighting words that, “by their very utterance, inflict injury or tend to incite an immediate breach of the peace.”).

As this Court has recognized, the First Amendment protects speech directed at law enforcement officers that “fails to rise above inconvenience, annoyance, or unrest, or constitute an incitement to immediate lawless action.” *Turner v. City of Round Rock*, No. 1:15-CV-939-RP, 2016 WL 8904964, at *8 (W.D. Tex. May 25, 2016) (quoting *Enlow v. Tishomingo Cnty.*, 962 F.2d 501, 509 (5th Cir. 1992)). The Fifth Circuit has advised that “courts need to be alert to arrests that are prompted by constitutionally protected speech.” *Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008). “Trained officers must exercise restraint when confronted with a citizen’s anger over police action.” *Id.* (citing *Lewis v. City of New Orleans*, 415 U.S. 130, 134-35 (1974) (Powell, J., concurring)). “[T]he First Amendment protects even profanity-laden speech directed at police officers,” and therefore “[p]olice officers reasonably may be expected to exercise a higher degree of restraint than the average citizen.” *Freeman*, 483 F.3d at 414 n.7 (citing *Payne v. Pauley*, 337 F.3d 767, 776 (7th Cir. 2003)).

If Texas’ interference with public duties statute reaches Mr. Reyes’s conduct on January 4, 2019, it violates these principles, as applied. Mr. Reyes did not even swear at the officers, let alone use “fighting words,” nor did he incite the citizens to “an imminent breach of the peace.” He did not physically interfere in the officers’ conduct. Even if his speech “riled up” the individuals or caused the officers “inconvenience, annoyance, or unrest,” and even if Officer Alas considered his

speech “opposition,” “criticism or challenge,” it was constitutionally protected. It is significant that Mr. Reyes was unmolested by any officer on the scene until he told Officer Alas that *he* was breaking the law. Only after hearing this comment did Officer Alas – who essentially had been ignoring Mr. Reyes until that point – angrily turn on him and started barking orders. The facts here are similar to those in *Ybarra v. Davis*, where this Court held that a plaintiff stated a First Amendment violation by alleging that a law enforcement officer threw him “to the ground by his neck for ‘exercising his free speech rights by telling Davis that he had entered the property illegally.’” 489 F. Supp. 3d 624, 630 (W.D. Tex. 2020). Such retaliation for critical speech is, unfortunately, not uncommon when officers believe their authority is being challenged. *E.g.*, *Mesa v. Prejean*, 543 F.3d 264, 268, 273 (5th Cir. 2008) (plaintiff engaged in protected speech when she told arresting officer “If you didn’t have that badge you wouldn’t be treating me like that.”); *Flores v. Rivas*, No. EP-18-CV-297-KC, 2019 WL 5070182, at *17 (W.D. Tex. Aug. 11, 2019) (“mouthing off and talking back to a police officer” constitutionally protected speech); *Harvey v. Montgomery Cnty.*, 991 F. Supp. 2d 785, 804 (S.D. Tex. 2012) (First Amendment protects plaintiff’s telling officers to leave his property and turning his back on them to enter his house); *Adams v. Praytor*, No. Civ. A. 303CV002N, 2004 WL 1490021, at *5 (N.D. Tex. July 1, 2004) (no qualified immunity for arresting person who “was at most, verbally argumentative” with law enforcement officers). *See also Coggin v. Texas*, 123 S.W.3d 82, 91-92 (Tex. App. – Austin 2003, pet. ref’d) (giving officer “the bird,” although “repugnant, distasteful, and crass,” was not disorderly conduct because it was not likely to cause an immediate breach of the peace).

VI. Conclusion and prayer.

Julian Reyes proved at trial that the City seized his documentary materials when they arrested him on January 4, 2019. Even if he was required to prove the arresting officer “reasonably

believed” he was filming in connection with an intent to publish, Mr. Reyes proved that fact. The City waived the PPA’s suspect exception because it is an affirmative defense that the City failed to plead in its answer or raise until after trial. Even if the City had not waived that defense, it is unavailable because the City lacked probable cause to arrest Mr. Reyes under Texas’s interference with public duties statute, which does not cover “speech only.” And to the extent the statute does cover Mr. Reyes’s conduct that day, it violates the First Amendment and therefore cannot provide support for the City’s unpled defense.

For these reasons, and those shown at trial, the Court should find that the City of Austin violated the Privacy Protection Act when it seized Mr. Reyes’ cameras and their contents on January 4, 2019, award him \$1,000 in statutory damages, costs of court, a reasonable attorney’s fee pursuant to 42 U.S.C. § 2000aa-6(f), and such other and further relief to which he has shown himself entitled.

Respectfully submitted,

By: /s/ Peter D. Kennedy
 Peter D. Kennedy
 State Bar No. 11296650
 pkennedy@gdham.com
 Daniela Peinado Welsh
 State Bar No. 24127300
 dwelsh@gdham.com
 Mark A. Stahl
 State Bar No. 24125420
 mstahl@gdham.com
 Graves, Dougherty, Hearon & Moody, P.C.
 401 Congress Avenue, Suite 2700
 Austin, Texas 78701
 (512) 480-5600 (Phone)
 (512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
 JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on January 23, 2025, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy

Peter D. Kennedy

4729896.v1

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CASE NO. 1:21-CV-0992-RP

**DEFENDANT CITY OF AUSTIN'S AMENDED PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Defendant City of Austin files its Amended Proposed Findings of Fact and Conclusions of Law as follows:

1. On January 4, 2019, APD Officers Gadiel Alas and Corey Hale were enforcing the City of Austin's sidewalk camping ordinances near the ARCH on East Seventh Street in Austin, Texas. As the officers were discussing the ordinances with several individuals at the southwest corner of East Eighth Street and Neches Street, Plaintiff Julian Reyes approached the group and interjected himself into the officers' interaction with the individuals.
2. Reyes filmed the interaction between himself, the officers and the other individuals at the scene. The officers never instructed Reyes to stop filming the interaction. Reyes never informed the officers that he was a journalist or that he intended to publish or otherwise disseminate the video. The officers did not know or reasonably believe that Reyes intended to publish or otherwise disseminate the video.
3. The video demonstrates that Reyes was in close proximity to the officers and the other individuals during the entire interaction. At one point, Officer Hale ordered Reyes to step back by instructing Reyes as follows: "Can you step back for me? To the Curb?" Reyes did not follow these orders and instead remained approximately 3-5 feet from Officer Hale.

4. Reyes interjected himself into the conversations between the officers and other individuals and interrupted the officers' attempts to explain the applicable ordinances to the individuals and the officers' efforts to issue citations to the individuals.

5. Officer Alas gave Reyes several clear orders including: "Move over there; I need you to move over there; Stand right over there; Stand up and stand by that wall; and I'm going to arrest you if you don't stand up and stand by that wall." Compliance with these orders would not have impeded Reyes's ability to film the incident. Reyes heard and understood these orders but did not comply with any of Alas's orders. Instead of complying with the orders, Reyes replied more than once: "I'm not going to do anything you tell me to do." Reyes also told Alas: "You can give me a ticket, or you can arrest me. I don't really care."

6. Eventually, Officer Alas placed Reyes under arrest for violating Section 38.15(a)(1) of the Texas Penal Code which provides: "A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with...a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law." During the arrest, Officers Alas and Hale conducted an inventory of Reyes's personal items, including a camcorder and cellphone, and the officers turned these items over to Travis County officials when Reyes was booked at the Travis County jail. Reyes was subsequently released from jail the next day, and the camcorder and cellphone were returned to Reyes. Neither Officer Alas nor Officer Hale viewed any videos or other information contained on Reyes's camcorder or cellphone.

7. The officers' actions in turning in Reyes's camcorder and cellphone to Travis County officials during Reyes's arrest booking were not a violation of the Privacy Protection Act, 42 U.S.C. §2000aa. Reyes produced insufficient evidence that the arresting officers either knew

that Reyes was a journalist or reasonably believed that Reyes was planning to disseminate the video to the public.

8. Additionally, the “suspect exception” to the Privacy Protection Act applies to Reyes’s arrest on January 4, 2019. The video of the incident demonstrates that Officer Alas had probable cause to arrest Reyes for interference with public duties under Section 38.15(a)(10 of the Texas Penal Code. First, the video clearly demonstrates that Reyes interrupted, disrupted, impeded or otherwise interfered with the officers’ duties or authority while the officers were attempting to enforce the city ordinances. Moreover, it is undisputed that Reyes did not comply with the officers’ instructions to physically move from his current location. Probable cause exists when a person does not follow instructions necessary for an officer to perform their duties. *See Bailey v. Ramos*, No. 23-50185 (5th Cir., Jan. 10, 2025)(officer could reasonably believe he had probable cause to arrest suspect for interference with public duties when suspect ignored officer’s instructions to stay away from crime scene); *Spillers v. Harris Cnty., Tex.*, ---F.4th---, 2024 WL 4002382, at *4 (5th Cir. Aug. 30, 2024)(finding that officer had probable cause to arrest plaintiff for interference with public duties when he failed to comply with instructions to move away from a crime scene); *Westfall v. Luna*, 903 F.3d 534, 544 (5th Cir. 2018)(finding that officer had probable cause to arrest plaintiff for interfering with his duties when she did not follow his instructions not to go into a home); *Childers v. Iglesias*, 848 F.3d 412, 415 (5th Cir. 2017)(finding that officer had probable cause to arrest plaintiff for violating officer’s instructions when plaintiff “did more than just argue with police officers; he failed to comply with an officer’s instruction, made within the scope of the officer’s official duty and pertaining to physical conduct rather than speech.”); *Haggerty v. Texas Southern University*, 391 F.3d 653, 657 (5th Cir. 2004)(reasonable officer could have believed with fair probability that arrestee had

interfered with officer's duties when arrestee ignored officer's warnings to step back); *see also Hall v. Trochessett*, 105 F.4th 335, 343-44 (5th Cir. 2024)(speech only defense did not vitiate probable cause at the time of arrest); *Voss v. Goode*, 954 F.3d 234, 240 (5th Cir. 2020).

Additionally, the camcorder and cellphone relate to the offense since Reyes was filming his interactions with the police officers before and while he was arrested.

9. Since the City of Austin did not violate the Privacy Protection Act during the incident which is the subject of this lawsuit, the Court should dismiss Plaintiff's PPA claim with prejudice.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
SARA SCHAEFER, ACTING CHIEF, LITIGATION

/s/ H. Gray Laird

H. Gray Laird

Assistant City Attorney

State Bar No. 24087054

gray.laird@austintexas.gov

City of Austin Law Department

P.O. Box 1546

Austin, Texas 78767-1546

Telephone: (512) 974-1342

Facsimile: (512) 974-1311

ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that on January 23, 2025 I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ H. Gray Laird
H. Gray Laird

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-cv-0992-RP

**DEFENDANT CITY OF AUSTIN’S REPLY IN SUPPORT OF ITS MOTION FOR
JUDGMENT AS A MATTER OF LAW**

TO THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin files this Reply in support of its Motion for Judgment as a Matter of Law as follows:

ARGUMENT AND AUTHORITIES

I. Plaintiff’s Privacy Protection Act claim should be dismissed.

a. The City did not waive the “suspect exception” defense.

In his response, Plaintiff asserts that the City waived the suspect exception defense under the Privacy Protection Act since the City did not list the suspect exception as an affirmative defense in its answer to Plaintiff’s First Amended Complaint. The Fifth Circuit has noted that “[c]entral to requiring the pleading of affirmative defenses is the prevention of unfair surprise.” *Ingraham v. U.S.*, 808 F.2d 1075, 1079 (5th Cir. 1987). The Fifth Circuit has held in a number of cases that “[w]here the matter [affirmative defense] is raised in the trial court in a manner that does not result in unfair surprise, however, technical failure to comply precisely with Rule 8c is not fatal.” *Lucas v. U.S.*, 807 F.2d 414, 417-18 (5th Cir. 1986), quoting *Allied Chemical Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983). The defendant does not waive an affirmative defense if “[h]e raised the issue at a pragmatically sufficient time, and [the plaintiff] was not

prejudiced in its ability to respond.” *Allied Chemical*, 695 F.2d at 856.

In his response, Plaintiff does not even feign surprise that the City relies on the suspect exception and for good reason: the suspect exception has been raised, briefed and discussed by the parties and the Court since the City filed its answer to the First Amended Complaint. Plaintiff’s assertion that the City raises for the first time in its post-trial motion that it is not liable under the PPA because it had probable cause to arrest Plaintiff is simply inaccurate. First, Plaintiff was aware that the City contended that it had probable cause to arrest Plaintiff when Plaintiff received the City’s answer to the First Amended Complaint. In his First Amended Complaint, Plaintiff alleged that the City violated the PPA when it seized Plaintiff’s materials during arrests and “[t]here was no probable cause to believe that Reyes had committed a criminal offense to which the materials related...” (Doc. 28, ¶¶ 25; 30)(emphasis added). Notably, the City specifically denied each of these allegations in its answer to the First Amended Complaint. (Doc. 29, ¶¶ 25; 30) So, Plaintiff had notice since at least July 6, 2023 that the City contended that its officers had probable cause to arrest Plaintiff.

Second, in its Motion for Summary Judgment, the City raised the suspect exception of the PPA. (Doc. 44, pp. 2-3; 10; 16-20) The City contended that APD officers had probable cause to arrest Plaintiff for the offenses raised by Plaintiff in his First Amended Complaint. *Id.*¹ Plaintiff addressed the probable cause arguments in his response to the Motion for Summary Judgment and thus has never been surprised that the City relied on the suspect exception throughout this case.

Additionally, Plaintiff could not possibly have been surprised by the City’s reliance on

¹ In his First Amended Complaint, Plaintiff did not identify the January 4, 2019 as an alleged violation of the PPA. (Doc. 28) In fact, Plaintiff did not identify the January 4, 2019 arrest at all until he raised it in his response to the City’s Motion for Summary Judgment. (Doc. 47)

the suspect exception since the magistrate judge and this Court addressed the applicability of the suspect exception to the January 4, 2019 incident in their rulings on the City's Motion for Summary Judgment. The magistrate judge found that the APD officers had probable cause to arrest Plaintiff on January 4, 2019 for interference with public duties and that the suspect exception precluded Plaintiff's PPA claim. (Doc. 56, pp. 11; 22; 25) This Court also discussed probable cause for the January 4, 2019 arrest and the applicability of the suspect exception in its order adopting in part and rejecting in part the magistrate judge's report and recommendation. (Doc. 68, pp. 21-22) Again, Plaintiff could not possibly have been surprised that the City relied on the suspect exception in its motion for judgment as a matter of law when the magistrate and this Court fully addressed the exception in the rulings on the Motion for Summary Judgment.

Additionally, the City discussed the suspect exception to the PPA and probable cause for all of Plaintiff's arrests, including the January 4, 2019 arrest, in its Proposed Findings of Fact and Conclusions of Law which it filed on December 5, 2024, over a month before the trial of this case. (Doc. 67, pp. 4-5; 13-14). Thus, Plaintiff had even more notice that the City had raised the suspect exception and intended to rely on it at trial.

Moreover, the suspect exception to the PPA and the issue of probable cause for the January 4, 2019 arrest were brought up at trial, and the Plaintiff had ample opportunity to present evidence and argument at trial concerning the applicability of the suspect exception. At the trial of this case, defense counsel discussed probable cause and the suspect exception in his opening statement. Additionally, Officer Alas testified that he believed he had probable cause to arrest Plaintiff for interference with public duties. Plaintiff had notice that the suspect exception would be an issue at trial and had a full and complete opportunity to address the exception and present evidence on the probable cause issue at trial.

This case is a far cry from the Fifth Circuit cases cited by Plaintiff where the Fifth Circuit held that a defendant waived an affirmative defense. In *Oden v. Oktibbeha County, Miss.*, 246 F.3d 458, 467 (5th Cir. 2001), the defendants asserted the personal staff exception to Title VII for the first time in the defendants' motion for post-trial relief which was filed after the jury returned its verdict, and the court had entered judgment. The Court stated that "[a] defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense." *Oden*, 246 F.3d at 467, quoting *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987). The Fifth Circuit held that allowing the defendant to wait until after the jury verdict to assert the personal staff exception was an unfair surprise to the plaintiff since the plaintiff was denied the opportunity to present evidence at trial concerning the applicability of the personal staff exception. *Oden*, 246 F.3d at 467; *see also Ingraham*, 808 F.2d at 1079 (defense was deemed waived where plaintiff had no opportunity at trial to challenge government's assertion of statutory limitation on medical malpractice damages or present more evidence on medical damages which were not subject to the statutory limit).

Here, Plaintiff was not ambushed at all by the City's assertion of the suspect exception to the PPA since the City denied that there was no probable cause in its answer, and the suspect exception was thoroughly discussed by the Court and parties in the summary judgment briefing and rulings. The City also raised the suspect exception in its Proposed Findings of Fact and Conclusions of Law which were filed over a month before trial. Additionally, Plaintiff's ability to present evidence at trial on the suspect exception and probable cause was not foreclosed or limited in any way. This case is akin to the Fifth Circuit's decision in *Lucas v. U.S.*, 807 F.2d 414, 418 (5th Cir. 1986). There, the Court held that the federal government did not waive a defense involving a statutory limit on the amount of nonmedical damages recoverable in a

medical malpractice action where the issue was raised at trial immediately following the testimony of an economist, and the litigants had a full opportunity at trial to develop damages not subject to the cap. *Id.* The Court held that the defendant does not waive an affirmative defense if “[h]e raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond.” *Id.*, quoting *Allied Chemical*, 695 F.2d at 856.

In this case, the probable cause issue was raised at a “pragmatically sufficient time” since it was raised in the City’s answer as well as the subsequent summary judgment briefing and rulings as well as the trial testimony. Plaintiff was not unfairly surprised by the City’s assertion of probable cause and the suspect exception, and Plaintiff does not even attempt to argue that he was prejudiced in any way by the fact that the City did not list the suspect exception as an affirmative defense. As a result, there was no waiver of the suspect exception defense.

b. The “suspect exception” to the PPA applies to Plaintiff’s January 4, 2019 arrest and thus his PPA claim fails.

In his response, Plaintiff cites cases that have held that merely arguing with police officers about the propriety of their conduct does not constitute probable cause for an arrest under Texas Penal Code §38.15, and Plaintiff contends that his alleged interference on January 4, 2019 consisted of speech alone. The problem with this argument is that Plaintiff’s interference was not speech alone but also consisted of repeated failure to comply with the officers’ orders. Contrary to Plaintiff’s assertion that Officer Alas did not give Plaintiff multiple warnings, the video of the January 4, 2019 incident demonstrates that officers repeatedly instructed Plaintiff to “step back,” “move over there,” “stand right over there,” “stand up and stand by that wall,” and “stand up and go over there.” Plaintiff admitted that he heard and understood these lawful orders, and it is undisputed that he did not follow these orders. In fact, Plaintiff repeatedly told the officers that he was not going to do anything that the officers told him to do.

Failure to comply with a police officer's instruction to stand back is not protected speech and gives the officer probable cause to arrest under Texas Penal Code §38.15. *Childers v. Iglesias*, 848 F.3d 412 (5th Cir. 2017); *Westfall v. Luna*, 903 F.3d 534, 544 (5th Cir. 2018)(failing to follow a deputy's instruction moves beyond the realm of speech). The fact that some of the cases cited by the City in its motion address probable cause in the context of a qualified immunity defense does not lessen the impact of their holdings that probable cause exists for interference with public duties when a person does not follow instructions necessary for an officer to perform their duties.

The cases cited by Plaintiff in his response are distinguishable. In *Carney v. State*, 31 S.W.3d 392, 398 (Tex. App.—Austin 2000, no pet.), officers shoved the arrestee in order to enter his house although the arrestee had only verbally argued with the officers. There was no evidence that the arrestee had disobeyed any orders of the officers or interfered with the officers' duties. *Id.* Similarly, in *Pulliam v. Fort Bend County, Texas*, No. 4:22-CV-04210, 2024 WL 4068767, (S.D. Tex. Sept. 5, 2024), the evidence revealed that the arrestee had only argued with the officer and had not disobeyed the officer's orders. Here, Plaintiff disobeyed Officer Alas's clear instructions to move back even though the instructions would not have interfered with Plaintiff's ability to film the interaction. Plaintiff's actions consisted of more than just mere speech.

Moreover, the Fifth Circuit has addressed and rejected Plaintiff's argument that there was no probable cause for an arrest for interference with public duties because of the "speech-only defense." In *Hall v. Trochessett*, 105 F.4th 335, 342 (5th Cir. 2024), the Fifth Circuit held that "the 'speech-only' defense is a defense to prosecution under Texas criminal law (see Tex. Pen. Code §2.03), which is of no consequence to the argument that probable cause is lacking. A

defense that may be raised in future proceedings does not vitiate probable cause at the time of arrest.” *Hall*, 105 F.4th at 342.

Probable cause to arrest “is not a high bar.” *Kaley v. United States*, 571 U.S. 320, 338, 134 S. Ct. 1090 (2014). Officer Alas had probable cause to arrest Plaintiff for interference with public duties when Plaintiff interrupted, disrupted, impeded and interfered with the officers’ duties within the meaning of Texas Penal Code §38.15. Since the officers had probable cause to arrest Plaintiff and the seized materials relate to the offense, the “suspect exception” to the PPA applies, and Plaintiff’s PPA claim fails as a matter of law.

c. Plaintiff has not proven his Privacy Protection Act claim.

Plaintiff did not introduce sufficient evidence to prove that the items allegedly seized by the APD officers were possessed by the Plaintiff with a purpose to disseminate the videos to the public. Plaintiff provided no testimony or other evidence that he was planning on disseminating these videos. Plaintiff’s only evidence is that APD and Officer Alas knew that Plaintiff was an activist who in the past had performed work for the *Challenger Street Newspaper*. Yet, this is not sufficient evidence to prove that he intended to disseminate the videos from this incident. He did not testify that he intended to publish **these** videos, and he never told the officers either before or after the alleged seizure that his purpose was to disseminate these videos. As a result, Plaintiff’s PPA claim fails.

Plaintiff argues that since one of his claims is that his “documentary materials” were allegedly seized, he was not required to prove that the officers reasonably believed that he was planning to disseminate the videos. Plaintiff’s interpretation of 42 U.S.C. §2000aa is illogical and easily results in inconsistent results. It makes little sense why a government official could be found liable for committing an unlawful act under the statute by searching for or seizing

“documentary materials” under §(b) of the statute, such as a videotape, when he did not reasonably believe the person possessing the videotape had a purpose of disseminating it, but he would not be liable for searching or seizing “work product materials” under §(a) of the statute which are contained on the same documentary materials when he did not reasonably believe the person in possession of the work product materials had a purpose of disseminating them. The only consistent interpretation of the statute is that the government official must reasonably believe that the person in possession of work product materials or documentary materials possessed them with a purpose to disseminate them to the public. Plaintiff has not proven (1) that he had a purpose of disseminating **these** videos and (2) that Officer Alas reasonably believed that Plaintiff possessed the videos with a purpose of disseminating them to the public.

Moreover, another inconsistent reading of 42 U.S.C. §2000aa is Plaintiff’s interpretation that the APD officers searched for or seized Plaintiff’s cell phone and camera. The officers did nothing more than turn in Plaintiff’s cell phone and camera as inventory to the Travis County booking officials. The evidence at trial revealed that neither APD officer searched for Plaintiff’s “work product materials” or other “documentary materials.” They did not review any material on Plaintiff’s cell phone and camera. The officers did not “seize” these items either. Plaintiff’s interpretation of the “search for” or “seize” element of the statute would essentially result in near strict liability for any officer who turns in an arrestee’s cell phone as personal inventory if the arrestee later claimed he intended to disseminate a video contained on the cell phone. This is a far cry from the purpose of the Privacy Protection Act. *See Guest v. Leis*, 255 F.3d 325, 340 (6th Cir. 2001)(“[T]he PPA was enacted to afford the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment.”) Plaintiff did not prove a violation of the PPA and, as a result, this claim should be dismissed.

II. Texas Penal Code §38.15 is not unconstitutional.

Plaintiff argues that if there was probable cause under Texas Penal Code §38.15 to arrest him, the statute is unconstitutional as applied to him and cannot support the suspect exception defense to the PPA. This argument is without merit.

First, Plaintiff did not assert a claim in his First Amended Complaint that the statute is unconstitutional. Nor did Plaintiff contend that the statute is unconstitutional in his response to the City's motion for summary judgment. Plaintiff also did not make this argument at trial. As a result, Plaintiff has waived this claim.

Even if Plaintiff is deemed not to have waived this claim, the claim is without merit because the application of the Texas statute to the Plaintiff's actions in this incident is not unconstitutional. While it is certainly true that "trained officers must exercise restraint when confronted with a citizen's anger over police action,"² and "[p]olice officers reasonably may be expected to exercise a higher degree of restraint than the average citizen,"³ that is exactly what Officer Alas did in this incident. Officer Alas exercised considerable restraint in response to Plaintiff's repeated efforts to interfere with the officers' interactions with the individuals about the camping ordinances. Officer Alas gave Plaintiff several clear orders to move a short distance which would not have interfered with Plaintiff's rights to free speech or to record the incident, and Plaintiff blatantly refused to comply with those orders.

Failure to comply with a police officer's instruction to stand back is not protected speech and gives the officer probable cause to arrest under Texas Penal Code §38.15. *Childers v. Iglesias*, 848 F.3d 412 (5th Cir. 2017); *Westfall v. Luna*, 903 F.3d 534, 544 (5th Cir. 2018)(failing to follow a deputy's instruction moves beyond the realm of speech). Officer Alas did not arrest

² *Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008).

³ *Freeman v. Gore*, 483 F.3d 404, 414 n. 7 (5th Cir. 2007).

Plaintiff for violating Texas Penal Code §38.15 because Plaintiff merely argued with the officers or criticized them. Officer Alas arrested Plaintiff because he failed to comply with Alas's lawful orders. This application of Texas Penal Code §38.15 to Plaintiff's actions is not unconstitutional.

PRAYER

For the above reasons, Defendant City of Austin respectfully requests that the Court grant this motion and enter judgment as a matter of law in favor of the Defendant City of Austin and dismiss Plaintiff's claims with prejudice. Defendant further requests any additional relief to which it is entitled.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
SARA SCHAEFER, ACTING LITIGATION
DIVISION CHIEF

/s/ H. Gray Laird III
H. Gray Laird III
Assistant City Attorney
State Bar No. 24087054
gray.laird@austintexas.gov
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78767-1546
Telephone: (512) 974-1358
Facsimile: (512) 974-1311
ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this the 31st day of January, 2025.

/s/ H. Gray Laird III
H. GRAY LAIRD III

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,

Plaintiff,

V.

CITY OF AUSTIN, AUSTIN POLICE
DEPARTMENT, TROY WISMAR,
CHRISTOPHER CARLISLE,
PATRICK WALSH, KYU SUK AN,
SARAH FOSTER, GREG McCORMACK,
and JOHN DOES, Individually and in
their official capacities,

Defendants.

[illegible]

Case No. 1:21-CV-00992-RP-SH

**JOINT STIPULATION AS TO FILING OF
AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO THE HONORABLE ROBERT PITMAN:

The Court has requested the parties submit amended proposed findings of fact and conclusions of law with citations to the transcript of the bench trial conducted by this Court on January 13, 2025. Counsel for Plaintiff Julian Reyes and for Defendant City of Austin received the bench trial transcript on February 5, 2025.

Although the Court has offered to provide the parties with additional time to file their amended proposed findings and conclusions, for the sake of expedience, counsel for Plaintiff and Defendant have conferred and agreed, and hereby stipulate, to submit their amended proposed findings and conclusions no later than **Tuesday, February 18, 2025**.

Respectfully submitted,

/s/ Peter D. Kennedy

Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5600 (Phone)
(512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

/s/ H. Gray Laird III

H. Gray Laird III
Assistant City Attorney
State Bar No. 24087054
gray.laird@austintexas.gov
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78767-1546
(512) 974-1358 (Phone)
(512) 974-1311 (Fax)

**ATTORNEYS FOR DEFENDANT
CITY OF AUSTIN**

CERTIFICATE OF SERVICE

I certify that on February 5, 2025, I caused a copy of the forgoing document to be served by the Electronic Case Filing System on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy

Peter D. Kennedy

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES,
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CASE NO. 1:21-CV-0992-RP

**DEFENDANT CITY OF AUSTIN'S SECOND AMENDED PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

Defendant City of Austin files its Second Amended Proposed Findings of Fact and Conclusions of Law as follows:

1. On January 4, 2019, APD Officers Gadiel Alas and Corey Hale were enforcing the City of Austin's sidewalk camping ordinances near the ARCH on East Seventh Street in Austin, Texas.¹ As the officers were discussing the ordinances with several individuals at the southwest corner of East Eighth Street and Neches Street, Plaintiff Julian Reyes approached the group and interjected himself into the officers' interaction with the individuals.²
2. Reyes filmed the interaction between himself, the officers and the other individuals at the scene. The officers never instructed Reyes to stop filming the interaction.³ Reyes never informed the officers that he intended to publish or otherwise disseminate the video.⁴ The officers did not know or reasonably believe that Reyes intended to publish or otherwise disseminate the video.
3. The video demonstrates that Reyes was in close proximity to the officers and the other individuals during the entire interaction.⁵ At one point, Officer Hale ordered Reyes to step back

¹ Trial Transcript, pp. 72-73.

² Trial Transcript, pp. 78-79.

³ Trial Transcript, pp. 95.

⁴ Trial Transcript, pp. 49-50.

⁵ Plaintiff's Exhibits 9;10.

by instructing Reyes as follows: “Can you step back for me? To the Curb?”⁶ Reyes did not follow these orders and instead remained approximately 3-5 feet from Officer Hale.⁷

4. Reyes interjected himself into the conversations between the officers and other individuals and interrupted the officers’ attempts to explain the applicable ordinances to the individuals and the officers’ efforts to issue citations to the individuals.⁸

5. While Reyes was approximately an arm’s length away from Officer Alas,⁹ Alas gave Reyes several clear orders including: “Stand up;¹⁰ Move over there;¹¹ I need you to move over there;¹² Stand right over there;¹³ Stand up and stand by that wall;¹⁴ and I’m going to arrest you if you don’t stand up and stand by that wall.”¹⁵ Compliance with these orders would not have impeded Reyes’s ability to film the incident.¹⁶ Reyes heard and understood these orders but did not comply with any of Alas’s orders.¹⁷ Instead of complying with the orders, Reyes replied more than once: “I’m not going to do anything you tell me to do.”¹⁸ Reyes also told Alas: “You can give me a ticket, or you can arrest me. I don’t really care.”¹⁹

6. Eventually, Officer Alas placed Reyes under arrest for violating Section 38.15(a)(1) of the Texas Penal Code which provides: “A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with...a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law.” During

⁶ Trial Transcript, pp. 50-51.

⁷ Trial Transcript, p. 51; Plaintiff’s Ex. 9; 10.

⁸ Trial Transcript, pp. 83; 98; 100

⁹ Trial Transcript, pp. 83; 103.

¹⁰ Trial Transcript, pp. 51; 102; Plaintiff’s Ex. 9; 10.

¹¹ Trial Transcript, pp. 54; 100; Plaintiff’s Ex. 9; 10.

¹² Trial Transcript, p. 54; Plaintiff’s Ex. 9; 10.

¹³ Trial Transcript, pp. 55; 102; Plaintiff’s Ex. 9; 10.

¹⁴ Trial Transcript, pp. 56; 102; Plaintiff’s Ex. 9; 10.

¹⁵ Trial Transcript, pp. 56; 102; Plaintiff’s Ex. 9; 10.

¹⁶ Trial Transcript, p. 101.

¹⁷ Trial Transcript, pp. 51-52; 54-57 ; 101-102.

¹⁸ Trial Transcript, pp. 52; 101; Plaintiff’s Ex. 9 ; 10.

¹⁹ Trial Transcript, pp. 52; 55-56; Plaintiff’s Ex. 9 ; 10.

the arrest, Officers Alas and Hale conducted an inventory of Reyes's personal items, including a camcorder and cellphone, and the officers turned these items over to Travis County officials when Reyes was booked at the Travis County jail.²⁰ Reyes was subsequently released from jail the next day, and the camcorder and cellphone were returned to Reyes that same day.²¹ Reyes was able to publish the videos contained on his camera and cellphone without any problems.²² Neither Officer Alas nor Officer Hale viewed or listened to any videos or other information contained on Reyes's camcorder or cellphone.²³

7. The officers' actions in turning in Reyes's camcorder and cellphone to Travis County officials during Reyes's arrest booking were not a violation of the Privacy Protection Act, 42 U.S.C. §2000aa. Reyes produced insufficient evidence that the arresting officers either knew that Reyes was a journalist or reasonably believed that Reyes was planning to disseminate the video to the public.

8. Additionally, the "suspect exception" to the Privacy Protection Act applies to Reyes's arrest on January 4, 2019. The video of the incident demonstrates that Officer Alas had probable cause to arrest Reyes for interference with public duties under Section 38.15(a)(10) of the Texas Penal Code. First, the video clearly demonstrates that Reyes interrupted, disrupted, impeded or otherwise interfered with the officers' duties or authority while the officers were attempting to enforce the city ordinances.²⁴ Moreover, it is undisputed that Reyes did not comply with the officers' instructions to physically move from his current location.²⁵ Probable cause exists when a person does not follow instructions necessary for an officer to perform their duties. *See Bailey*

²⁰ Trial Transcript, pp. 59; 69

²¹ Trial Transcript, pp. 37; 59

²² Trial Transcript, pp. 30; 37; 59

²³ Trial Transcript, pp. 38; 57-58; 104-105.

²⁴ Plaintiff's Ex. 9; 10.

²⁵ Trial Transcript, pp. 51-52; 54-57 ; 101-102.

v. Ramos, No. 23-50185 (5th Cir., Jan. 10, 2025)(officer could reasonably believe he had probable cause to arrest suspect for interference with public duties when suspect ignored officer's instructions to stay away from crime scene); *Spillers v. Harris Cnty., Tex.*, ---F.4th---, 2024 WL 4002382, at *4 (5th Cir. Aug. 30, 2024)(finding that officer had probable cause to arrest plaintiff for interference with public duties when he failed to comply with instructions to move away from a crime scene); *Westfall v. Luna*, 903 F.3d 534, 544 (5th Cir. 2018)(finding that officer had probable cause to arrest plaintiff for interfering with his duties when she did not follow his instructions not to go into a home); *Childers v. Iglesias*, 848 F.3d 412, 415 (5th Cir. 2017)(finding that officer had probable cause to arrest plaintiff for violating officer's instructions when plaintiff "did more than just argue with police officers; he failed to comply with an officer's instruction, made within the scope of the officer's official duty and pertaining to physical conduct rather than speech."); *Haggerty v. Texas Southern University*, 391 F.3d 653, 657 (5th Cir. 2004)(reasonable officer could have believed with fair probability that arrestee had interfered with officer's duties when arrestee ignored officer's warnings to step back); *see also Hall v. Trochessett*, 105 F.4th 335, 343-44 (5th Cir. 2024)(speech only defense did not vitiate probable cause at the time of arrest); *Voss v. Goode*, 954 F.3d 234, 240 (5th Cir. 2020).

Additionally, the camcorder and cellphone relate to the offense since Reyes was filming his interactions with the police officers before and while he was arrested.

9. Since the City of Austin did not violate the Privacy Protection Act during the incident which is the subject of this lawsuit, the Court should dismiss Plaintiff's PPA claim with prejudice.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, INTERIM CITY ATTORNEY
SARA SCHAEFER, ACTING CHIEF, LITIGATION

/s/ H. Gray Laird

H. Gray Laird

Assistant City Attorney

State Bar No. 24087054

gray.laird@austintexas.gov

City of Austin Law Department

P.O. Box 1546

Austin, Texas 78767-1546

Telephone: (512) 974-1342

Facsimile: (512) 974-1311

ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that on February 18, 2025, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ H. Gray Laird

H. Gray Laird

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,

Plaintiff,

V.

CITY OF AUSTIN, AUSTIN POLICE
DEPARTMENT, TROY WISMAR,
CHRISTOPHER CARLISLE,
PATRICK WALSH, KYU SUK AN,
SARAH FOSTER, GREG McCORMACK,
and JOHN DOES, Individually and in
their official capacities,

Defendants.

Case No. 1:21-CV-00992-RP-SH

PLAINTIFF JULIAN REYES' AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Findings of Fact.

1. Plaintiff Julian Reyes was born in Dallas and grew up in Fort Worth, Texas. Tr. 20:16-19. He has earned degrees with honors from Baylor University and Texas State Technical College. Tr. 20:22-3. He has lived in Austin for about 20 years. Tr. 20:20-21. For at least twelve years, Mr. Reyes has been publishing videos, articles, and other written work on various outlets on the internet for public reading and viewing. Tr. 23:18–24:3, 24:18–25:8, 26:9–24. *See* Plaintiff’s Ex. 3.

2. Mr. Reyes began working as a journalist around 2000, when he joined *The Austin Advocate*. Tr. 26:11-12. He joined *The Challenger Street Newspaper* around 2013. Tr. 25:5-8.

3. Mr. Reyes's work has been published on *The Challenger Street Newspaper's* website. Plaintiff's Ex. 3. He films Sixth Street activities, protests, and City of Austin homeless sweeps. Tr. 23:13-17. He publishes his videos on a personal YouTube channel and Facebook

account. Tr. 23:18-23. He has posted over 700 videos which have received over 300,000 views. Tr. 24:1-3. When filming, Mr. Reyes wears a press ID that says he is a member of the press for the *Challenger* newspaper. Tr. 27:15-17.

4. After Austin Police Department (APD) officer shot and killed his dog “Shiner” in 2013, Mr. Reyes began recording police activities and publishing his videos online for public viewing. Tr. 21:8-12, 22:1-23:1, 23:24-25. He has also become an advocate for the homeless, recording police interactions with homeless individuals in an effort to keep police officers accountable and their activities transparent to public view. Tr. 23:2-17, 24:18-25:3. He has worked with police accountability organizations Peaceful Streets Project, Housing Not Handcuffs, and Stop the Sweeps. Tr. 22:20-23:9. He has experienced homelessness himself. Tr. 23:10-12.

5. Mr. Reyes has been arrested by APD many times while he was recording police activity and advocating for government accountability. Tr. 27:19-24. He has never been convicted on any charge resulting from those arrests. Tr. 27:25-28:3.

6. On January 4, 2019, Mr. Reyes approached and filmed a scene where APD Officers Gadiel Alas and Hale were confronting a group of individuals who Officer Alas claims were violating the City of Austin’s “no sit, no lie, or camp” ordinance, even though no one in the group was sitting, lying, or camping. *See* Plaintiff’s Ex. 10 at 07:05. The officers had no supervisor present. Tr. 85:12-13. While Mr. Reyes filmed, he read the officers’ names and badge numbers to himself for documentation. *E.g., id.* at 08:10, 08:20. At the time, Mr. Reyes was wearing a press ID, Tr. 48:21-49:1, and carrying two cameras. Tr. 29:19-20.

7. Mr. Reyes documented the group arguing with the APD officers, stating that they were being selectively targeted and harassed because the officers had walked by several individuals who were sitting down without confronting them, and because they had been given permission to

be where they were by a higher chain of command and Judge Coffey, and they believed they were not violating the “no sit, no lie, or camp” ordinance. Tr. 33:1-13. The individuals were standing; they were not sitting, lying, or camping. Tr. 33:2. While documenting the encounter, Mr. Reyes began expressing his own views and criticisms. Plaintiff’s Ex. 10 at 09:33. As Mr. Reyes spoke, Officer Alas continued to interact with individual members of the group and to fill out his citation book. *Id.* at 11:00. Mr. Reyes approached Officer Hale to learn and document the name on Officer Hale’s uniform. *Id.* at 11:40. Officer Hale told Mr. Reyes to step back, and Mr. Reyes complied. *Id.* at 11:44. Officer Hale did not give Mr. Reyes any further instructions nor, at any time, did he tell Mr. Reyes he was interfering with any of the officers’ duties. *Id.* at 12:15; Tr. 84:3-9; 89:4-16.

8. According to Officer Alas, the group of individuals were in violation of the City’s “no sit, lie, or camp” ordinance, and he was trying to get them to comply with that ordinance which they were purportedly violating because they had “a large amount of their personal property with them on the street corner.” Tr. 73:5-25. He did not know what property belonged to which individual. Tr. 74:18-75:10. Officer Alas had no doubt that the individuals were homeless and had nowhere to go. Tr. 75:6-18. Nonetheless, Officer Alas testified that “the compliance we were trying to obtain” was “[m]oving to a different area.” Tr. 75:23-24. Yet, he repeatedly testified that they would still be in violation of the ordinance even if they moved to a different area. Tr. 75:25-76:4; 77:16-78:6. When asked by Mr. Reyes at the scene what the individuals were supposed to do to comply with their orders, Officer Hale said he did not know. Tr. 89:22-90:3.

9. Mr. Reyes then sat down and continued to film the scene. Plaintiff’s Ex. 10 at 13:00. Mr. Reyes’s location was not in the middle of the group or between any officer and individual. Tr. 34: 6-8. It is uncontested that Mr. Reyes did not physically interfere with or touch the officers or the citizens or their possessions; he did not get between the officers and citizens; he

did nothing but speak and sit down out of the way. Tr. 33:24-13; Tr. 83:1-14. Thirty seconds later, Officer Alas approached Mr. Reyes and told Mr. Reyes to stand up. *Id.* at 13:32. Mr. Reyes demurred. *Id.* at 13:32. Officer Alas ignored Mr. Reyes and continued to write a citation, unobstructed by Mr. Reyes. *Id.* at 13:40. Mr. Reyes remained seated. *Id.* at 13:50.

10. Mr. Reyes continued verbally criticizing Officer Hale and Officer Alas's actions while sitting. Plaintiff's Ex. 10 at 13:55. When Mr. Reyes declared that the officers, not the group of individuals, were "breaking the law," Officer Alas abruptly turned on Mr. Reyes and claimed Mr. Reyes was "interfering." *Id.* at 13:57. Mr. Reyes was addressing Officer Alas at this point, not the individuals, *id.* at 13:52–57, and it is uncontested that at no time did Mr. Reyes tell the individuals not to cooperate with the police or otherwise direct them to do anything illegal.

11. Although Mr. Reyes accurately told Officer Alas that he was "not physically doing anything," Officer Alas told Mr. Reyes to move to "where the crack is" and to "stand right over there." *Id.* at 14:03. Officer Alas did not tell Mr. Reyes that he was in a crime scene. *Id.* There was no other indication that Mr. Reyes was in a crime scene or was physically located in the middle of an investigation. *Id.* Officer Alas did not tell Mr. Reyes that he was "interfering" because of where Mr. Reyes was sitting, but because Mr. Reyes's speech was supposedly riling up the group, *id.* at 14:13, even though the group was riled up before Mr. Reyes began speaking. *See id.* at 09:00; Tr. 33:17-21. At trial, Officer Alas testified that one of the individuals was riled up before Mr. Reyes said or did anything. Tr. 86:8-13.

12. Officer Alas then arrested Mr. Reyes. Plaintiff's Ex. 10 at 14:40. Only forty-two seconds elapsed between the time when Officer Alas first told Mr. Reyes that he was "interfering" and when he placed Mr. Reyes under arrest. *Id.* at 13:58–14:40. While Mr. Reyes was arrested, Mr. Reyes told APD officers that he was a journalist. Plaintiff's Ex. 9 at 13:50.

13. Mr. Reyes was charged with allegedly interfering with public duties. Ex. 13 at 1. Those charges were later dismissed “in the interest of justice.” Ex. 14. When examined by Mr. Reyes’ counsel, Officer Alas testified, consistent with his contemporaneous arrest report, that he arrested Mr. Reyes because he was “interfering with his public duties” by riling up the individuals “purely with the words he was saying.” Tr. 88:8-11; 93:6-13. Officer Alas testified that he did not arrest Mr. Reyes “for not following [his] command.” Tr. 93:16-18. His “interference” consisted of sitting down and verbally interjecting. Tr. 94:1-15.

14. In subsequent answers to leading questions by counsel for the City, Officer Alas testified that he arrested Mr. Reyes because he failed to obey his orders. Tr. 103:4-104:9. The Court does not find that testimony credible, given Officer Alas’s contemporaneous statement to Mr. Reyes that he was “interfering,” given his police report, and given his testimony when questioned by Mr. Reyes’s counsel. The Court finds that Officer Alas’s after-the-fact claim that he arrested Mr. Reyes for failing to obey an order to be pretextual.

15. Before Officer Alas arrested Mr. Reyes on January 4, 2019, Officer Alas knew Mr. Reyes from Mr. Reyes’s activities filming police in downtown Austin on Sixth Street. Tr. 64:23-66:14. Officer Alas knew Mr. Reyes filmed police officers interacting with citizens, knew that Mr. Reyes was a member of the Peaceful Streets Project, and knew Mr. Reyes’s videos were published online. *Id.* He understood that if Mr. Reyes was filming, it was with the intent to publish what he thought was worth publishing. Tr. 66:10-14. Officer Alas’s report of Mr. Reyes’s January 4, 2019, arrest confirms that Officer Alas knew Mr. Reyes was filming when he was arrested. Plaintiff’s Ex. 11 at 5.

16. Mr. Reyes is well known to the City and APD as a citizen journalist who conducts investigations, writes articles, and records police activity for publication. Tr. 39:1-40:14; 45:11-6;

Ex. 4, 5.

17. APD's internal profile of Mr. Reyes has long labeled him an "anti-police activist." Plaintiff's Ex. 6, 7, 8. He was labeled such based on the content that he has posted online about Austin police officers. *See* Plaintiff's Ex. 2 at 27-30. APD's label of Mr. Reyes as an "anti-police activist" is contained in his arrests reports and is read by APD officers, detectives, and supervisors. Plaintiff's Ex. 7.

18. APD's internal profile of Mr. Reyes also identifies him as an employee of The Challenger Street Newspaper, Plaintiff's Ex. 5, which is an online publication that publishes stories about issues with the streets in Austin. Tr. 25:4-8.

19. Before Mr. Reyes was arrested by APD on January 4, 2019, he was filming police interactions with several people on a sidewalk in downtown Austin near the ARCH facility. Tr. 28:20-22, 46:25-47:3. Mr. Reyes intended to publish and ultimately did publish his video recordings from January 4, 2019, online. Tr. 30: 18-21. His video has had over 30,000 views. Tr. 30:22-25.

20. It was readily apparent that he was videoing the police which was seen by the officers at the scene. *See* Plaintiff's Ex. 11 at 7. The officers who arrested Mr. Reyes knew or reasonably believed at the time of his arrest that he was filming their activities and possessed video of their activities with a purpose to disseminate to the public a broadcast or similar form of public communication.

II. Conclusions of Law.

21. The Privacy Protection Act of 1980 ("PPA") provides that

Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or

other similar form of public communication, in or affecting interstate or foreign commerce
...

42 U.S.C. § 2000aa(b).

22. The City of Austin seized, by arresting Mr. Reyes and taking possession of his person and the things he was carrying, two cameras Mr. Reyes was using to film police interaction with citizens. Those cameras contained video images and sound recordings that Mr. Reyes possessed with the purpose of disseminating them to the public on YouTube, a public communication in or affecting interstate or foreign commerce. The seized video images and sound recordings were not contraband, the fruits of a crime, or otherwise criminally possessed, nor were they property designed or intended for use, or used as, the means of committing a criminal offense. The City of Austin therefore seized Mr. Reyes's documentary materials as defined in 42 U.S.C. § 2000aa-7(a).

23. Mr. Reyes therefore has established each element of his PPA claim against the City of Austin by a preponderance of evidence.

24. The City argues that Mr. Reyes failed to prove that the arresting officers "reasonably believed" he was filming them in order to publish the videos to the public. This is not, however, an element of a PPA claim for the seizure of documentary materials in violation of 42 U.S.C. § 2000aa(b). The words "reasonably believed" do not appear in Section 2000aa(b), which outlaws the seizure of documentary materials. Those words appear only in Section 2000aa(a), which prohibits the seizure of work product materials. Mr. Reyes, therefore, was not required to prove that the arresting officers had reason to believe he was filming them with a purpose of disseminating a public communication.

25. Even if Mr. Reyes was required to prove that element, the Court finds that he did, given the records in APD's possession identifying Mr. Reyes as employed by *The Challenger*

Street Newspaper and as the likely author of a Stop the Sweeps newsletter, in addition to Officer Alas's testimony that he knew Mr. Reyes from his encounters with Mr. Reyes, knew Mr. Reyes filmed police officers interacting with citizens, knew Mr. Reyes was a member of the Peaceful Streets Project, and knew Mr. Reyes's videos were published online. *See* Tr. 25:5-8, 26:11-12, 64:23-66:14; Plaintiff's Ex. 8.

26. The City argues that it had probable cause to arrest Mr. Reyes, raising the exception to liability under Section 2000aa(b)(1) for seizures where "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." Mr. Reyes argues, the City does not dispute, and the Court holds, that this "suspect exception" is an affirmative defense on which the City bore the burden of pleading and proof under Rule 8(c), Fed. R. Civ. P. *See Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987) (statutory limitations on liability and statutory exemptions are affirmative defenses governed by Rule 8(c)); *Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990) (Louisiana statutory limitation of liability on malpractice claims is an "avoidance" under Rule 8(c) because it prevents the plaintiff's claim from having its "ordinary legal effect"). *See also Citicasters v. McCaskill*, 89 F.3d 1350, 1353 (8th Cir. 1996) (identifying PPA's "suspect exception" as an affirmative defense); *Am. News and Info. Servs., Inc. v. Gore*, 778 Fed. Appx. 429, 43 (9th Cir. 2019) (suspect exception "bars a PPA claim"); *Berglund v. City of Maplewood*, 173 F. Supp. 2d 935, 949 (D. Minn. 2001) (PPA's exception "applies to defeat Plaintiffs' claims"); *Madaie v. Roden*, No. CV-06-BD-0904-S, 2007 WL 9697592, at *3 (N.D. Ala. May 9, 2007) (placing burden on FBI to "show that it could have established probable cause" to defeat PPA claim).

27. The City waived this affirmative defense.

28. Even if the City had not waived this defense, the Court finds that it lacked probable

cause to arrest Mr. Reyes for interference with public duties. Mr. Reyes was arrested for interference with public duties under Texas Penal Code § 38.15. “It is a defense to prosecution under this section that the interruption, disruption, impediment, or interference alleged consisted of speech only.” Tex. Penal Code § 38.15(c). Thus, in order to violate this statute, “a person’s interference must consist of more than speech alone.” *Voss v. Goode*, 954 F.3d 234, 239 (5th Cir. 2020). “[M]erely arguing with police officers about the propriety of their conduct, including about whether they have the legal authority to conduct a search, falls within the speech exception of section 38.15.” *Freeman v. Gore*, 483 F.3d 404, 414 (5th Cir. 2007). Officer Alas arrested Mr. Reyes for allegedly “riling up” the citizens, Tr. 93:6-13, Plaintiff’s Ex. 13, but the citizens were already riled up when Mr. Reyes approached, Tr. 33:1-6, and the alleged “riling up” was through Mr. Reyes’s speech alone. Tr. 88:8-11. Mr. Reyes did not obstruct Officer Alas or Officer Hale from carrying out their official duties and did not instruct anyone else to obstruct or disobey the officers. The Court finds that Officer Alas had no probable cause to arrest Mr. Reyes for interference with public duties under Texas Penal Code § 38.15 because Mr. Reyes conduct consisted of constitutionally protected speech only. Because Officer Alas lacked probable cause to arrest Mr. Reyes, the exception to liability under Section 2000aa(b)(1) of the Privacy Protection Act is inapplicable.

29. Finally, even if there was probable cause to arrest Mr. Reyes for interference with public duties, the City has not met its burden of proving the type of probable cause required by the PPA: “probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” 42 U.S.C. § 2000aa(b)(1). The Court finds that the City “seized” Mr. Reyes’s cameras and the videos they contained, within the meaning of the PPA, when he was arrested on January 4, 2019, because the APD officers took

control of the cameras and took them away from Mr. Reyes to check it in with Travis County upon his arrest. *See* Tr. 68:25-69:14. However, the City did not take Mr. Reyes's cameras and videos because they "relate[d] to his alleged criminal offense. Tr. 69:23-25. The videos were not viewed or copied, and they were returned to him when he was released. Tr. 37:13-38:1. APD did not treat his cameras or the videos they contained as evidence of a crime. Tr. 69:9-22. Officer Aras testified repeatedly that the city did not consider "the camera or the film to be evidence of some crime that had occurred," but that the seizure was "incident to the fact that they seized his person." Tr. 70:1-9. The City did not retain the videos in order to prosecute Mr. Reyes for any crime. The Court therefore finds that the City did not believe, and there was no probable cause to believe, that the seized videos related to a criminal offense Mr. Reyes purportedly committed, and therefore the City did not meet its burden of proof on this affirmative defense, even if it had not been waived.

30. In the alternative, even if there was probable cause to arrest Mr. Reyes for interference with public duties under Texas Penal Code § 38.15, the statute violates the First Amendment as applied to Mr. Reyes. "Speech is often provocative and challenging. . . [but it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). "The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Houston v Hill*, 482 U.S. 451 (1987). Indeed, the "freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63. Because "the First Amendment protects even profanity-laden speech directed at police officers," "[p]olice officers reasonably may be expected to exercise a higher degree of restraint than the average citizen."

Freeman v. Gore, 483 F.3d 404, 414 n.7 (5th Cir. 2007) (citing *Payne v. Pauley*, 337 F.3d 767, 776 (7th Cir. 2003)); accord *Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008) (“Trained officers must exercise restraint when confronted with a citizen’s anger over police action.”). Even if Officer Alas had probable cause to arrest Mr. Reyes under Texas Penal Code § 38.15 on January 4, 2019, the statute violates these First Amendment principles, as applied. Mr. Reyes did not physically interfere in the officers’ duties, use “fighting words,” nor incite the citizens to “an imminent breach of the peace.” See *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974) (ordinance prohibiting “any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty” was unconstitutionally overbroad because it punished speech only and was not limited to fighting words that, “by their very utterance inflict injury or tend to incite an immediate breach of the peace”). Mr. Reyes’ speech is protected, regardless of whether it “riled up” the citizens, whether it caused the officers “inconvenience, annoyance, or unrest,” and whether Officer Alas understood it as opposition, challenge, or criticism. See *Ybarra v. Davis*, 489 F. Supp. 3d 624, 630 (W.D. Tex. 2020) (holding the plaintiff stated a First Amendment violation by alleged that a law-enforcement officer threw him “to the ground by his neck for ‘exercising his free speech rights by telling Davis that he had entered the property illegally’”). Because Mr. Reyes speech is protected, Texas Penal Code § 38.15 is unconstitutional as applied to Mr. Reyes and cannot support application of the exception to liability under Section 2000aa(b)(1) of the Privacy Protection Act.

31. The City of Austin’s seizure of Mr. Reyes’s cameras and videos on January 4, 2019, therefore constituted an unlawful seizure of documentary materials as defined in 42 U.S.C. § 2000aa-7(a), in violation of 42 U.S.C. § 2000aa(b).

32. Mr. Reyes is therefore entitled to recover \$1,000 in statutory damages and

reasonable attorney's fees and costs.

Respectfully submitted,

By: /s/ Peter D. Kennedy
Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5600 (Phone)
(512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on February 18, 2025, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy
Peter D. Kennedy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,

Plaintiff,

v.

CITY OF AUSTIN,

Defendant.

§
§
§
§
§
§
§
§

1:21-CV-992-RP

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 13, 2025, the Court held a bench trial in this matter. (Dkt. 77). Plaintiff Julian Reyes (“Reyes”) and Defendant the City of Austin (the “City”) submitted post-trial proposed findings of fact and conclusions of law. (Def.’s Proposed Findings of Fact, Dkt. 88; Pl.’s Proposed Findings of Fact, Dkt. 89). Also before the Court is the City’s Motion for Judgment as a Matter of Law. (Dkt. 76). Reyes filed a response, (Dkt. 81), to which the City replied, (Dkt. 86). Having considered the evidence and testimony presented at trial, the arguments of counsel, the briefing, and the governing law, the Court enters the following findings of fact and conclusions of law.

I. BACKGROUND

Reyes is a citizen journalist and advocate for homeless Austin residents. Reyes has frequently filmed police activity and several times has been arrested by the Austin Police Department (“APD”). Reyes brought claims under the Privacy Protection Act, (“PPA”), 42 U.S.C. § 2000aa *et seq.*, for seizure of his journalist work product and documentary materials during those arrests. After the Court resolved Reyes’s other claims in its Summary Judgment order,¹ (Order, Dkt. 68), the trial

¹ Reyes brought constitutional claims under Section 1983 alleging a pattern or practice by the City of arresting him in retaliation for his views. The Court granted summary judgment to the City on that claim because, while it was possible that a jury could reasonably find he was arrested in retaliation for his views in a maximum of five isolated instances, he had not met his burden to provide evidence from which a reasonable factfinder could infer a policy, custom, or practice of the City existed, and had rather only demonstrated

addressed Reyes's arrest on January 4, 2019, and the APD's seizure of his camera following the arrest. Prior to his arrest, Reyes was filming and verbally criticizing officers who were telling a group of homeless individuals to leave the sidewalk. Reyes was told to leave and subsequently arrested. Reyes's camera contained raw footage of APD activities that he intended to, and ultimately did, publish. As set out in the analysis below, Reyes has proven a PPA violation based on the evidence admitted at trial.

II. SUMMARY OF THE EVIDENCE

Reyes has lived in Austin for about 20 years. (Tr. 20:20–21). For at least twelve years, Reyes has been publishing videos, articles, and other written work in various outlets on the internet for public reading and viewing. (Tr. 23:18–24:3; 24:18–25:8; 26:9–24). Reyes began working as a journalist around 2000, when he joined The Austin Advocate. (Tr. 26:11–12). He joined The Challenger Street Newspaper around 2013. (Tr. 25:5–8). Reyes's work has been published on The Challenger Street Newspaper's website. (Tr. 25:20–21). He films Sixth Street activities, protests, and City of Austin homeless sweeps. (Tr. 23:13–17). He publishes his videos on a personal YouTube channel and Facebook account. (Tr. 23:18–23). He has posted over 700 videos, which have received over 300,000 views. (Tr. 24:1–3). When filming, Reyes wears a press ID that says he is a member of the press for The Challenger newspaper. (Tr. 27:15–17). After an APD officer shot and killed his dog Shiner in 2013, Reyes began recording police activities and publishing his videos online for public viewing. (Tr. 21:8–12, 22:1–23:1, 23:24–25). He has also become an advocate for the

isolated instances, which cannot support a finding of municipal liability on the part of the City. (Order, Dkt. 68, at 14–22).

As to his PPA claims, Reyes mentioned several arrests in his Amended Complaint during which his camera was seized and addressed two in summary judgment briefing. (*Id.* at 4). In its summary judgment order, the Court found that his arrest on October 24, 2021, did not violate the PPA because the City had probable cause to arrest Reyes for violating a noise ordinance, and because Reyes did not rebut the probable cause finding in his objections to the report and recommendation of the United States Magistrate Judge. (*Id.* at 21). Trial proceeded as to the issue of a PPA violation on one date, January 4, 2019.

homeless, recording police interactions with homeless individuals in an effort to keep police officers accountable and their activities transparent to public view. (Tr. 23:2–17, 24:18–25:3). He has worked with police accountability organizations Peaceful Streets Project, Housing Not Handcuffs, and Stop the Sweeps. (Tr. 22:20–23:9). He has experienced homelessness himself. (Tr. 23:10–12).

The Court heard testimony from Reyes, Officer Corey Hale (“Hale”), and Officer Gadiel Alas (“Alas”) at trial. The Court also admitted documentary evidence including the police report about Reyes’s arrest, (Dkt. 79-8), and a video Reyes took during the encounter, (Pl.’s Ex. 10). The Court finds the following facts about the events of January 4, 2019.

Reyes approached a scene where APD officers were confronting a group of individuals who they claim were violating the City’s “no sit, lie, or camp” ordinance. (*See id.* at 7:05; Tr. 72:12–23). The video evidence shows that the individuals being confronted by APD officers were agitated and expressing their frustrations with their situation, asking the APD officers where they were supposed to go if they could not stay on that sidewalk. (Pl.’s Ex. 10 at 9:00, 10:38–50). While filming, Reyes read the officers’ names and badge numbers to himself for documentation. (*Id.* at 8:10, 8:20). After documenting the group and arguing with the officers about whether they were violating the ordinance, Reyes began expressing his own views. (*Id.* at 9:33). As Reyes spoke, Alas continued to interact with the individuals and fill out his citation book. (*Id.* at 11:00). Reyes approached Hale to learn his name. (*Id.* at 11:40). Hale told Reyes to step back, and Reyes complied. (*Id.* at 11:44). Hale did not give Reyes any further instructions or claim Reyes was interfering with anyone’s duties. (*Id.* at 12:15). Reyes sat down in a location that did not impede the officers’ access to the individuals and continued filming. (*Id.* at 13:00). Thirty seconds later, Alas approached Reyes and told him to stand up. (*Id.* at 13:30). Reyes demurred. (*Id.* at 13:32). Alas continued to write a citation, unobstructed by Reyes. (*Id.* at 13:40). Reyes remained seated. (*Id.* at 13:50).

Reyes continued to verbally criticize the officers' actions. (*Id.* at 13:55). Reyes declared that the officers, not the individuals, were "breaking the law." (*Id.* at 13:57). Alas then told Reyes he was "interfering." (*Id.* at 13:58). Reyes told Alas that he was "not physically doing anything," and Alas told Reyes to move to "where the crack is" and to "stand right over there." (*Id.* at 14:03). He did not tell Reyes that he was in a crime scene. (*Id.*). He told Reyes he was "riling up" the group. (*Id.* at 14:31). Alas then arrested Reyes. (*Id.* at 14:40). Alas did not give Reyes clear warnings with time to respond but rather arrested him very shortly after claiming that he was "interfering" by "riling them up" with his words. (*Id.* at 14:38). About 40 seconds elapsed from the time Alas told Reyes that he was "interfering" and telling him he was under arrest. (*Id.* at 13:58–14:40).

Alas arrested Reyes for allegedly "riling up" the citizens, (Tr. 93:6–13; Dkt. 79-8, at 3), even though, as noted above, the citizens were already agitated by the situation when Reyes approached, (Tr. 33:1–6). Any "riling up" was through Reyes's speech alone and did not involve, for example, any incitement, instruction to disobey a police order, or physical obstruction by Reyes. (Tr. 88:8–11, 9–21). The evidence at trial demonstrates that Reyes did not obstruct Alas or Hale from carrying out their official duties and did not instruct anyone else to obstruct or disobey the officers.

III. DISCUSSION

A. Legal Standard

The PPA "generally prohibits government officials from searching for and seizing documentary materials possessed by a person in connection with a purpose to disseminate information to the public." *Citicasters v. McCaskill*, 89 F.3d 1350, 1353 (8th Cir. 1996). Congress passed the PPA in response to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), in which the Supreme Court held that the Fourth Amendment does not prohibit the search of a newspaper office for photographs revealing the identities of individuals who assaulted police officers during a demonstration, even though no one employed by the newspaper was suspected of involvement. *See*

Guest v. Leis, 255 F.3d 325, 340 (6th Cir. 2001) (“[T]he PPA was enacted to afford the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment.” (internal quotation marks and citation omitted)).

First, the PPA provides that “it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.” 42 U.S.C. § 2000aa(a). “Work product materials” include those “prepared, produced, authored, or created” “in anticipation of communicating such materials to the public” that are possessed for that purpose and include “mental impressions, conclusions, opinions, or theories” of the person who prepared them. 42 U.S.C. § 2000aa-7(b).

Second, the PPA provides that “it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.” 42 U.S.C. § 2000aa(b). “[D]ocumentary materials” include “written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs.” 42 U.S.C. § 2000aa-7(a).

The PPA “carves out various exceptions to the prohibition against searches and seizures of materials intended for public dissemination.” *Sennett v. United States*, 667 F.3d 531, 535 (4th Cir. 2012). Under the “suspect exception,” a government officer or employee can seize otherwise-protected materials “when the person possessing the materials is a criminal suspect, rather than an innocent third party.” *Id.* (cleaned up). For the exception to apply, there must be “probable cause to

believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” 42 U.S.C. § 2000aa(a)(1), (b)(1). The materials exempted under the suspect exception “must relate to the offense and the offense must not involve the communication of the materials.” *Guest*, 255 F.3d at 341.

Section 2000aa-6 of the PPA creates a private right of action for damages resulting from a search or seizure of materials that violates the statute. 42 U.S.C. § 2000aa-6(a). A “person aggrieved” by such an unlawful search or seizure may bring suit “against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim resulting from a violation of this chapter, or against any other governmental unit.” *Id.* “A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of \$1,000, and such reasonable attorneys’ fees and other litigation costs reasonably incurred.” 42 U.S.C. § 2000aa-6(f).

B. Reyes’s PPA Claim

The City seized, by arresting Reyes and taking possession of his person and the things he was carrying, two cameras Reyes was using to film police interaction with citizens. Those cameras contained video images and sound recordings that Reyes possessed with the purpose of disseminating on YouTube, a public communication in or affecting interstate or foreign commerce. The seized video images and sound recordings were not contraband, the fruits of a crime, or otherwise criminally possessed, nor were they property designed or intended for use, or used as, the means of committing a criminal offense. The City therefore seized Reyes’s documentary materials as defined in 42 U.S.C. § 2000aa(a). The Court turns to each element of a PPA claim, which, as described above, include showing (1) seizure; of (2) documentary or work product materials; without (3) “probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” § 2000aa(a), (b).

1. Seizure

The Court finds that the City “seized” Reyes’s cameras and the videos they contained, within the meaning of the PPA, when he was arrested on January 4, 2019, because the APD officers took control of the cameras and took them away from Reyes to check them in with Travis County upon his arrest. (*See* Tr. 68:25–69:14). The City does not contest that a seizure occurred within the meaning of the statute. (*See* Def.’s Proposed Findings of Fact, Dkt. 88).

2. Documentary or work product materials

The Court finds that Reyes possessed documentary materials within the meaning of Section 2000aa(b). *See Binion v. City of St. Paul*, 788 F. Supp. 2d 935, 948 (D. Minn. 2011) (noting that “subsection (b), which protects ‘documentary materials,’ does not contain” the “reasonably believed” element). Reyes credibly testified that he possessed his cameras and their content in connection with a purpose to disseminate them publicly on his YouTube channel. (Tr. 30:18–25).

Even if Reyes was required to prove that the arresting officers “reasonably believed” he was filming them to publish them, the Court finds Reyes has met that burden. Reyes informed the arresting officers that he was a journalist. When Reyes was arrested, he was wearing a press pass issued to him by The Challenger Street Newspaper. (Tr. 27:15–17). In one of the videos introduced at trial, Reyes can be heard telling the arresting officers “I’m a member of the press.” (Pl.’s Ex. 9, at 13:50; Tr. 37:1–3). Alas testified that before he arrested Reyes on January 4, 2019, he knew who Reyes was, knew that Reyes videoed police interacting with citizens, knew about the Peaceful Streets Project, and knew Reyes’s videos were likely published online. (Tr. 64:23–66:14). His police report confirmed he knew that Reyes was filming when he was arrested. (*See* Dkt. 79-8, at 7 (“Julian was in possession of a small camera which appeared he was utilizing.”)).

The Court finds that the statements made by Reyes, combined with the police officers’ knowledge of Reyes’s status as a journalist, put the officers on reasonable notice that he was a

publisher protected by the PPA. *Binion*, 788 F. Supp. 2d at 948 (a reasonable jury could find evidence that plaintiff was “wearing press credentials and carrying a camera and videotapes” sufficient to put arresting officers on notice that she intended to disseminate videos to the public); *Basler v. Barron*, No. H-15-2254, 2017 WL 477573, at *12 (S.D. Tex. Feb. 6, 2017) (arresting officer who was “fully aware of web sites where civilians disseminate films of police activity to the public” means he “likely knew or had reason to know [arrestee] was filming him for the purpose of disseminating the film to the public”).

3. Probable cause

The City argues that it had probable cause to arrest Reyes, raising the exception to liability under Section 2000aa(b)(1) for seizures where “there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” Reyes argues, and the Court finds, that this “suspect exception” is an affirmative defense on which the City bore the burden of pleading and proof under Federal Rule of Civil Procedure 8(c). *See Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987) (statutory limitations on liability and statutory exemptions are affirmative defenses governed by Rule 8(c)); *see also Citicasters*, 89 F.3d at 1353 (identifying PPA’s “suspect exception” as an affirmative defense); *Berglund v. City of Maplewood*, 173 F. Supp. 2d 935, 949 (D. Minn. 2001) (PPA’s exception “applies to defeat Plaintiffs’ claims”); *Madaie v. Roden*, No. CV-06-BD-0904-S, 2007 WL 9697592, at *3 (N.D. Ala. May 9, 2007) (placing burden on government defendant to “show that it could have established probable cause” to defeat PPA claim).

However, the City has not waived this affirmative defense. In his First Amended Complaint, Plaintiff alleges that the City violated the PPA when it seized Plaintiff’s materials during arrests and “[t]here was no probable cause to believe that Reyes had committed a criminal offense to which the materials related” (Am. Compl., Dkt. 28, at 5). The City denies these allegations in its answer to

the First Amended Complaint. (Am. Answer, Dkt. 29, at 4). So, the City in its answer contended that its officers had probable cause to arrest Reyes, and this defense was not waived.

Even if the City had waived this defense by failing to deny the existence of probable cause in its Answer, the Court finds there was no unfair surprise or prejudice to Reyes. The Fifth Circuit has noted that “[c]entral to requiring the pleading of affirmative defenses is the prevention of unfair surprise.” *Ingraham*, 808 F.2d at 1079. “Where the [affirmative defense] is raised in the trial court in a manner that does not result in unfair surprise, however, technical failure to comply precisely with Rule 8(c) is not fatal.” *Lucas v. United States*, 807 F.2d 414, 417–18 (5th Cir. 1986) (quoting *Allied Chemical Corp. v. Mackay*, 695 F.2d 854, 855–56 (5th Cir. 1983)). The defendant does not waive an affirmative defense if “[h]e raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond.” *Allied Chemical*, 695 F.2d at 856.

The issue of the suspect exception to the PPA was thoroughly addressed by the parties during summary judgment briefing. (Pl.’s Resp., Dkt. 47, at 27). This Court also discussed probable cause for the January 4, 2019, arrest and the applicability of the suspect exception in its order adopting in part and rejecting in part the report and recommendations of the United States Magistrate Judge. (Order, Dkt. 68, at 21). Additionally, the City discussed the suspect exception to the PPA and probable cause for all of Reyes’s arrests, including the January 4, 2019, arrest, in its pretrial filings. (Dkt. 67-1, at 4–5, 13–14). The issue was brought up at trial, where Reyes presented evidence on the issue and questioned the City’s witnesses on it. In short, Reyes had notice that the suspect exception would be an issue at trial and had a complete opportunity to address the exception and present evidence on probable cause at trial.

Having found that the City did not waive the suspect exception as an affirmative defense, the Court turns to the application of the suspect exception and will find that the City lacked

probable cause to arrest Reyes for interference with public duties. Reyes was arrested for interference with public duties under Texas Penal Code § 38.15, which provides, in relevant part:

- (a) A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with . . .
 - (1) a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law . . .
- (d) It is a defense to prosecution under this section that the interruption, disruption, impediment, or interference alleged consisted of speech only.

Tex. Penal Code § 38.15. In order to violate this statute, “a person’s interference must consist of more than speech alone.” *Voss v. Goode*, 954 F.3d 234, 239 (5th Cir. 2020). “[M]erely arguing with police officers about the propriety of their conduct, including about whether they have the legal authority to conduct a search, falls within the speech exception of section 38.15.” *Freeman v. Gore*, 483 F.3d 404, 414 (5th Cir. 2007); *see also Bailey v. Ramos*, 125 F.4th 667, 676 (5th Cir. 2025). The speech exception has been interpreted to allow some time during which a person can speak up during police activity before their speech constitutes interference of that police activity. For example, the Fifth Circuit has held that arguing with deputies about whether they had the right to search the arrestee’s home, even though it delayed their efforts to locate a suspect, fell within the speech exception. *Freeman*, 483 F.3d at 408, 414. Likewise, the Austin Court of Appeals has held that arguing with officers, even though it delayed the execution of a search warrant, fell within the speech exception when the arrestee was not obstructing officers’ way. *Carney v. State*, 31 S.W.3d 392, 398 (Tex. App.—Austin 2000, no pet.).

The evidence at trial shows that Reyes’s alleged interference with public duties was through speech alone. As described above, for most of the several minutes Reyes was filming, Reyes was verbally complaining about the officers’ conduct but not interfering. (*See* Pl.’s Ex. 10, at 7:05–14:40). It is not disputed that for most of the time Reyes interacted with the citizens and the APD on the

scene, the officers were still able to carry out their work. For a few minutes, Reyes verbally disputed Hale's actions. At one point during Reyes's exchange with Hale, Reyes was asked to move back from where he was videoing, and he did. (*Id.* at 11:44). After less than two more minutes, a second officer, Alas, approached Reyes with his ticketing notebook out. (*Id.* at 13:30). Over an interaction of about 40 seconds, Alas told Reyes to stand up, that he was interfering by "riling up" other citizens, and told him to go "over there." (*Id.* at 13:30–14:13). Based on this evidence, the Court finds that Alas had no probable cause to arrest Reyes for interference with public duties under Texas Penal Code § 38.15, because Reyes's conduct consisted of constitutionally protected speech only. Reyes was also not physically interfering at the time; did not incite others to unlawful conduct; and was not afforded time to comply with Alas's fast-issued directives.

Courts have concluded officers had no probable cause to arrest or reversed a conviction for interference in similar circumstances. Of note, those cases make clear to the Court that the pure-speech defense affords some period during which a person may argue with police verbally to some extent without committing the crime of interference. In *Carney*, the Austin Court of Appeals reversed the conviction of a defendant arrested for interference for public duties. 31 S.W.3d 392. There, officers appeared at the defendant's home with a search warrant and a warrant for his wife's arrest. *Id.* at 397. Although the defendant argued with officers and questioned the validity of their authority, the defendant ultimately told officers he would let them into his home and began leading them through his garage. *Id.* Impatient, officers arrested the defendant for interference. *Id.* at 398. Although the court acknowledged that the defendant argued and delayed officers' entry into the home, it reversed the conviction because there was no evidence that he physically prevented the officers' entry into the home and his speech alone was insufficient for conviction. *Id.* at 398. In *Freeman*, officers arrested a plaintiff after she argued with the officers who told her that they could search her home. 483 F.3d at 414. The Fifth Circuit held that the officers lacked probable cause to

arrest the plaintiff for interference with public duties as her conduct consisted of speech alone, noting that yelling and screaming is protected by the speech exception. *Id.* As in these cases, Reyes was disputing Alas's authority to issue citations and to order Reyes to move. Reyes's arguing at most delayed Alas from completing the citation he was writing for a matter of seconds. And like in both cases, there is no evidence that Reyes prevented Alas from performing an official duty because of his arguing (even if there was some minimal delay).

Cases in a different procedural posture also support the above analysis. In *Pulliam v. Fort Bend County*, the plaintiff was filming police conduct during a welfare check and an officer asked him to move across the street. No. 4:22-CV-04210, 2024 WL 4068767, at *2 (S.D. Tex. Sept. 5, 2024), *report and recommendation adopted* 2024 WL 4282088 (S.D. Tex. Sept. 24, 2024). The officer arrested the plaintiff after he argued with the officer instead of moving. *Id.* The district court denied granting summary judgment on qualified immunity because fact issues remained over the existence of probable cause, noting (1) that the plaintiff did not obstruct the officer from carrying out his job, (2) that the plaintiff did not instruct anyone else to obstruct the officer, and (3) that more information on the location of others at the scene was relevant to determine whether the order to move was necessary for security purposes. *Id.* at *11. Here, the Court finds as a factual matter that Reyes did not obstruct officers from carrying out their work and that Reyes did not instruct anyone else to obstruct. In addition, there is no evidence that Reyes's seated position was a security concern or that it hindered the officers' ability to move freely and carry out their duties. *See also Novak v. Sheets*, No. 6:05-CV-252, 2006 WL 8441114, at *8 (E.D. Tex. May 25, 2006) (denying summary judgment on qualified immunity because "[a]ll reasonable officials in the defendant's circumstances should have then known that the defendant's conduct in arresting [plaintiff] when she was merely 'mouthing off' did not constitute an actionable offense"). These cases also support the Court's conclusion that the existence of a speech-alone defense requires there is at least some window of time during which a

person verbally questioning, or arguing with, a police officer does not constitute interference, so long as the person does not physically interfere with an officers' duties, or absent other exigent circumstances.²

The City cites five cases in support of its claim there was probable cause to arrest Reyes. (Mot., Dkt. 76, at 4) (citing *Bailey*, 125 F.4th at 667; *Spillers v. Harris Cnty.*, 113 F.4th 573 (5th Cir. 2024); *Westfall v. Luna*, 903 F.3d 534, 544 (5th Cir. 2018); *Childers v. Iglesias*, 848 F.3d 412, 415 (5th Cir. 2017); *Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 657 (5th Cir. 2004)). However, each case addressed whether the defendant officer was entitled to qualified immunity for an arrest, a different standard than probable cause. Officers enjoy qualified immunity even if they are wrong about the existence of probable cause, so long as they “reasonably but mistakenly conclude probable cause is present.” *Bailey*, 125 F.4th at 677. In such cases, “[t]here must not even arguably be probable cause for the . . . arrest for the immunity to be lost,” a burden the plaintiff must meet. *Id.* (internal quotation marks and citation omitted). The Fifth Circuit in *Bailey* was especially clear in noting this distinction. *Bailey*, 125 F.4th at 676–78 (discussing *Haggerty*, 391 F.3d at 657, and describing it as “[holding] that an officer mistakenly but reasonably believed that an action constituted interference with a public duty”). Here, by contrast, the City must prove that probable cause in fact existed, not just that its officers were reasonable in believing they had probable cause to arrest Reyes. The PPA is a separate waiver of sovereign immunity Congress created for the purpose of preventing journalists from

² The City also says that Reyes failed to comply with Alas's orders and suggests that this constitutes an independent reason for his arrest. (Dkt. 88, at 4). However, Alas testified that he arrested Reyes for interference rather than failure to comply with his orders, a fact that is confirmed by Reyes's arrest report. (*See* Dkt. 79-8; Tr. 97:1–7). The Court also finds as a factual matter that Alas did not give Reyes a meaningful opportunity to comply with his orders before arresting him. Rather, Alas arrested Reyes less than a minute after engaging him, despite not testifying that the investigation, or any exigent circumstances or danger, necessitated Reyes leaving the scene. (Tr. 88:8–11, Pl.'s Ex. 10, 13:58–14:40). It would negate the existence of the speech-alone defense if an arresting officer could tell someone to stop speaking and then almost immediately arrest them for non-compliance with an order, without more.

having their materials seized by the government without probable cause of a crime. As described above, Congress intended the PPA to provide protection beyond that afforded by the Fourth Amendment. *Guest*, 255 F.3d at 340. As such, this case arises in a different context than the qualified immunity cases the City cites.

In addition to addressing a different legal standard, each of the qualified immunity cases the City cited arose in a different factual circumstance. The qualified immunity cases do suggest that there are exceptions where certain speech would not fall under the speech-alone defense. For example, the qualified immunity cases show that probable cause for interference may be more easily found when someone interjects themselves into an active crime scene,³ behaves in a way that exacerbates the danger of a situation,⁴ or prevents an officer from questioning another person.⁵ These cases also underscore that physical interference differs from speech alone, as described above.⁶ Here, there is no indication that there was an active crime scene, a dangerous situation, physical interference with the officers' work, or any behavior preventing the officers from questioning the citizens on the scene. Rather, the record shows Reyes voiced his opposition and frustrations with one officer present for several minutes without issue and then had an exchange with a second officer for about forty seconds during which the officer appeared to treat his interference as a foregone conclusion. Even when considering the qualified immunity cases as

³ In *Bailey*, officers told the arrestee that he was in an active crime scene and should therefore stand back, the situation was tense and dangerous because another person present was openly holding a gun, and the arrestee did not comply as quickly as others at the scene. *Bailey*, 125 F.4th at 678.

⁴ In *Haggerty*, 391 F.3d at 656, there had been the report of a fight among students, the situation was "potentially explosive," and the plaintiff had stepped toward the officers after being told to step back. *Id.* at 656–57.

⁵ In *Spiller*, 113 F.4th at 579, the plaintiff was near a single-vehicle accident on a dangerous, elevated expressway, prevented another person from answering the officers' questions, and refused to leave the highway when asked multiple times.

⁶ In *Childers*, 848 F.3d at 415, an officer ordered the plaintiff to move his truck, which was blocking the entrance to the plaintiff's ranch and therefore physically impeding the officer's investigation, and the plaintiff failed to do so. *Id.* at 413. In *Westfall*, 903 F.3d at 544, the plaintiff did not follow the officers' instructions not to enter her house and put her hand on the doorknob to enter. *Id.* at 544.

informative to its PPA probable-cause analysis, the Court still concludes that Reyes’s arrest lacked probable cause.⁷

Finally, the Court notes that the PPA requires not only probable cause, but probable cause *related* to the materials at issue, an additional element for the City to prove. *See Garcia v. Montgomery Cnty., Maryland*, 145 F. Supp. 3d 492, 524–25 (D. Md. 2015). Here, it is uncontested that the City did not take Reyes’s cameras and videos because they “relate[d]” to any alleged criminal offense. (Tr. 69:23–25). The videos were not viewed or copied, and they were returned to him when he was released. (Tr. 37:13–38:1). APD did not treat his cameras or the videos they contained as evidence of a crime. (Tr. 69:9–22). Alas testified that the City did not consider “the camera or the film to be evidence of some crime that had occurred,” but that the seizure was “incident to the fact that they seized his person.” (Tr. 70:1–9). The Court therefore finds that the City did not believe, and had no probable cause to believe, that the seized videos related to a criminal offense Reyes committed. The

⁷ In their Reply, (Dkt. 86, at 6), the City also discusses *Hall v. Trochessett*, 105 F.4th 335, 342 (5th Cir. 2024), and argues that the Fifth Circuit held that “the ‘speech-only’ defense is a defense to prosecution under Texas criminal law . . . which is of no consequence to the argument that probable cause is lacking” because “[a] defense that may be raised in future proceedings does not vitiate probable cause at the time of arrest.” *Hall*, 105 F.4th at 342. It appears to the Court that this comment was dicta, rather than a holding, and is not binding precedent, since the Fifth Circuit’s analysis did not turn on this statement. *Knight v. Kirby Offshore Marine Pac., L.L.C.*, 983 F.3d 172, 177 (5th Cir. 2020) (“A statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding and[,] being peripheral, may not have received the full and careful consideration of the court that uttered it.”) (internal citation omitted). Rather, that statement arose in a discussion finding the independent intermediary doctrine broke the causal link between the law enforcement officer’s motives and the arrest in question. *Hall*, 105 F.4th at 342. The Fifth Circuit concluded that the “single, narrow exception” to that doctrine did not apply, meaning it was not “obvious that *no* reasonably competent officer would have concluded that a warrant should issue” in those factual circumstances. *Id.*

Nevertheless, on the question of whether the speech-alone defense can impact the existence of probable cause for an arrest, the Court notes that in *Bailey*, the Fifth Circuit said the opposite: that, in the context of evaluating probable cause for arresting someone for interference with public duties, “to constitute interference, the action must consist of more than speech alone.” *Bailey*, 125 F.4th at 676; *see also Voss*, 954 F.3d at 239; *Freeman*, 483 F.3d at 414. *Bailey*, as well as *Voss* and *Freeman*, address the issue more squarely and the Court will follow them.

Court finds that Reyes was not a suspect of a crime to which the materials related. 42 U.S.C.

§ 2000aa(a)(1), (b)(1).⁸

IV. CONCLUSION

Based on these findings of fact and conclusions of law, the Court finds that Reyes proved his Privacy Protection Act claim at trial.

For the same reasons, **IT IS ORDERED** that the City's Motion for Judgment as a Matter of Law, (Dkt. 76), is **DENIED**.

A final judgment will be entered separately.

SIGNED on June 6, 2025.

A handwritten signature in blue ink, appearing to read "Robert Pitman", is written above a horizontal line.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

⁸ Since the Court has held no probable cause existed for Reyes's arrest, the Court need not reach the issue briefed by the parties about whether the application of the statute violates Reyes's First Amendment rights.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,

Plaintiff,

v.

CITY OF AUSTIN,

Defendant.

§
§
§
§
§
§
§
§

1:21-CV-992-RP

FINAL JUDGMENT

On this day, the Court issued its Findings of Fact and Conclusions of Law following a bench trial. Accordingly, the Court renders Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that judgment is awarded in favor of the plaintiff, Julian Reyes.

IT IS FURTHER ORDERED that within 60 days of the entry of final judgment, Defendant the City of Austin shall pay liquidated damages in the amount of \$1,000 to Reyes, pursuant to 42 U.S.C. § 2000aa-6(f).

IT IS FURTHER ORDERED that all other relief not specifically granted is denied and that this case is **CLOSED**.

IT IS FINALLY ORDERED that Reyes shall file a motion for reasonable attorneys' fees and a bill of costs, with supporting documentation, no later than fourteen days after the entry of final judgment, pursuant to Local Rules CV-7 and CV-54.

SIGNED on June 6, 2025.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES.

Plaintiff,

V.

CITY OF AUSTIN, AUSTIN POLICE
DEPARTMENT, TROY WISMAR,
CHRISTOPHER CARLISLE,
PATRICK WALSH, KYU SUK AN,
SARAH FOSTER, GREG McCORMACK,
and JOHN DOES, Individually and in
their official capacities,

Defendants.

Case No. 1:21-CV-00992-RP-SH

JOINT AGREED MOTION FOR EXTENSION OF TIME

TO THE HONORABLE ROBERT PITMAN:

Plaintiff Julian Reyes and Defendant City of Austin (together, the “Parties”) file this joint agreed motion for extension of time and in support respectfully shows as follows:

On June 6, 2025, the Court entered a final judgment in favor of Plaintiff. The Court further ordered that, pursuant to Local Rules CV-7 and CV-54, Plaintiff “file a motion for reasonable attorneys’ fees and a bill of costs, with supporting documentation” (collectively, “Application”) on or before June 20, 2025. Defendant’s response is due 14 days later. *See* Local Rules CV-7, CV-54.

Plaintiff is diligently reviewing each billing entry to ensure his Application is reasonable and thorough. Counsel for Plaintiff and Counsel for Defendant conferred and now seek extensions to the deadlines related to the Application. The basis for the extension is that completion of the Application and the response by the current deadlines is impractical due to the demands of other

briefing deadlines for Plaintiff's counsel and the demands of a two-week jury trial set to commence on June 23, 2025, for Defendant's counsel. The extensions are not sought for delay. Accordingly, Plaintiff respectfully requests a seven-day extension of time to file the Application to June 27, 2025. Defendant seeks a corresponding seven-day extension of time to file its response to the Application to July 18, 2025.

WHEREFORE, PREMISES CONSIDERED, the Parties respectfully request that the Court extend the deadline for Plaintiff to file his Application to June 27, 2025, and extend the deadline for Defendant to file its response to the Application to July 18, 2025. The Parties request all such other relief to which they may be justly entitled.

Respectfully submitted,

/s/ Mark A. Stahl

Peter D. Kennedy
State Bar No. 11296650

pkennedy@gdhm.com

Daniela Peinado Welsh

State Bar No. 24127300

dwelsh@gdhm.com

Mark A. Stahl

State Bar No. 24125420

mstahl@gdhm.com

GRAVES, DOUGHERTY, HEARON & MOODY,
P.C.

401 Congress Avenue, Suite 2700

Austin, Texas 78701

(512) 480-5600 Telephone

(512) 480-5822 Telecopier

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

/s/ H. Gray Laird III

H. Gray Laird III

Assistant City Attorney

State Bar No. 24087054

gray.laird@austintexas.gov

City of Austin Law Department

P.O. Box 1546

Austin, Texas 78767-1546

(512) 974-1358 Telephone

(512) 974-1311 Fax

**ATTORNEY FOR DEFENDANT
CITY OF AUSTIN**

CERTIFICATE OF CONFERENCE

I hereby certify that on June 19, 2025, I conferred with opposing counsel and received a response stating that Defendant City of Austin agrees with the relief requested in this motion.

/s/ Peter D. Kennedy
Peter D. Kennedy

CERTIFICATE OF SERVICE

I certify that on the June 20, 2025, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Mark A. Stahl
Mark A. Stahl

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
CITY OF AUSTIN, AUSTIN POLICE	§	Case No. 1:21-CV-00992-RP-SH
DEPARTMENT, TROY WISMAR,	§	
CHRISTOPHER CARLISLE,	§	
PATRICK WALSH, KYU SUK AN,	§	
SARAH FOSTER, GREG McCORMACK,	§	
and JOHN DOES, Individually and in	§	
their official capacities,	§	
Defendants.	§	

**PREVAILING PLAINTIFF'S APPLICATION
FOR ATTORNEY'S FEES**

TO THE HONORABLE ROBERT PITMAN:

Pursuant to this Court's Final Judgment and Local Rules CV-7 and CV-54, Plaintiff Julian Reyes submits this application for attorney's fees and costs and would respectfully show:

I. Introduction and summary.

Plaintiff prevailed in his First Amendment Privacy Protection Act claim and is therefore entitled to an award of attorney's fee pursuant to 42 U.S.C. § 2000aa-6(f) and this Court's Final Judgment entered June 6, 2025. Plaintiff seeks a fee award based on the loadstar method – the number of hours spent by Plaintiff's counsel in the litigation and preparing this fee request, after exercising billing judgment and eliminating time devoted to unsuccessful claims, multiplied by (significantly discounted) hourly rates. In total, Plaintiff seeks an award of attorneys' fees of \$110,005.00 for the merits of the litigation, \$2,500.00 for preparing this fee application, plus \$2,495.27 in costs.

II. Mr. Reyes is entitled to be awarded attorney’s fees and costs.

Mr. Reyes prevailed on his claim that the City of Austin violated the Privacy Protection Act (“PPA”) when it seized his cameras on January 4, 2019. The PPA provides that a prevailing plaintiff “shall be entitled to recover ... such reasonable attorneys’ fees and other litigation costs reasonably incurred as the court, in its discretion, may award ...” 42 U.S.C. § 2000aa-6(f). There is not much case law construing the PPA’s fee provision, but cases awarding fees under 42 U.S.C. § 1988 “provide substantial guidance, if not binding authority, for awards under the PPA.” *Minneapolis Star and Tribune Co. v. United States*, 713 F. Supp. 1308, 1310 (D. Minn. 1989).

A prevailing plaintiff in civil rights cases should recover reasonable attorneys’ fees unless special circumstances render an award unjust. *Virginia v. Consumers Union*, 446 U.S. 719, 736 (1980); *Kirchberg v. Feenstra*, 708 F.2d 991, 995-96 (5th Cir. 1983). This exception is narrowly construed, and there must be an extremely strong showing of special circumstances to justify denying fees. *Kirchberg*, 708 F.2d at 998. Special circumstances do *not* include that the plaintiff was only partially successful, *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897-98 (9th Cir. 1979), that the lawsuit was only a “private” claim of the plaintiff, *Kirchberg*, 708 F.2d at 996-97, or that the defendants claimed to act in good faith, *id.* at 999.

A plaintiff need not succeed on all issues or even on the central issue to be the prevailing party. *Texas State Teachers Ass’n v. Garland ISD*, 489 U.S. 782, 790 (1989). A civil rights plaintiff is a prevailing party who succeeds on “any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of litigation.” *Id.* at 791.

Mr. Reyes is a prevailing party. Although he did not prevail on his Section 1983 claims, he did prevail on his claim that the City of Austin’s seizure of his cameras on January 4, 2019, violated the PPP. *See* Doc. 90; Doc. 91. Mr. Reyes’s partial lack of success affects the amount of

the attorneys' fee award, not his status as a prevailing party and his right to recover fees for the time and effort spent on the prevailing claim. *Texas State Teachers Ass'n*, 489 U.S. at 790.

In addition, the fees incurred preparing a fee application are recoverable. *Crus v. Hauck*, 762 F.2d 1230, 1233-35 (5th Cir. 1985).

III. The amount of the proposed award is reasonable and necessary.

A. The lodestar methodology.

The lodestar is the starting point for determining a reasonable attorneys' fee in a civil rights action, which is calculated by multiplying the number of hours reasonably expended times an hourly rate. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989). The hourly rate should reflect "the prevailing market rates in the relevant community" for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010). "[T]he lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Id.* (emphasis in original). "[A] 'reasonable fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case.'" *Id.* at 552. "[T]he lodestar method yields a fee that is presumptively sufficient to achieve this objective." *Id.* This Court's lodestar determination will be affirmed unless clear error is shown. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998).

In determining reasonableness, courts may consider the "*Johnson* factors:" (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained;

(9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974).

B. Application of the lodestar methodology.

Mr. Reyes proposes a lodestar attorney's fee award: the number of hours necessarily spent to prevail on the PPA claim, reduced by billing judgment to eliminate redundant work, multiplied by a reasonable hourly rate. Billing judgment is "shown by the attorney writing off unproductive, excessive, or redundant hours." *Green v. Administrators*, 284 F.3d 642, 662 (5th Cir. 2002) Undersigned counsel has considered each of the *Johnson* factors and exercised billing judgment in calculating the proposed fee award.

1. Hours.

Attached as Exhibit 1 is the declaration of Mr. Reyes's lead counsel, Peter D. Kennedy. Mr. Kennedy's declaration describes generally the work necessary to prevail on the PPA claim, his consideration of the *Johnson* factors, his exercise of billing judgment, and his opinion that the time spent, hourly rates suggested, and total fee request are necessary and reasonable. His declaration is supported by a spreadsheet derived from GDHM's detailed and contemporaneously maintained time records.

The spreadsheet includes individual entries for all the work performed in representing Mr. Reyes from the time of the Court's appointment of counsel. Each row on the spreadsheet shows the date, the timekeeper, the timekeeper's role, the hours, rate, and narrative of the work performed. The final column, "% of Charge," indicates, for each time entry, whether Mr. Reyes is requesting an award of fees for all, some, or none of that time. Mr. Kennedy personally reviewed the narrative in each time entry and estimated, from his personal knowledge of the case and the

work performed, the percentage of work in that entry that was necessary to prevail on the PPA claim – either 100%, 75%, 50%, or 25%. If none of the work recorded in a time entry was necessary to prevail on the PPA claim, that column is blank, reflecting 0%. For each time entry, the spreadsheet multiplies the number of hours spent by that time-keeper's rate for that timekeeper, reflected in the "Charge" column. The spreadsheet then multiplies the Charge by the percentage allocated for each time entry, *i.e.*, 1.0, .75, .50, .25, or 0. The spreadsheet then totals the result of each of those calculations to determine the Requested Fee Amount, which is found at the bottom right corner of the last page of the spreadsheet.

The hours used to calculate the Requested Fee Amount reflect the reasonable and necessary amount of time for prevailing on the PPA case, which involved (1) research, drafting, and filing of the Amended Complaint after appointment to represent Mr. Reyes by this Court, including adding the PPA claim; (2) responding to the Defendant's written discovery; (3) deposing the City's witnesses; (4) defending the City's motion for summary judgment; and (5) objecting to the Magistrate Judge's Report and Recommendation; (5) investigation and pretrial work; (6) preparing for and attending the bench trial on the merits; and (7) preparing the proposed findings and conclusions requested by the Court; and (8) responding to the City's post-trial Motion for Judgment as a Matter of Law. As noted, the proposed loadstar does *not* include time devoted to the unsuccessful claims but, to the best of counsels' ability, reflect only time necessarily devoted to the successful PPA claim or indivisible time necessary to handle the case as a whole.

2. Rates.

The Requested Fee Amount is calculated using an hourly rate for Mr. Kennedy of \$500 per hour, \$300 per hour for associate attorneys Daniela Walsh and Mark Stahl, and \$150 for paralegals. These rates are significantly lower than rates routinely charged by GDHM for these attorneys'

work in similar cases involving First Amendment rights and media defense. Mr. Kennedy's current standard hourly rate is \$750 per hour, Ms. Welsh's rate is \$415, and Mr. Stahl's rate is \$350, and the paralegal rates are \$225.

3. Attorney's fees and costs requested.

Mr. Reyes asks the Court to enter an award of **\$110,05.00** in attorney's fees through entry of Final Judgment. This represents the lodestar – his attorneys' actual hours necessarily and reasonably devoted to the prevailing claim, reduced by the exercise of billing judgment, multiplied by an hourly rate for the timekeepers, discounted from the rates typically paid by paying clients. In addition, Mr. Reyes requests an award of **\$2,500.00** for the time spent preparing this fee application and the required supporting documents, which reflects five hours of work by Mr. Kennedy, the principal drafter of this fee request, his declaration in support, and time entry spreadsheet. Finally, Mr. Reyes seeks reimbursement for **\$2,495.27** paid for deposition transcripts.

Although there is little case law on PPA attorney fees awards, this request compares very favorably to the award in *Minneapolis Star and Tribune Co. v. United States*. There, the plaintiffs won summary judgment on a PPA claim against the federal government for having seized, for a total of three hours, the plaintiffs' photographic equipment, photos, and videotapes. 713 F. Supp. at 1309. The plaintiffs sought a total fee award of over \$208,000. While the district court chastised plaintiffs' counsel for over-lawyering the case, it ultimately awarded \$80,243.37 in fees and expenses for a case that was decided on cross-motions for summary judgment. *Id.* at 1324-15. Using the US Bureau of Labor Statistics CPI Inflation Calculator, \$80,000 in May 1989 dollars (when the case was decided) is the equivalent of \$207,731.83 in May 2025 dollars. Mr. Reyes's fee application, therefore – for a case in which the plaintiff prevailed at trial after defeating a

summary judgment motion – is still about *half* of the amount awarded in *Minneapolis Star and Tribune Co.*

IV. Conclusion and prayer.

Based on the foregoing and the attached declarations and exhibits, the Plaintiff respectfully requests that this Court award attorney's fees in the amount of \$110,005.00 as prevailing plaintiff on the merits of this case, \$2,500.00 in fees for preparation of this application, and **\$2,495.27** in costs and expenses, and such other and further relief to which he may be justly entitled.

Respectfully submitted,

/s/ Peter D. Kennedy

Peter D. Kennedy

State Bar No. 11296650

pkennedy@gdhm.com

Daniela Peinado Welsh

State Bar No. 24127300

dwelsh@gdhm.com

Mark A. Stahl

State Bar No. 24125420

mstahl@gdhm.com

Graves, Dougherty, Hearon & Moody, P.C.

401 Congress Avenue, Suite 2700

Austin, Texas 78701

(512) 480-5600 (Phone)

(512) 480-5822 (Fax)

ATTORNEYS FOR PLAINTIFF

JULIAN REYES

CERTIFICATE OF CONFERENCE

I hereby certify that, Pursuant to Local Rule 7(i), before filing this application I contacted counsel for the City of Austin regarding the possibility of resolving the Plaintiff's fee award by agreement. Counsel replied that he would not be able to respond to the Plaintiff's request until after a two-week trial concluded. Therefore, the parties have not reached agreement on the Plaintiff's application for a fee award as of today.

/s/ Peter D. Kennedy

Peter D. Kennedy

CERTIFICATE OF SERVICE

I certify that on June 26, 2025, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy

Peter D. Kennedy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,
Plaintiff,

v.

CITY OF AUSTIN, AUSTIN POLICE
DEPARTMENT, TROY WISMAR,
CHRISTOPHER CARLISLE,
PATRICK WALSH, KYU SUK AN,
SARAH FOSTER, GREG McCORMACK,
and JOHN DOES, Individually and in
their official capacities,
Defendants.

§
§
§
§
§
§
§
§
§
§
§

Case No. 1:21-CV-00992-RP-SH

PLAINTIFF JULIAN REYES'S NOTICE OF APPEAL

Plaintiff Julian Reyes gives notice of his appeal to the United States Court of Appeals for the Fifth Circuit from the District Court's Final Judgment entered June 6, 2025 (Dkt. 91), which incorporates the Court's Order filed December 12, 2024 (Dkt. 68) adopting the Magistrate Judge's Report and Recommendation (Dkt. 56) in part and granting in part the City of Austin's Motion for Summary Judgment in part. This Notice of Appeal is being filed within thirty (30) days of entry of the Final Judgment. Fed. R. App. P. 4(a)(1)(A).

Respectfully submitted,

/s/ Peter D. Kennedy

Peter D. Kennedy
Texas Bar No. 11296650
pkennedy@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5764
(512) 536-9908 Fax

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on July 7, 2025, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy

Peter D. Kennedy

District Court Western District of Texas District Court Docket No. 1:21-cv-00992-RP
 Short Case Title Julian Reyes v. City of Austin
ONLY ONE COURT REPORTER PER FORM Court Reporter Lily Iva Reznik, CRR, RMR
 Date Notice of Appeal Filed in the District Court 07/07/2025 Court of Appeals No. 25-50550

PART I. (To be completed by party ordering transcript. Do not complete this form unless financial arrangements have been made, see instructions on page 2.)

A. Complete the Following:
☐ No hearings ☐ Transcript is unnecessary for appeal purposes ☐ Transcript is already on file in the Clerk's Office
OR
Check all of the following that apply, include date of the proceeding.
 This is to order a transcript of the following proceedings: ☐ Bail Hearing _____ ☐ Voir Dire _____
☐ Opening Statement of Plaintiff _____ ☐ Opening Statement of Defendant _____
☐ Closing Argument of Plaintiff _____ ☐ Closing Argument of Defendant: _____
☐ Opinion of court _____ ☐ Jury Instructions _____ ☐ Sentencing _____
 Other proceedings not listed above:

Hearing Date(s)	Proceeding	Judge/Magistrate
January 13, 2025	Bench Trial on the Merits	Judge Pitman

Failure to specify in adequate detail those proceedings to be transcribed, or failure to make prompt satisfactory financial arrangements for transcript, are grounds for DISMISSAL OF APPEAL.

B. This is to certify satisfactory financial arrangements have been made. Method of Payment:
☒ Private Funds; ☐ Criminal Justice Act Funds (**Enter Authorization-24 via eVoucher**);
☐ Other IFP Funds; ☐ Advance Payment Waived by Reporter; ☐ U.S. Government Funds
☐ Other _____

Signature /s/ Peter D. Kennedy Date Transcript Ordered 7/18/2025
 Print Name Peter D. Kennedy Phone 512-480-5634
 Counsel for Julian Reyes, Appellant
 Address Graves Dougherty Hearon & Moody, PC, 401 Congress Ave., Ste. 2700, Austin, TX 78701

PART II. COURT REPORTER ACKNOWLEDGMENT (To be completed by the court reporter and filed with the Court of Appeals within 10 days after receipt. Read instructions on page 2 before completing.)

Date Transcript Order Received	Date Satisfactory Arrangements for Payment were Made	Estimated Completion Date	Estimated Number of Pages

Payment arrangements have NOT been made or are incomplete.
 Reason: ☐ Deposit not received ☐ Unable to contact ordering party ☐ Awaiting creation of CJA 24 eVoucher
☐ Other (Specify) _____

Date _____ Signature of Reporter _____ Tel. _____
 Email of Reporter _____

Part III. NOTIFICATION THAT TRANSCRIPT HAS BEEN FILED IN THE DISTRICT COURT (To be completed by court reporter on date of filing transcript in the District Court. This completed form is to be-filed with the Court of Appeals.)

This is to certify that the transcript has been completed and filed at the District Court today.
 Actual Number of Pages _____ Actual Number of Volumes _____
 Date _____ Signature of Reporter _____

INSTRUCTIONS FOR ANYONE FILING A NOTICE OF APPEAL

1. Complete Part 1. Whether or not transcripts are being ordered. A single order form should be used for the same court reporter with multiple proceedings (if the number of proceedings exceed the form limitations, additional forms may be used).
2. Contact each court reporter involved in reporting the proceedings to make arrangements for payment. A SEPARATE ORDER FORM MUST BE COMPLETED FOR EACH COURT REPORTER.
3. Send a copy of the form to the court reporter (via email or mail, ask court reporter). CJA counsel must also enter an Authorization-24 in the U. S. District Court's eVoucher System. Once the Authorization-24 is approved, create the CJA 24 eVoucher for payment.
4. File a copy of this form with the District Court.
5. File a copy of this form with the U.S. Court of Appeals for the Fifth Circuit (Attorneys must e-file. Pro se filers must mail form unless authorized to e-file).
6. Send a copy to other parties.
7. Retain a copy for your files.

FAILURE TO MAKE SATISFACTORY ARRANGEMENTS FOR TRANSCRIPT PRODUCTION, INCLUDING FINANCIAL ARRANGEMENTS WITHIN 14 DAYS OF THE FILING OF THE NOTICE OF APPEAL, MAY RESULT IN THE DISMISSAL OF YOUR APPEAL.

This is an electronic version of the original multipart form. It is your responsibility for ensuring that the correct number of copies are made to meet the distribution requirements.

INSTRUCTIONS TO COURT REPORTER

To assure the Court of Appeals that the ordering party has fulfilled his or her obligations under FRAP 10(b), for ordering and making adequate financial arrangements with the court reporter, you are requested to complete Part II and file with the Court of Appeals within ten (10) days after receipt. For information on becoming an e-filer, please contact a deputy clerk at the number below.

It is the appellant's responsibility to contact you and make financial arrangements before filling out the form. However, if financial arrangements have not been made within ten (10) days after receipt of transcript order, complete Part II and file with the Court of Appeals. If financial negotiations with the ordering party are still in progress when the 10 days expires, contact a deputy clerk for additional time to complete this form.

If financial arrangements are made after you have notified the Court of Appeals that no financial arrangement were made, immediately notify the Court in writing of the fact, furnishing the estimated delivery date.

THE JUDICIAL COUNCIL'S DISCOUNT DATE BEGINS TO RUN FROM THE DATE SATISFACTORY FINANCIAL ARRANGEMENTS HAVE BEEN MADE.

WRITTEN REQUEST FOR EXTENSION OF TIME WITH EXPLANATION OF CIRCUMSTANCES AND A REQUEST FOR WAIVER OF DISCOUNT MUST BE ADDRESSED TO THE CLERK OF THE CIRCUIT COURT.

Link to contact information: [Contact Clerk's Office About My Case](#) or call:

NORTHERN AND WESTERN TEXAS CASE TEAM: 504-310-7806

SOUTHERN AND EASTERN TEXAS CASE TEAM: 504-310-7807

LOUISIANA, MISSISSIPPI, & AGENCY CASE TEAM: 504-310-7808

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 18, 2025

Mr. Peter Drew Kennedy
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue
Suite 2700
Austin, TX 78701

No. 25-50550 Reyes v. City of Austin
USDC No. 1:21-CV-992

Dear Mr. Kennedy,

We have docketed the appeal and ask you to use the case number above in future inquiries.

Filings in this court are governed strictly by the Federal Rules of **Appellate** Procedure. We cannot accept motions submitted under the Federal Rules of **Civil** Procedure. We can address only those documents the court directs you to file, or proper motions filed in support of the appeal. See Fed. R. App. P. and 5th Cir. R. 27 for guidance. Documents not authorized by these rules will not be acknowledged or acted upon.

You must complete a transcript order form, which can be obtained from the court's website www.ca5.uscourts.gov. If you are required to electronically file, you must, file the form via the 5th Circuit's Electronic Document Filing System even if the form was filed with the district court, and make financial arrangements with the court reporter. See also 5th Cir. R. 30.1.2 and 5th Cir. R. 31.1 to determine if you have to file electronically. When completed, this meets your obligation to order the necessary portions of the court reporter's transcript, see Fed. R. App. P. 10(b). (If you are pro se and unable to afford payment, you must file a motion with the district court requesting transcript at government expense, and notify this court.) We will coordinate the transcript deadlines with the court reporter. The court reporter should contact you directly if an extension of time to file the transcript is granted. Failure to complete the transcript order form and make financial arrangements with the court reporter within 15 days will result in dismissal of the appeal in accordance with the rules.

We will provide you information about the briefing schedule of this appeal at a later date. If a transcript is unnecessary,

please complete the section on the transcript order form to indicate such and we will start the briefing schedule. 5th Cir. R. 31.4 and the Internal Operating Procedures following rules 27 and 31 state that except in the most extraordinary circumstances, the maximum extension for filing briefs is 30 days in criminal cases and 40 days in civil cases.

All counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" naming all parties represented within 14 days from this date, see Fed. R. App. P. 12(b) and 5th Cir. R. 12. This form is available on our website www.ca5.uscourts.gov. Failure to electronically file this form will result in removing your name from our docket. Pro se parties are not required to file appearance forms.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

Electronic Record on Appeal (EROA): We permit you to download all or part of the electronic record on appeal (EROA) after this is approved by the U.S. District Court. You will receive a notice when access to the EROA is available. Counsel must be approved for electronic filing and be listed as an attorney of record in the case before access will be granted. Instructions for accessing and downloading the EROA will be included in the notice you receive from the district court, but are also available here: <http://www.ca5.uscourts.gov/docs/default-source/forms/instructions-for-electronic-record-download-feature-of-cm>.

Please note that sealed documents, except for the presentence investigation report in criminal appeals, will not be included in the EROA. You must file a motion in our court for access to sealed documents, which will be provided by the district court only upon the filing and granting of a motion by our court.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

ATTENTION: If you are filing Pro Se (without a lawyer) you can request to receive correspondence from the court and other parties by email and can also request to file pleadings through the court's electronic filing systems. Details explaining how you can request this are available on the Fifth Circuit website at <http://www.ca5.uscourts.gov/docs/default-source/default-document-library/pro-se-filer-instructions>. This is not available for any pro se serving in confinement.

Special guidance regarding filing certain documents:

General Order No. 2021-1, dated January 15, 2021, requires parties to file in paper highly sensitive documents (HSD) that would

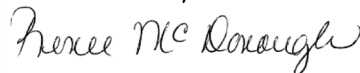
ordinarily be filed under seal in CM/ECF. This includes documents likely to be of interest to the intelligence service of a foreign government and whose use or disclosure by a hostile foreign government would likely cause significant harm to the United States or its interests. Before uploading any matter as a sealed filing, ensure it has not been designated as HSD by a district court and does not qualify as HSD under General Order No. 2021-1.

A party seeking to designate a document as highly sensitive in the first instance or to change its designation as HSD must do so by motion. Parties are required to contact the Clerk's office for guidance before filing such motions.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Renee S. McDonough, Deputy Clerk
504-310-7673

cc: Mr. Henry Gray Laird III

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

Case No. 25-50550

Julian Reyes,

Plaintiff - Appellant

v.

City of Austin, Incorporated,

Defendant - Appellee

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JULIAN REYES
Plaintiff,

v.

CITY OF AUSTIN
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-cv-0992-RP

**DEFENDANT CITY OF AUSTIN’S RESPONSE TO PLAINTIFF’S
APPLICATION FOR ATTORNEY’S FEES**

TO THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin files this Response to Plaintiff’s Application for Attorney’s Fees (Doc. 94) as follows:

I. Introduction

Plaintiff originally filed suit in this Court against the City of Austin and six Austin Police Department officers alleging that the City and officers violated Plaintiff’s constitutional rights when the officers arrested him on November 5, 2019. (Doc. 1) The Court dismissed the Plaintiff’s claims against the officers on May 10, 2022. (Doc. 14) Plaintiff subsequently amended his complaint to assert a Section 1983 *Monell* claim against the City arising out of several arrests of Plaintiff by APD officers. (Doc. 28) Plaintiff also asserted a claim under the Privacy Protection Act of 1980 (“PPA”) arising out of the alleged seizure of Plaintiff’s materials during the arrests. (Doc. 28) In his First Amended Complaint, Plaintiff sought declaratory relief, injunctive relief and requested that he be awarded his actual damages and minimum damages of \$1,000 per violation of the PPA. (Doc. 28 at 7) In its order adopting in part and rejecting in part the magistrate’s report and recommendations concerning the City’s motion for summary judgment, the Court dismissed Plaintiff’s *Monell* claim against the City, and dismissed Plaintiff’s PPA claim as to all of his arrests

except for the January 4, 2019 arrest. (Doc. 68) The PPA claim arising out of the January 4, 2019 arrest was the sole surviving claim.

Following a bench trial on Plaintiff's one remaining claim, the Court found in Plaintiff's favor on the PPA claim arising out of the January 4, 2019 arrest (Doc. 90) and entered Final Judgment for Plaintiff on that claim. (Doc. 91) The Court awarded liquidated damages to Plaintiff in the amount of \$1,000 under the PPA and denied Plaintiff's request for actual damages and declaratory and injunctive relief. (Doc. 91) Plaintiff now seeks a large award of attorney's fees even though all of his claims but one were dismissed and all of his requested relief was denied except for the award of \$1,000 in liquidated damages. Plaintiff's request of an attorneys' fees award of more than one hundred times his damages award is unreasonable.

II. The amount of Plaintiff's proposed attorneys' fee award is not reasonable and necessary.

First, the City does not dispute that Plaintiff is a "prevailing plaintiff" within the meaning of the PPA's fee provision found in 42 U.S.C. §2000aa-6(f) and applicable civil rights attorneys' fees caselaw. A plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Farrar v. Hobby*, 506 U.S. 103, 111-112, 113 S. Ct. 6 (1992), citing *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792, 109 S. Ct. 1486 (1989). Since Plaintiff obtained a judgment on his remaining claim and was awarded damages, he is considered a "prevailing plaintiff" within the meaning of the PPA's fee provision and 28 U.S.C. §1988.

However, the Supreme Court has made clear that once civil rights litigation materially alters the legal relationship between the parties, "the degree of the plaintiff's overall success goes

to the reasonableness” of a fee award under *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983). *Farrar*, 506 U.S. at 114. “[T]he most critical factor” in determining the reasonableness of a fee award “is the degree of success obtained.” *Hensley*, 461 U.S. at 436. In *Farrar*, the Court noted that it had already observed in *Hensley* that if “a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.” *Farrar*, 506 U.S. at 114, citing *Hensley*, 461 U.S. at 436. In fact, the Court in *Farrar* stated that in some circumstances, even a plaintiff who formally “prevails” under §1988 should receive no attorney’s fees at all, and that a plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. *Farrar*, 506 U.S. at 115. Plaintiff’s minimal damages award of \$1,000 highlights his failure to prove actual, compensable injury and demonstrates that his request for over \$110,000 in attorneys’ fees is unreasonable.

Plaintiff’s application suggests that the lodestar is the appropriate methodology to be used to determine a reasonable attorneys’ fee in this case. The lodestar method is calculated by multiplying the number of hours reasonable expended times an hourly rate. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989). But, in light of the Plaintiff’s overall limited success of his claims and the minimal damages award, the product of hours reasonably spent on the litigation times a reasonable hourly rate results in an excessive amount of attorneys’ fees.

In his application, Plaintiff notes that in determining reasonableness, courts may consider the “Johnson factors:” (1) the time and labor required; the novelty and difficulty of the questions; (3) the skill requisite to perform the service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount

involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974).

The only *Johnson* factor that Plaintiff actually discusses in his application is the time and labor required to pursue his PPA claim. However, the remaining factors do not demonstrate that the requested fee award is reasonable. First, the questions presented by Plaintiff's PPA claim arising out of the January 4, 2019 arrest were not novel or difficult. The essential issue was whether there was probable cause to arrest Plaintiff for interference with public duties. This issue is not novel or difficult, and only two witnesses testified at trial regarding this issue: the Plaintiff and Officer Gadiel Alas.

While the City does not dispute or otherwise challenge the experience, reputation and ability of Plaintiff's attorneys (factor 9), the remaining factors do not support the requested high fee award. Plaintiff has not demonstrated that accepting this case precluded his attorneys from accepting other legal work or that time limitations had any effect on the case or outcome. He also does not discuss the customary fee in similar cases and has not demonstrated that the case was particularly undesirable which could potentially justify a larger award. Plaintiff also provides no information on awards in other cases other than the award in the *Minneapolis Star and Tribune Co. v. U.S.* case discussed below. In short, none of the other *Johnson* factors support an attorneys' fee award of over one hundred times his damages award. Plaintiff's calculation of fees by multiplying the number of hours expended times an hourly rate, even when time spent on non-successful claims is removed, results in an excessive amount of fees when compared to the Plaintiff's limited success and damages award.

Plaintiff cites *Minneapolis Star and Tribune Co. v. U.S.*, 713 F. Supp. 1308 (D. Minn. 1989) in support of his application and argues that his request compares favorably with the award in *Minneapolis Star*. In *Minneapolis Star*, the court awarded plaintiffs summary judgment on liability under the PPA and by consent order awarded each plaintiff \$750.00 as liquidated damages allowable under the PPA. *Minneapolis Star*, 713 F. Supp. at 1309. The court also dismissed plaintiffs' claims for injunctive relief. *Id.* The court rejected plaintiffs' requested attorneys' fee award of over \$208,000 finding that the two plaintiffs' attorneys' firms had clearly over-lawyered and over-staffed the case. *Id.* at 1311. The court noted that there was no justification or rationale that results in the expenditure of a vast array of legal resources in an action where the facts are straightforward and where the legal issues involved the interpretation of a single statute. *Id.* Moreover, the court noted that the damage award was "obviously nominal," and the case resulted in no precedential pronouncement on First or Fourth Amendment issues of general application. *Id.* at 1314. Having concluded that the action was over-lawyered and resulted in recovery of only minimal damage on a discreet single claim, the court found that a reasonable award of fees and expenses to one plaintiffs' firm who represented two plaintiffs was \$48,246.93 and to another plaintiffs' firm who represented the other two plaintiffs was \$31,996.44. *Id.* Contrary to Plaintiff's argument here that the fee awards in *Minneapolis Star* compare favorably to his requested award when the *Minneapolis Star* awards are adjusted for inflation, the awards actually do not support Plaintiff's argument since the *Minneapolis Star* awards were actually for four separate plaintiffs and their pursuit of four separate PPA claims. Here, only one plaintiff is involved and only one separate and simple PPA claim was successfully tried. The facts of this case simply do not justify a fee award of over \$110,000.

In other cases, the Fifth Circuit has emphasized the importance of giving adequate

consideration to the results obtained relative to the fee award, and the result obtained relative to the result sought. In *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1048 (5th Cir. 1998), the Fifth Circuit reversed an attorneys' fee award of \$81,000 when the plaintiff was only awarded \$5,000 in compensatory damages and \$7,233.32 in back pay. The Fifth Circuit noted that the attorneys' fee award of \$81,000 was over six and one-half times the amount of damages awarded. The Court stated: "[r]egardless of the effort and ability of her lawyers, we conclude that these ratios are simply too large to allow the fee award to stand. We hold that the district court abused its discretion by failing to give adequate consideration to the result obtained relative to the fee award, and the result obtained relative to the result sought." *Migis*, 135 F.3d at 1048. Likewise, here, an attorneys' fee award of over \$110,000 when Plaintiff was only awarded \$1,000 in damages and when all but one of his claims were dismissed, is not a "reasonable fee" under the PPA's fee provision and 28 U.S.C. §1988.

III. Excessive and duplicative time entries

The City does not dispute that Plaintiff's attorneys are highly skilled and effective attorneys with excellent reputations. A review of the timesheets submitted by Plaintiffs' counsel however reveals that a few of the time entries appear to be excessive and duplicative for the work performed. For example, from April 18, 2024 to April 30, 2024, three attorneys and one paralegal for the Plaintiff spent 92.7 hours preparing for and taking two depositions of City representatives. (Doc. 94-1) One deposition (Eric Miesse) lasted approximately five and one-half hours and the other deposition (Brian Yarger) lasted less than one hour. These requested fees should be reduced to a reasonable amount required for deposition preparation.

Similarly, a review of the timesheets reveals that from December 6, 2024 until the trial date of January 3, 2025, three attorneys and one paralegal spent approximately 155.8 hours preparing

for and attending trial. (Doc. 94-1) The trial of this case was limited to the one surviving PPA claim which arose out of one incident on January 4, 2019. Only two witnesses, the Plaintiff and arresting officer Gadiel Alas, testified at the bench trial, and the trial lasted only half a day. For a bench trial limited in scope to one issue, it was not reasonably necessary for three attorneys and a paralegal to spend that much time to prepare for and attend the trial. As a result, the requested fees should be adjusted to a reasonable amount for those tasks.

PRAYER

For the above reasons, Defendant City of Austin respectfully requests that the Court deny Plaintiff's Application for Attorney's Fees and instead award Plaintiff reasonable fees and costs consistent with the degree of Plaintiff's overall success. Defendant further requests any additional relief to which it is entitled.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, CITY ATTORNEY
SARA SCHAEFER, ACTING LITIGATION
DIVISION CHIEF

/s/ H. Gray Laird III

H. Gray Laird III

Assistant City Attorney

State Bar No. 24087054

gray.laird@austintexas.gov

City of Austin Law Department

P.O. Box 1546

Austin, Texas 78767-1546

Telephone: (512) 974-1358

Facsimile: (512) 974-1311

ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this the 18th day of July, 2025.

/s/ H. Gray Laird III
H. GRAY LAIRD III

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
CITY OF AUSTIN, AUSTIN POLICE	§	Case No. 1:21-CV-00992-RP-SH
DEPARTMENT, TROY WISMAR,	§	
CHRISTOPHER CARLISLE,	§	
PATRICK WALSH, KYU SUK AN,	§	
SARAH FOSTER, GREG McCORMACK,	§	
and JOHN DOES, Individually and in	§	
their official capacities,	§	
Defendants.	§	

**PREVAILING PLAINTIFF’S REPLY IN SUPPORT OF
APPLICATION FOR ATTORNEY’S FEES**

TO THE HONORABLE ROBERT PITMAN:

Plaintiff Julian Reyes hereby files this Reply in support of his application for attorney’s fees (Dkt. 94) and would respectfully show:

I. Contrary to the City’s suggestion, Mr. Reyes’s application only seeks fees for the claim on which he prevailed.

The City’s response to Mr. Reyes’s fee application is largely devoted to comparing the claims Mr. Reyes made with the claim on which he prevailed, arguing that his request is “unreasonable” because he did not win every claim alleged. Dkt. 97 at 1-6. The City ignores the fact that Mr. Reyes’s counsel reviewed his firm’s time records and *eliminated* any time entries devoted to unsuccessful claims and *reduced* time entries devoted to both successful and unsuccessful claims by percentages ranging from 75% to 25%. *See* Dkt. 94 at 4-5 (explaining that lead counsel “personally reviewed the narrative in each time entry and estimated, from his personal knowledge of the case and the work performed, the percentage of work in that entry that was not

necessary to prevail on the PPA claim – either 100%, 75%, 50%, or 25%,” or 0% for entries reflecting no work necessary for the PPA claim).

The City does not point to a single time entry for which Mr. Reyes seeks fees that was not devoted, at least in part, to prevailing on the PPA claim. Dkt. at 1-6. Nor does the City dispute the percentage allocated by counsel to the prevailing claim for even one entry, choosing instead to ignore the careful review and allocation conducted by Mr. Reyes’s counsel. *Id.* The City’s suggestion that Mr. Reyes is seeking fees for unsuccessful claims is baseless.

II. The amount of the proposed award is reasonable and necessary.

The City agrees that Mr. Reyes is a prevailing party. Dkt. 97 at 2. The City does not dispute his counsel’s qualifications nor the reasonableness of the (discounted) rates at which his fee request is calculated. *Id.* at 4. The City seems to dispute that the lodestar method is the appropriate way to calculate the fee award, but it cites no case in support or suggest an alternative. Dkt. 97 at 3. The lodestar method is, of course, the “guiding light” for federal courts to determine fee awards in civil rights cases. *E.g., Perdue v. Kenney A.*, 559 U.S. 542, 550 (2010). The lodestar should approximate the fee the prevailing attorney would have received if billing a paying client by the hour and yield “a fee that is presumptively sufficient to achieve this objective.” *Id.*

The City claims that Mr. Reyes’ application fails to address the “*Johnson* factors,” again ignoring counsel’s description of the work performed, the rates typically charged, the allocation of time between successful and unsuccessful claims, and the exercise of billing discretion to eliminate any redundant entries, including his express declaration that he considered the *Johnson* factors. *See* Dkt. 94-1 ¶¶ 3-10. The firm’s time entries, which cover seventeen single-spaced pages, show in detail all the tasks performed. *See* Dkt. 94-1 at 5-23. Between the declaration and the time entries, the relevant *Johnson* factors are addressed. *Id.*

The first *Johnson* factor, “the time and labor required,” is shown in the application’s supporting declaration and attached timesheets. Dkt. 94-1.

Ironically, the City claims the PPA claim was not “novel or difficult” (*Johnson* factor 2), but the trial evidence showed that the City (or at least the Austin Police Department) was either unaware of this important federal protection for journalists and citizens, or chose to ignore it when training its police officers. By all indications, the PPA was quite “novel” to the City and APD. Case law on the PPA is relatively scarce, and the interaction between the federal statute and state probable cause law presented challenging analysis and proof.

The City concedes that Mr. Reyes’s counsel had the skills to properly handle the matter and does not challenge the rates sought (*Johnson* factors 3 and 9). It is self-evident that Mr. Reyes’s attorneys could not work on fee-paying matters while working on this court-appointed case (*Johnson* factor 4), and his counsel’s declaration identifies the (higher) hourly rate that fee-paying clients pay for similar matters (*Johnson* factor 5). Dkt. 94-1 at 2-3. And, as the Court knows, Mr. Reyes’s counsel effectively handled this matter on a contingent basis as appointed counsel, with no opportunity to receive fees unless Mr. Reyes prevailed, beyond a minimal and capped CJA fee (*Johnson* factor 6).

Mr. Reyes does not claim that the case presented time limitations (*Johnson* factor 7) or was undesirable (*Johnson* factor 10). There was no preexisting relationship between Mr. Reyes and his appointed counsel (*Johnson* factor 11). The City focusses on the two remaining *Johnson* factors, the amount involved and results obtained (factor 8) and awards in similar cases (factor 12), but its arguments are unpersuasive.

The PPA provides statutory damages of \$1,000 because it recognizes that violations may not cause substantial financial damage. The PPA provides for attorney’s fees as an incentive for

private enforcement for the same reason. To claim that a fee request is “excessive” because it exceeds the PPA’s statutory damages is to flip the Act on his head. Here, Mr. Reyes proved that the City violated his rights as a citizen journalist under the PPA *and* that APD arrested him without probable cause. The City has not appealed the Court’s judgment, making it final as to the City, so this Court’s ruling will provide a deterrent to future unlawful arrests and seizures. Mr. Reyes has provided the City and APD a hard – and apparently needed – lesson about not arresting journalists who are not interfering with police work, and about not seizing cameras and video recorded by citizen journalists in violation of federal law. Even without injunctive relief, Austin residents can expect the City and APD to reform its policies to comply with the PPA.

As to *Johnson* factor 12, the City complains that Mr. Reyes did not cite any PPA case addressing fee awards other than *Minneapolis Star and Tribune v. United States*, 713 F. Supp. 1308, 1310 (D. Minn. 1989), but the City has not cited any other case, either. The City tries to distinguish that case but ignores the bottom line – that its fee award, adjusted for inflation, was *twice* what Mr. Reyes seeks. Dkt. 94 at 6-7. Yes, the court held that the case had been over-lawyered, but it *reduced the fee award accordingly*, 713 F. Supp. at 1309-11, yet *still* awarded twice what Mr. Reyes seeks. And while there were two media entities involved, the case was decided on cross-summary judgment motions, not after a bench trial, requiring far less work. Here, Mr. Reyes had to defend the City’s summary judgment motion, object (successfully) to the Magistrate Judge’s PPA ruling, prepare for and conduct a bench trial, and then respond (successfully) to the City’s post-trial motion for entry of judgment. Yet Mr. Reyes is *still* seeking *half* what the court awarded in *Minneapolis Star and Tribune*.

III. The City’s accusations of “[e]xcessive and duplicative” time entries are false.

The City identifies just two instances of what it calls “excessive and duplicative” time

entries. Dkt. 97 at 6. The City claims that Mr. Reyes seeks fees for 92.7 hours spent by “three attorneys and one paralegal” preparing for and taking two depositions, and claims he seeks fees for 155.8 hours for trial and trial preparation. *Id.* at 6-7. These accusations of overbilling are based on the *total* time recorded in the time sheets, not the time *for which Mr. Reyes seeks a fee award*, as explained in the fee application.

First, while Mr. Reyes’s counsel did *spend* about 92 hours on his case from April 18-30, 2024, Mr. Reyes is not *seeking fees* for all that time. As explained in Mr. Reyes’s application and his counsel’s declaration, the right-hand column reflects whether, and what percentage, of fees Mr. Reyes is seeking. As easily can be seen, during the April 18-30 period, Mr. Reyes seeks *no fees at all* for eight time entries, just 50% for two entries, and just 25% for all other entries. Moreover, of the “three attorneys” the City claims shows over-lawyering, Mr. Reyes seeks just 25% of a .10 hour time entry – a minute and a half – for the “third” lawyer, Mark Stahl.¹ As for Mr. Reyes having two attorneys attend the depositions, the City also had two attorneys there, even though it was Mr. Reyes’s counsel who took them. The City cannot claim that Mr. Reyes’s request for 25% of the time the City’s own attorneys spent in deposition is “excessive.”

As for trial and trial preparation, Mr. Reyes did not discount any time spent on unsuccessful claims because, by then, only his successful PPA claim was at issue. The City, nonetheless, ignores undersigned counsel’s review and exercise of billing judgment reflected in the right-hand column of the time sheets, which eliminated over five hours of work. Dkt. 94-1 at 20-23. Besides the two baseless claims of overbilling and a generalized complaint about the amount of time

¹ The undersigned told the City’s counsel about these errors in a telephone call on Tuesday, July 22, 2025, to give the City a chance to correct them voluntarily. Unfortunately, as of this filing, the City has not done so, requiring Mr. Reyes to spend time addressing them here. If the City is truly concerned about Mr. Reyes’s counsel “overbilling,” it should avoid making such misstatements or correct them when given the chance.

Mr. Reyes's lawyers devoted to this case, the City does not identify even one time entry *for which Mr. Reyes seeks to recover fees* that it claims was unnecessary or excessive. Dkt. 97 at 6-8.

The City raises no objection to the costs and expenses sought. The Court should reject the City's arguments about fees and award Mr. Reyes the lodestar amount requested.

IV. Conclusion and prayer.

The Plaintiff respectfully requests that this Court grant his application for fees and costs and fee application and such other and further relief to which he may be justly entitled.

Respectfully submitted,

/s/ Peter D. Kennedy

Peter D. Kennedy
State Bar No. 11296650
pkennedy@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdhm.com
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5600 (Phone)
(512) 480-5822 (Fax)

**ATTORNEYS FOR PLAINTIFF
JULIAN REYES**

CERTIFICATE OF SERVICE

I certify that on July 25, 2025, I caused a copy of the forgoing document to be served by the Electronic Case Filing System for the United States District Court for the Western District of Texas on all parties registered or otherwise requesting electronic notice in this case.

/s/ Peter D. Kennedy

Peter D. Kennedy

From: TXW_USDC_Notice@txwd.uscourts.gov
To: cmecf_notices@txwd.uscourts.gov
Subject: Activity in Case 1:21-cv-00992-RP Reyes v. City of Austin, Inc. et al Transcript Filed
Date: Sunday, August 10, 2025 10:41:19 AM

External Email - Exercise Caution

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court [LIVE]

Western District of Texas

Notice of Electronic Filing

The following transaction was entered on 8/10/2025 at 10:39 AM CDT and filed on 8/10/2025

Case Name: Reyes v. City of Austin, Inc. et al

Case Number: [1:21-cv-00992-RP](#)

Filer:

WARNING: CASE CLOSED on 06/06/2025

Document Number: [99](#)

Docket Text:

Transcript filed of Proceedings held on January 13, 2025, Proceedings Transcribed: Bench Trial. Court Reporter/Transcriber: Lily I. Reznik, Telephone number: 512-391-8792. Parties are notified of their duty to review the transcript to ensure compliance with the FRCP 5.2(a)/FRCrP 49.1(a). A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Notice of Redaction Request must be filed within 21 days. If no such Notice is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed Redaction Request due 9/2/2025, Redacted Transcript Deadline set for 9/10/2025, Release of Transcript Restriction set for 11/10/2025, Appeal Record due by 8/25/2025, (lr)

1:21-cv-00992-RP Notice has been electronically mailed to:

Daniela Peinado Welsh dwelsh@gdhm.com, 1daniela.peinado@gmail.com

Henry Gray Laird , III gray.laird@austintexas.gov, ashley.herrera@austintexas.gov, priscilla.chavez@austintexas.gov

Mark Anthony Stahl mstahl@gdhm.com, nkarnes@gdhm.com

Peter D. Kennedy pkennedy@gdhm.com, eevans@gdhm.com, nkarnes@gdhm.com

1:21-cv-00992-RP Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1080075687 [Date=8/10/2025] [FileNumber=32765070-0] [0d8d91605dd089f03c503ea4e64dd364df969eb20ac79a6b7d3b9f0d7678e73320d5f947e129ed8662b6a4fd5e46e6fd927d23619eec4f8ae9957e006cf9d1d3]]

CAUTION: This is an EXTERNAL email. Please use caution when clicking links or opening attachments. If you believe this to be a malicious or phishing email, please report it using the "Report Message" button in Outlook.
For any additional questions or concerns, contact CSIRT at "cybersecurity@austintexas.gov".

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**JULIAN REYES,
Plaintiff,**

v.

**CITY OF AUSTIN,
Defendant.**

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-CV-00992-RP

DEFENDANTS' NOTICE OF APPEARANCE OF LEGAL COUNSEL

TO THE HONORABLE JUDGE OF SAID COURT:

PLEASE TAKE NOTICE that the undersigned attorney, who is admitted to practice in this Court and is a member in good standing, hereby enters an appearance in the above-styled and numbered cause as legal counsel for the defendants:

Monte L. Barton
State Bar No. 24115616
Assistant City Attorney
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78717
(512) 974-2409 Telephone
(512) 974-1311 Facsimile
monte.barton@austintexas.gov

Service of all pleadings, papers, orders, and documents required to be served in this action should be served on Monte Barton.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, CITY ATTORNEY
SARA SCHAEFER, ACTING LITIGATION
DIVISION CHIEF

/s/ Monte L. Barton Jr.
MONTE L. BARTON JR.
State Bar No. 24115616
monte.barton@austintexas.gov

City of Austin
P. O. Box 1546
Austin, Texas 78767-1546
Telephone (512) 974-2409
Facsimile (512) 974-1311
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on August 28, 2025, I served a copy of this motion on all parties, by and through their attorneys of record, in compliance with the Federal Rules of Civil Procedure via ECF/e-filing, this 28th day of August, 2025.

/s/ Monte L. Barton Jr.
MONTE L. BARTON JR.

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**JULIAN REYES,
Plaintiff,**

v.

**CITY OF AUSTIN,
Defendant.**

§
§
§
§
§
§
§

CIVIL ACTION NO. 1:21-CV-00992-RP

MOTION TO WITHDRAW APPEARANCE OF COUNSEL

Pursuant to Local Rule AT-3, Gray Laird, Assistant City Attorney for the City of Austin, respectfully moves this court to withdraw his appearance as counsel for the Defendant City of Austin in this matter.

Mr. Laird is leaving City of Austin employment on September 1, 2025. Defendant City of Austin will continue to be represented by Monte Barton of the City of Austin Law Department, who is entering an appearance in this matter and whose contact information is below. This withdrawal will not delay proceedings. Counsel for the Plaintiff does not oppose this motion to withdraw.

RESPECTFULLY SUBMITTED,

DEBORAH THOMAS, CITY ATTORNEY
SARA SCHAEFER, ACTING LITIGATION
DIVISION CHIEF

/s/ H. Gray Laird III
H. GRAY LAIRD III
Assistant City Attorney
State Bar No. 24087054
gray.laird@austintexas.gov
City of Austin- Law Department
P. O. Box 1546
Austin, Texas 78767-1546
Telephone (512) 974-1342

Facsimile (512) 974-1311

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this the 28th day of August, 2025.

/s/ H. Gray Laird III
H. GRAY LAIRD III

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

September 25, 2025

Mr. Peter Drew Kennedy
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue
Suite 2700
Austin, TX 78701

No. 25-50550 Reyes v. City of Austin
USDC No. 1:21-CV-992

Dear Mr. Kennedy,

We have docketed the appeal referenced above. Please use the assigned case number for all future inquiries.

Briefing Notice: The record is now complete for the purposes of this appeal, as outlined in Fed. R. App. P. 12. The appellant's brief and record excerpts must be submitted within 40 days of the date listed above on November 4, 2025 in accordance with Fed. R. App. P. & 5th Cir. R. 28, 30, and 31. Please review 5th Cir. R. 30.1.2 and 5th Cir. R. 31.1 to determine if you are required to file electronic copies of the brief and record excerpts. If required, electronic copies must be in Portable Document Format (PDF). Please refer to our briefing checklist on the Fifth Circuit's website at: <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/brchecklist.pdf>.

Paper Copies of Briefs Not Required unless directed by the Clerk. The court has waived requirement to file paper copies of briefs or record excerpts. Should paper copies be required, the clerk will notify you and instruct the number of copies to file.

Brief Covers: The case captions on brief covers must match the case captions on the enclosed title caption sheets exactly. Any modifications to the captions must be corrected before the brief is submitted to the court.

Record Excerpts: As specified in 5th Cir. R. 30.1.7(c), an appellant must file record excerpts. The electronic PDF version of the record excerpts should include pages representing the "tabs" identified in the document index. If you are notified to provide paper copies of the excerpts, please ensure that copies filed

contain actual physical tabs that extend beyond the edge of the document, to facilitate easy identification and review.

Policy on Extensions: The court grants extensions sparingly, following the criteria outlined in 5th Cir. R. 31.4. If you request an extension, you must notify opposing counsel and inform us whether the extension is opposed or unopposed. Note that, except in extraordinary circumstances, the maximum extension for filing briefs is 30 days in criminal cases and 40 days in civil cases.

Reply Brief: Cases are generally not submitted to the court until all briefs are filed, except in criminal appeals. Reply briefs must be filed within the 21-day period specified in Fed. R. App. P. 31(a)(1). Please refer to 5th Cir. R. 31.1 to determine if electronic copies of the reply brief are required, and for guidance on format.

Dismissal of Appeals: Please be aware that the clerk may dismiss appeals without notice if briefs are not filed on time, or if other rules are not followed.

Appearance Form: If you have not yet electronically filed a "Form for Appearance of Counsel," please do so within 14 days of this notice. Ensure that you name each party you represent, as required by Fed. R. App. P. and 5th Cir. R. 12. The form is available on the Fifth Circuit's website at www.ca5.uscourts.gov.

Brief Template: The clerk's office provides brief templates and a tool to check briefs for potential deficiencies before docketing. To access these resources, log in to CM/ECF and select 'Brief Template' (Counsel Only) or 'PDF Check Document' from the Utilities menu or the "Attorney Toolbox".

Electronic Record on Appeal (EROA): We permit you to download all or part of the electronic record on appeal (EROA) after this is approved by the U.S. District Court. You will receive a notice when access to the EROA is available. Counsel must be approved for electronic filing and be listed as an attorney of record in the case before access will be granted. Instructions for accessing and downloading the EROA will be included in the notice you receive from the district court, but are also available here: <http://www.ca5.uscourts.gov/docs/default-source/forms/instructions-for-electronic-record-download-feature-of-cm>.

Please note that sealed documents, except for the presentence investigation report in criminal appeals, will not be included in the EROA. You must file a motion in our court for access to sealed documents, which will be provided by the district court only upon the filing and granting of a motion by our court.

Video/Audio Exhibits: If this record contains exhibits, such as dash cam or body cam videos, that need to be submitted to the court, please provide them to the District Court in MP4 format for submission to our court.

Citation Guidelines: Pursuant to 5th Cir. R. 28.2.2, use the following citation format:

- For single record cases, use "ROA." followed by the page number (e.g., "ROA.123").
- For multiple record cases, cite "ROA." followed by the Fifth Circuit appellate case number, followed by the page of the record (e.g., "ROA.13-12345.123").
- Each citation must end with a period (.) or semicolon (;).

Pro Se Litigants: If you are a pro se litigant, you may request the record from the district court to prepare your brief. Those proceeding in forma pauperis may receive the record without payment of shipping costs. If you wish to receive exhibits, you must specifically request them. Upon receiving the record, please review it within 14 days for any missing or incomplete items. If you need to request a supplemental record or order transcripts, do so promptly. The court will not grant extensions of time to file your brief due to a delay in checking the record.

Reminder Regarding Sealed Documents: Our court presumes the public has a right to court records, and request to seal pleadings, record excerpts, or other documents must be justified with particularity. Simply stating that the originating court sealed the matter is insufficient. Counsel is responsible for justifying a request to file under seal, as well as for notifying the court when sealing is no longer necessary. An unopposed motion to seal does not relieve counsel of the obligation to justify the motion.

Signing Pleadings. While our rules do not directly regulate the process by which a party or an attorney produces the filing—such as writing it personally with no assistance, delegating part of its preparation to another, or using generative artificial intelligence, the signature is an attestation that the signer has reviewed the filing and is responsible for the accuracy of its contents.

If you have any questions or require further assistance, please do not hesitate to contact our office.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Renee McDonough
Renee McDonough, Deputy Clerk
504-310-7673

Enclosure(s)

cc w/encl:

Mr. Monte Lewis Barton Jr.
Mr. Henry Gray Laird III

Case No. 25-50550

Julian Reyes,

Plaintiff - Appellant

v.

City of Austin, Incorporated,

Defendant - Appellee

No. 25-50550

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JULIAN REYES,

Plaintiff – Appellant

v.

CITY OF AUSTIN,

Defendant – Appellee

On Appeal from Cause No. 1:21-cv-992
In the United States District Court, Western District of Texas, Austin Division
Hon. Robert Pitman, Presiding

**APPELLANT’S UNOPPOSED MOTION TO
WITHDRAW APPEAL**

TO THE HONORABLE COURT OF APPEALS:

Appellant Julian Reyes no longer desires to prosecute this appeal. He therefore respectfully requests that this Court dismiss this appeal pursuant to Rule 42(b)(2), Fed. R. App. P. and Fifth Circuit Rule 42.1, with each party to bear its own costs, if any.

The undersigned hereby certifies that he has conferred with counsel for Appellee City of Austin, who confirmed on November 6, 2025, that Appellee does not oppose the relief requested.

WHEREFORE, PREMISES CONSIDERED, Appellant Julian Reyes

respectfully moves this Court to dismiss this appeal and grant such other and further relief to which he may be entitled.

Respectfully submitted,

/s/ Peter D. Kennedy

Peter D. Kennedy

Texas Bar No. 11296650

Graves, Dougherty, Hearon & Moody, P.C.

401 Congress Avenue, Suite 2700

Austin, Texas 78701

(512) 480-5764 (Phone)

(512) 536-9908 (Fax)

pkennedy@gdhm.com

**ATTORNEY FOR APPELLANT
JULIAN REYES**

Certificate of Service

I certify that the foregoing was served on all counsel of record via eService on November 7, 2025.

/s/ Peter D. Kennedy

Peter D. Kennedy

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 10, 2025

Mr. Philip Devlin
Western District of Texas, Austin
United States District Court
501 W. 5th Street
Austin, TX 78701-0000

No. 25-50550 Reyes v. City of Austin
USDC No. 1:21-CV-992

Dear Mr. Devlin,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk
504-310-7675

cc w/encl:

Mr. Monte Lewis Barton Jr.
Mr. Peter Drew Kennedy
Mr. Henry Gray Laird III

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 10, 2025

Lyle W. Cayce
Clerk

No. 25-50550

JULIAN REYES,

Plaintiff—Appellant,

versus

CITY OF AUSTIN, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-992

CLERK'S OFFICE:

Under FED. R. APP. P.42(B), the appeal is dismissed as of
November 10, 2025, pursuant to appellant's motion.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 10, 2025

Mr. Philip Devlin
Western District of Texas, Austin
United States District Court
501 W. 5th Street
Austin, TX 78701-0000

No. 25-50550 Reyes v. City of Austin
USDC No. 1:21-CV-992

Dear Mr. Devlin,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk
504-310-7675

cc w/encl:

Mr. Monte Lewis Barton Jr.
Mr. Peter Drew Kennedy
Mr. Henry Gray Laird III

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 10, 2025

Lyle W. Cayce
Clerk

No. 25-50550

JULIAN REYES,

Plaintiff—Appellant,

versus

CITY OF AUSTIN, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-992

CLERK'S OFFICE:

Under FED. R. APP. P.42(B), the appeal is dismissed as of
November 10, 2025, pursuant to appellant's motion.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 10, 2025

Lyle W. Cayce
Clerk

No. 25-50550

JULIAN REYES,

Plaintiff—Appellant,

versus

CITY OF AUSTIN, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-992

CLERK'S OFFICE:

Under FED. R. APP. P.42(B), the appeal is dismissed as of
November 10, 2025, pursuant to appellant's motion.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 10, 2025

Lyle W. Cayce
Clerk

No. 25-50550

JULIAN REYES,

Plaintiff—Appellant,

versus

CITY OF AUSTIN, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-992

CLERK'S OFFICE:

Under FED. R. APP. P.42(B), the appeal is dismissed as of
November 10, 2025, pursuant to appellant's motion.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIAN REYES,

Plaintiff,

v.

CITY OF AUSTIN, INC.,

Defendant,

§
§
§
§
§
§
§
§

1:21-CV-992-RP

ORDER

Before the Court is Plaintiff Julian Reyes’ (“Reyes”) Motion for Attorney’s Fees. (Dkt. 94). Defendant the City of Austin, Inc., (“the City”) filed a response, (Dkt. 97), to which Reyes replied, (Dkt. 98). Having reviewed the parties’ briefing, the relevant law, and past filings from the overall litigation, the Court enters the following order.

I. BACKGROUND

Reyes is a citizen journalist and advocate for homeless Austin residents. Reyes has frequently filmed police activity and several times has been arrested by the Austin Police Department. Reyes brought claims under the Privacy Protection Act, (“PPA”), 42 U.S.C. § 2000aa *et seq.*, for seizure of his journalist work product and documentary materials during those arrests. Reyes brought constitutional claims under Section 1983 alleging a pattern or practice by the City of arresting him in retaliation for his views. (Findings of Fact and Conclusions of Law, Dkt. 90, at 1–2). The Court granted summary judgment to the City on that claim because, while it was possible that a jury could reasonably find he was arrested in retaliation for his views in a maximum of five isolated instances, he had not met his burden to provide evidence from which a reasonable factfinder could infer a

policy, custom, or practice of the City existed, and had rather only demonstrated isolated instances, which cannot support a finding of municipal liability on the part of the City. (Order on Summ. J., Dkt. 68, at 14–22).

As to his PPA claims, Reyes mentioned several arrests in his Amended Complaint during which his camera was seized and addressed two in summary judgment briefing. (*Id.* at 4). In its summary judgment order, the Court found that Reyes’ arrest on October 24, 2021, did not violate the PPA, because the City had probable cause to arrest Reyes for violating a noise ordinance, and because Reyes did not rebut the probable cause finding in his objections to the report and recommendation of the United States Magistrate Judge. (*Id.* at 21). Trial proceeded as to the issue of a PPA violation on one date, January 4, 2019. On January 13, 2025, the Court held a half-day bench trial in this matter. (Dkt. 77). Following the bench trial, the Court found that Reyes proved a PPA violation on January 4, 2019, based on the evidence admitted at trial. (Dkt. 90). The Court awarded Reyes \$1,000 in statutory damages as provided for under the PPA. (Dkt. 91).

II. LEGAL STANDARD

The PPA entitles a prevailing plaintiff to reasonable attorney’s fees and court costs awarded in the discretion of the Court. 2 U.S.C. § 2000aa-6(f) (a prevailing plaintiff “shall be entitled to recover . . . such reasonable attorneys’ fees and other litigation costs reasonably incurred as the court, in its discretion, may award . . .”). Cases awarding fees under 42 U.S.C. § 1988 “provide substantial guidance” for fee awards under the PPA. *Minneapolis Star and Tribune Co. v. United States*, 713 F. Supp. 1308, 1310 (D. Minn. 1989). A prevailing plaintiff in civil rights cases should recover reasonable attorneys’ fees unless special circumstances render an award unjust. *Virginia v. Consumers Union*, 446 U.S. 719, 737 (1980); *Kirchberg v. Feenstra*, 708 F.2d 991, 995–96 (5th Cir. 1983). A plaintiff

need not succeed on all issues or even on the central issue to be the prevailing party. *Tex. State Teachers Ass'n v. Garland ISD*, 489 U.S. 782, 790 (1989). A civil rights plaintiff is a prevailing party who succeeds on “any significant claim affording it some of the relief sought.” *Id.* at 791.

Determining an attorney’s fee award rests within the discretion of the district court. *E.E.O.C. v. Clear Lake Dodge*, 60 F.3d 1146, 1153 (5th Cir. 1995). In determining reasonable attorney’s fees in a civil rights action, first, the court may calculate a “lodestar” by multiplying the number of hours reasonably expended times an hourly rate. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989). The hourly rate should reflect “the prevailing market rates in the relevant community” for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Perdue v. Kenny A.*, 559 U.S. 542, 551 (2010). The lodestar method “approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case.” *Id.* “[A] ‘reasonable’ fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case.” *Id.* at 552.

Second, the court—after calculating the lodestar—“may decrease or enhance the amount based on the relative weights of the twelve factors set forth in *Johnson*.” *Saižan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 800 (5th Cir. 2006) (discussing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)). The twelve *Johnson* factors are (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and

ability of the attorneys; (10) the desirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717–19.

III. DISCUSSION

The parties do not dispute that Reyes is the prevailing party and entitled to attorney’s fees. Reyes requests a lodestar award of \$110,050. (Mot. Fees, Dkt. 94, at 7). As discussed above, the Court will consider whether to enhance or decrease the lodestar amount of attorney’s fees based on the relative weights of the twelve factors set forth in *Johnson*. Here, the City requests a downward adjustment based on some of the *Johnson* factors, focusing on factor 8, the degree of results obtained. The City argues that Reyes should not receive an attorney’s fees award that is more than one hundred and ten times the damages award of \$1,000 that he received. (Resp., Dkt. 97, at 3).

The Court finds that a reduction in Reyes’ fees award is appropriate from the lodestar amount his attorneys propose based on *Johnson* factor 8 and Fifth Circuit caselaw. As an initial matter, the Court commends Reyes’ attorneys for considering the *Johnson* factors and reducing time entries related to both successful and unsuccessful claims, by percentages ranging from 75% to 25%, in their lodestar calculation. (Dkt. 94-1, at 3–4 (declaration from Reyes’ lead counsel that he had reviewed each time entry and, from his knowledge of the case, assessed whether each time entry was necessary to prevail on the PPA claim, either 100%, 75%, 50%, 25%, or 0%)). Also, the Court does not find duplication or errors in the attorney’s fees calculation proposed by counsel. (Dkt. 94-1).

However, a further reduction in Reyes’ fee award remains warranted. The main contention of Reyes’ complaint was that he had experienced a pattern of retaliatory arrests in violation of the Constitution, a claim on which he did not ultimately prevail, and that he had experienced PPA violations due to his camera being seized on several instances, of which he ultimately proved one.

(Am. Compl., Dkt. 28). Reyes raised claims related to more than ten incidents during which he was arrested over the span of about five years, and the parties' summary judgment briefing addressed seven of those incidents and whether they constituted a pattern or practice of retaliatory enforcement on the part of the City. (Order, Dkt. 68, at 3). In keeping with that overall focus, Reyes devoted a substantial majority of his summary judgment response brief, (Dkt. 47), and his objections to the Report and Recommendation of the United States Magistrate Judge, (Dkt. 61), to his argument that the City had a pattern of arresting him in violation of the First Amendment. Out of the sections of those briefs devoted to the PPA claim, only part was devoted to the PPA claim relating to January 4, 2019, as Reyes also discussed an unsuccessful PPA claim alleging the seizure of his camera on another date.

In sum, based on its careful consideration of the overall litigation and the spreadsheet Reyes submitted, (Dkt. 94-1), the Court finds that a substantial amount of the discovery requests, research, factual analysis, and client communications reflected in the time entries from before this Court's summary judgment order, (Dkt. 68), were not necessary to win Reyes' claim on the PPA violation on January 4, 2019. This incident was one of many that Reyes' counsel investigated and litigated during that time. And nothing suggests, for example, that during the pretrial period, the January 4, 2019 incident was more hotly contested or heavily briefed than the multiple other incidents described in Reyes' briefs. The Court finds that a more substantial reduction of Reyes' time entries than reduced by counsel from the pretrial period of this case is appropriate under the *Johnson* factors.

So too, the Court finds that an overall reduction of Reyes' fees award from the lodestar amount is appropriate to account for its proportionality to his damages award of \$1,000. The Fifth Circuit has made clear that the Court should consider the overall ratio between a damages award and

attorney's fees. In *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047–48 (5th Cir. 1998), the Fifth Circuit reversed an attorney's fees award of \$81,000 when the plaintiff was awarded \$5,000 in compensatory damages and \$7,233.32 in back pay. The Fifth Circuit noted that this fee award was over six and one-half times the amount of damages awarded and that “[r]egardless of the effort and ability of her lawyers, we conclude that these ratios are simply too large to allow the fee award to stand.” *Migis*, 135 F.3d at 1048. It held that the district court erred in “failing to give adequate consideration to the result obtained relative to the fee award, and the result obtained relative to the result sought.” *Id.* See also *Combs v. City of Huntington, Tex.*, 829 F.3d 388, 395–96 (5th Cir. 2016); *Hodges v. City of Houston*, 1995 WL 726463, at *4–5 (5th Cir. 1997) (unpublished decision) (reversing \$65,000 attorney's fee award where plaintiff received \$3,500 in damages based on fees being “excessive” in relationship to damages); *Saldivar v. Aus. Indep. Sch. Dist.*, 675 F. App'x 429, 432 (5th Cir. 2017) (affirming district court's decision to reduce fee award by 82 percent, because the district court correctly applied *Migis* in finding that a fees-to-damages ratio of “seventy-nine to one is simply too large”); *McAfee v. Bozcar*, 738 F.3d 81, 92–93, 95 (4th Cir. 2013) (reversing attorney's fee award in civil rights case of 109 times the verdict because it did not “properly reflect[] [plaintiff's] success in the case,” and directing that it be reduced by 66%). In sum, this Court will consider proportionality of the fees award to the damages award. However, there is no strict proportionality requirement or cap on the ratio between damages and attorney's fee awards; the Fifth Circuit explained in *Combs* that district courts are not to treat the 6.5:1 ratio reversed in *Migis* as a cap on fees or a strict proportionality rule. *Combs*, 829 F.3d at 397 (discussing *Migis*, 135 F.3d at 1048).

The above cases about proportionality guide the Court's downward adjustment of the lodestar amount in Reyes' case. In some instances, a district court has reduced an award very

substantially to avoid a large disparity between damages and attorney's fees. *E.g., Saldivar*, 675 F. App'x at 432 (affirming district court's reduction by 82 percent); *Jason D.W. by Douglas W. v. Hous. Indep. Sch. Dist.*, 158 F.3d 205, 209 (5th Cir. 1998) (affirming district court's reduction by 75 percent); *Reynolds Next Best Friend of J.R. v. George Cnty. Sch. Dist.*, No. 1:19-CV-426-TBM-RPM, 2023 WL 4939379, at *10 (S.D. Miss. Aug. 2, 2023) (reducing the lodestar amount by 60% considering plaintiff's limited overall results and collecting cases reducing the lodestar amount similarly).

Here, however, the Court also considers that Reyes' attorneys, using the *Johnson* factors, already reduced their proposed lodestar award to account for the unsuccessful claims. (Dkt. 94-1, at 3-4); see *Planned Parenthood Sw. Ohio Region v. Dewine*, 931 F.3d 530, 544 (6th Cir. 2019) (finding that a reduction under the *Johnson* factors, where counsel had omitted time spent on unsuccessful claims, was "embedded" in fee request and district court did not err in declining to further reduce fee award as a result). The Court also considers that, beyond the \$1,000 damages award afforded under the PPA, Reyes attained a legal ruling that his arrest violated the law. Because Reyes explains that he intended to attain a legal ruling that could impact the City's future practices, (Reply, Dkt. 98, at 4), the Court acknowledges that the ruling itself is a part of his overall results. *E.g., Corral v. Montgomery Cnty.*, 91 F. Supp. 3d 702, 720 (D. Md. 2015) (reducing fees award by 33% based on balancing relief sought with relief obtained, where a plaintiff failed to secure an injunction but secured county defendant's admission that his First Amendment rights were violated).

In sum, based on *Johnson* factor 8, the Court finds that a downward adjustment of 45% is warranted. The Court arrives at that percentage by carefully considering Reyes' attorneys' time sheets, (Dkt. 94-1). The Court acknowledges that a reduction is already embedded in the fee request, because Reyes' attorneys omitted time spent on unsuccessful claims. However, the Court concludes

that a more substantial reduction in a fees award for time entries from the pretrial period is warranted to account for the limited success of Reyes' PPA claim as to January 4, 2019, in relation to Reyes' relief sought, discovery process, and dispositive briefing, considering, for example, the number of unlawful arrests alleged and the volume of facts and briefing about the constitutional claims presented throughout the case. The Court find that a 45% downward adjustment is appropriate considering the ratio between the attorney's fees sought and the success obtained.

The other *Johnson* factors that the parties briefed do not meaningfully impact this Court's selection of a downward adjustment. As to factor 2 (novelty and difficulty of the legal claim), the Court recognizes that the PPA has limited case law, but this weighs in favor of neither party. Reyes' attorneys pursued novel arguments but also had a more limited scope of possible legal research and shorter responsive briefing on the PPA as a result. As to factor 12 (fee awards in analogous cases), the parties discuss one fee award in a PPA case, *Minneapolis Star and Tribune*, 713 F. Supp. at 1310, where the Court awarded \$80,000, which would be about \$200,000 in today's dollars. (Mot., Dkt. 94, at 6). This case weighs in favor of neither party as it arose in a different procedural posture and had different facts. For example, there was no trial (reducing the time spent by the attorneys), but counsel represented multiple plaintiffs against multiple defendants (increasing the time spent). The Court finds that *Minneapolis Star and Tribune*, 713 F. Supp. at 1310, affirms its selection of a more moderate 45% downward adjustment in the lodestar award than the 60%-82% adjustments made in the cases discussed above, because the *Minneapolis Star and Tribune* Court similarly awarded fees which were significantly larger than the PPA statutory damages award of \$750 per plaintiff.

Accordingly, the Court finds that a downward adjustment of 45% is warranted from Reyes' proposed lodestar amount of \$110,050, for a total award of \$60,527.50 in reasonable attorney's fees.

The City raises no objections to Reyes' proposed award in the amount of (1) \$2,500 for preparing the fee application and (2) \$2,495.27 for deposition costs. (Resp., Dkt. 97). The Court grants Reyes' motion as unopposed as to those fees and costs.

IV. CONCLUSION

For these reasons, **IT IS ORDERED** that Reyes' Motion for Attorney's Fees, (Dkt. 94), is **GRANTED IN PART** as follows. The Court finds that Reyes is entitled to \$63,027.50 in reasonable attorney's fees and \$2,495.27 in litigation costs. **IT IS FURTHER ORDERED** that the City shall pay \$63,027.50 in reasonable attorney's fees and \$2,495.27 in litigation costs to Reyes' counsel. All other requested relief is **DENIED**.

SIGNED on January 29, 2026.

A handwritten signature in blue ink, appearing to read "Robert Pitman", is written above a horizontal line.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE