No.

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL, PETITIONER

v.

CORRINE MCCLINTIC AND VILLAGE OF WILMETTE,
A MUNICIPAL CORPORATION

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Does the First Amendment protect a person's right to photograph or videotape in public?

If so, where officers threaten to arrest a person for photographing or videotaping in public does the First Amendment require a heightened pleading standard or particular mental state to hold the officer and municipality liable? Similarly, should municipalities have rules forbidding officers from arresting persons who photograph or videotape in public?

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The opinion of the Seventh Circuit Court of Appeals is reported as *Spiegel v. McClintic*, 916 F.3d 611 (7th Cir. 2019). App.1a-14a. The District Court Opinion is not reported. App15a-43a.

JURISDICTION

The Seventh Circuit denied the petition for rehearing on March 19, 2019. App.44a. This petition for writ of certiorari is filed within 90 days of the decision in accordance with Supreme Court Rule 13. This Honorable Court has jurisdiction pursuant to 28 U.S.C. §2101(c).

RELEVANT PROVISIONS INVOLVED

U.S. Const., Amendment 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. §1983

> **Every** person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, suit in equity, or other proper proceeding for redress. . .

STATEMENT

A private individual, Corrine McClintic, filed a report with the Village of Wilmette police claiming she was upset because Marshall Spiegel took pictures of her while she was leaving the condominium building where she and Spiegel reside. McClintic lurks around the building peering into Spiegel's windows to draft condominium rule violations. App.2a-4a. McClintic's husband sits on the condominium building's board. App.3a.

An hour later, a Wilmette police officer appeared at Spiegel's building and threatened that Spiegel had broken the law. App.3a. The officer warned him not to photograph or videotape McClintic again. App.3a.

A few days later, two Wilmette detectives showed up at Spiegel's building. The two detectives again warned Spiegel about any further photographing and videotaping of McClintic in public places or otherwise. App.3a.

A few months later, a Wilmette detective called Spiegel and stated that McClintic again was upset because Spiegel had photographed or videotaped her in public. The detective threatened that he would file disorderly conduct charges against Spiegel if he did it again. App.3a-4a. Thereafter, McClintic would taunt Spiegel that if he photographed or videotaped her again, Wilmette would arrest him. App.4a.

Spiegel sought a declaratory judgment and injunction against Wilmette and McClintic to preclude

any future arrest. App.15a-16a. In briefing, Wilmette admitted McClintic's being annoyed was the only "breach of the peace." App.11a-12a. Wilmette's briefs also ratified its officers' acts, claiming Spiegel lacked any "interest in preserving his right" to photograph or videotape in public places and Wilmette had a "significant public interest" to let its officers" determine whether probable cause exists" to charge Spiegel or others with disorderly conduct if they did. App.11a-12a.

The District Court dismissed Spiegel's declaratory judgment and request for an injunction against Wilmette and McClintic. App.15a-38a. The District Court held three incidents were insufficient for *Monell* liability, *Twombly* required a heightened pleading standard, and *Monell* requires an express policy. App.15a-38a. The Seventh Circuit agreed. App.1a-14a.

REASONS FOR GRANTING THE PETITION

I. First Amendment Does Not Require Proof of a Mental State.

The First Amendment protects "audiovisual recording." *ACLU v. Alvarez*, 679 F.2d 583, 589 (7th Cir. 2012). "It is not a crime to take pictures on the street." *Jones v. Clark*, 630 F.3d 677, 683 (7th Cir. 2011). Similarly, "[v]ideotaping other people in public, while potentially intrusive, is not illegal in Illinois." *Reher v. Vivo*, 656 F.3d 772, 776 (7th Cir. 2011).

State action can arise from private use of state laws or procedures with the encouragement, approval, or assistance of state officials. *Edmonson v. Leesville Concrete*, 500 U.S. 614, 621-623 (1991). The state's

putting its power and prestige behind the unconstitutional action alone may suffice. *Burton v. Wilmington Parking*, 365 U.S. 715, 725 (1961).

Municipalities can also be liable for ratifying a subordinate's unconstitutional decision. *St. Louis v. Praprotnik*, 485 U.S. 112, 117 (1988). A single ratification may suffice. *Pembauer v. Cincinnati*, 475 U.S. 469, 480-481 (1986). Here, the Seventh Circuit followed *Praprotnick*: the authorized policymaker must usually "approve the decision" and "the basis for it." *Praprotnik* at 127.

But unlike supervisory liability, municipal liability "does not turn on any underlying" mental test culpability, like agreeing with the "basis" for a decision. *City of Canton v. Harris*, 489 U.S. 378, 389 fn. 8 (1989).

Moreover, First Amendment "rights are entitled to special constitutional solicitude." *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). Mental states are irrelevant. *Reed v. Town of Gilbert*, 135 S.Ct. 2219, 2229 (2015). The First Amendment "targets the operation of the laws." *Id.* Even good faith, content neutral laws, can be struck down. *Id.* at 2229-2230.

Iqbal makes "crystal clear" that required mental state varies with the "constitutional provision at issue." *OSU v. Ray*, 699 F.3d 1053, 1071 (9th Cir. 2012). For example, for supervisory liability, "knowledge" alone "suffices for free speech violations." *Id.* at 1073. Free speech violations "do not require specific intent" by a supervisor. *Id.* at 1075. Neither are they required for municipalities. *Reed* at 2220-2230.

The Seventh Circuit erred. Litigants need not plead, or meet, any *Praprotnik* "basis" ratification requirement for why a police officer acted. A municipality, like Wilmette's, "basing of a defense" in the suit constitutes ratification and "cannot be

retracted." *Restatement (Second) of Agency*, §97, cmt. a. Principals need only "knowledge of the facts," not the basis for an agent's acts. *Id.* at cmt. d.

II. Conspiracy & Ratification Theories Cannot Superimpose Intent Requirement.

The Seventh Circuit also erred in imposing a conspiracy's heightened pleading standard to First Amendment claims.

A "conspiracy creates specific–intent liability[,]" knowing the conduct is wrongful, and agreeing to "the achievement of that conduct." *Governmental Conspiracies to Violate Civil Right*s, 57 Mont. L.R.,1 22 (1996). As the First Amendment lacks any specific intent, proof a third-party and the government "conspired" is irrelevant.

A municipality's propounding to an employee an *ad hoc* decision causing a constitutional violation suffices, regardless of a "conspiracy." *Pembauer* at 480-481. A municipality's ratifying an employee's *ad hoc* decision that caused a constitutional violation should as well.

Ratification is proof the municipality agrees the employee acted appropriately. *Bryan Cty. v. Brown*, 520 U.S. 397, 406 (1997). An unconstitutional "as applied" ordinance ratified by a municipality satisfies *Monell*. *Amnesty v. W. Hartford*, 361 F.3d 112, 125-126 (2nd Cir. 2004).

Even giving an employee one unconstitutional option suffices. *Johnson v. Vanderkooi*, 918 N.W.2d 785, 793-794 (Mich. 2018). The employee would be "taking an action linked to a deliberate choice of the municipality, even if no single option was mandated." *Id.* at 794.

III. First Amendment Requires Rules to Limit Discretion.

Both Wilmette's ordinance (12-4.1) and the Illinois disorderly statute (720 ILCS 5/2601) require the act the "unreasonable" and "disturb another and to provoke a breach of the peace."

But unlike rules (eg. a 55 mph speed limit), a standard's meaning, e.g., "excessive speed," or "unreasonableness," can only be determined "with its applications[,]" not in advance. *Problems With Rules*, Cass Sunstein, 83 Cal.L.R. 953, 964-965 (1995).

For the accused, a "reasonableness" standard is "inconsistent with the conventional requirement for criminal conduct – awareness of some wrongdoing." *Elonis v. United States*, 135 S.Ct. 2001, 2011 (2015)(quoting case). It is even more inconsistent when criminality turns on the State or "victim's" view of reasonableness. Similarly, the State cannot criminalize conduct that "annoys" others. *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971). This "contains an obvious invitation to discriminatory enforcement." *Id.* at 616.

The "categorization" approach to First Amendment claims is "a version of the rules/standards distinction." *The Justices of Rules and Standards*, 106 Harv. L.R. 22, 59 (1999). The Court's categorization binds the decision-maker "to respond in a determinative way" to the facts. *Categoricalism and Balancing*, 84 N.Y. Univ. L.R. 375, 381 (2009).

Similarly, the First Amendment does not contemplate "*ad hoc* balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010). "[V]alue judgments" are "for the individual to make" not the "Government to decree." *United States v. Play*boy, 529 U.S. 803, 818 (2000).

Municipalities cannot evade liability by delegating discretionary authority to decide for themselves if the First Amendment was violated. Municipalities must carefully choose what authority to delegate, and to whom.

To ensure this, municipalities must create fixed, written "standards to cabin discretion" in First Amendment cases. *OSU* at 1064. A sharp line also assures permissible speech will not be chilled." *Rules & Standards*, 33 UCLA L.R., 379, 380 (1985). The case for crisp rules in "criminal law is even more compelling." *Legal Reasoning*, Cass Sunstein, e-loc *122 (2018).

For example, only "standards limiting" a municipality's discretion to grant licenses will eliminate the danger of self-censorship. *Lakewood v. Plain Dealer*, 486 U.S. 750, 758 (1988). Otherwise, governments can evade responsibility with vague laws or entrusting "lawmaking," *ie.* gratuitous discretion, to police.

Without clear guideposts, "*post hoc* rationalizations" and "shifting or illegitimate criteria" make it too hard for courts to effectively detect, review, and correct violations. *Id.* Similarly, though "as applied" relief may vindicate plaintiff's rights, it provides no protection against "self censorship" by speakers or a "chilling effect" on third parties. *Id.*

The failure to make rules regulating a municipal policy may satisfy *Monell*. *Sims v. Mulchay*, 902 F.2d 524, 543 (7th Cir. 1990). A "stringent" "deliberate indifference" requirement should not be required. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Officers don't need training from a directive: "photographing or videotaping persons in public is a protected First Amendment right."

Millions of persons using their cell phones to take pictures every day should not be threatened with criminal "disorderly conduct," especially when this will invariably be a pretext to let police target disfavored persons or cover up their own abuses. *Disorderly (mis)Conduct" The Problem with "Contempt of Cop" Arrests*, Am.Const.Soc. (2010).

IV. Heightened Pleading Standards Do Not Apply.

The Seventh Circuit also erred by applying a "heightened pleading standard" in civil rights cases. *Leatherman v. Tarrant Cty.*, 507 U.S. 163, 164 (1993). "The *Leatherman* holding has survived the Court's later civil pleading decisions in *Iqbal* and *Twombly*, which require the pleader to allege a 'plausible' claim.'" *White v. City of Chicago*, 829 F.3d 837 (7th Cir. 2016).

Even if it didn't, *Iqbal* also conflicts with the requirement that "[m]alice intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed.R.Civ.Pro 9(b). *Iqbal* also conflict with prior cases (eg. *Sweirkiewicz v. Sorema*, 534 U.S. 506 (2002)) and the approved Rule 84 forms. *McCauley v. City of Chicago*, 671 F.2d 611, 623-624 (7th Cir. 2011)(concur).

Moreover, First Amendment claims cannot be windowed out by thousands of different trial judge's using *Twombly/Iqbal's* "common sense" and "judicial experience." When A First Amendment "line must be drawn," it is drawn by the "Members of this Court," and the line is drawn for everyone. *Bose v. Consumers*, 466 U.S. 485, 506-511 (1984). First Amendment rights should not "vary from community to community." *Miller v. California*, 413 U.S. 15, 30 (1973).

Finally, stronger pleading standards "decrease deterrence, increasing the prevalence of unlawful activity" which can increase "total litigation costs." *Deterrence Effects under Twombly*, 44 Int'l. Rev. Law & Econ. 61, 68 (2015).

Similarly, most Federal litigants report "the cost of discovery had 'no effect on the likelihood of settlement'." *Fed. Jud. Ctr. Nat'l., Case-Based Civil Rule Survey*, *2 (2009). Most also agreed that discovery is essential to narrow the issues for any settlement. *Id.* Most disagreed with claims "discovery is abused in almost every case in federal court." *Id.* at *2-3. At most, discovery makes up a mere 3.3% of the reported stakes. *Id.* at *2.

CONCLUSION

This Honorable Court should grant the petition for a writ of certiorari. Picture and video taking with cell phones are too ubiquitous to let police use this as an excuse to stop, arrest, or search someone on the pretext of disorderly conduct.

Review will also ensure lower courts cannot thwart a private person's seeking declaratory relief on a municipality's position and giving it the option to ratify its officer's conduct. Deterrence is likely low for constitutional tort litigation, especially in First Amendment cases. *Ciraolo v. New York*, 216 F.3d 236, 247 (2nd Cir. 2000)(Calabresi concur)(quoting article). Harm is invariably intangible, widely dispersed, and often small. *Id.* Municipalities will argue factual differences between plaintiffs and situations preclude class certification. *Wal-Mart v. Dukes*, 564 U.S. 338, 349 (2011).

Also, if review is granted, no possibility exists it will resolve the case against Wilmette on qualified immunity grounds. *Olson v. City of Independence*, 445 U.S. 622, 627 (1980)(municipalities not entitled to qualified immunity). Moreover, the case comes to this Honorable Court on a motion to dismiss; hence, the facts are undisputed and present issues of law.

Respectfully Submitted,

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916 F.3d 611

United States Court of Appeals, Seventh Circuit.

Marshall SPIEGEL, Plaintiff-Appellant,

v.

Corrine MCCLINTIC and Village of Wilmette, Defendants-Appellees.

No. 18-1070

Argued December 4, 2018Decided February 14, 2019

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 16 C 9357 — **Sara L. Ellis**, *Judge*.

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Before Bauer, Kanne, and Brennan, Circuit Judges.

Opinion

Kanne, Circuit Judge.

Marshall Spiegel believes that Corrine McClintic (and her husband William) have been violating condominium association rules since the McClintics purchased a unit in the building where he lives. To document their perceived violations, Spiegel took to photographing and filming the McClintics. In response to his less-than-subtle surveillance, Corrine McClintic began filing police reports. Spiegel was not arrested. But members of the Village of Wilmette Police Department threatened him with arrest for disorderly conduct if he persists in photographing and videotaping the McClintics. Spiegel subsequently sued Corrine and the Village of Wilmette. In his second amended complaint—the dismissal of which Spiegel now appeals—he argues that Wilmette and McClintic conspired together to violate his constitutional rights. He further claims that Corrine intruded upon his seclusion, in violation of Illinois law, by photographing the interior of his condominium. Because Spiegel has not identified a constitutional violation or shown that he suffered damages from the alleged intrusion upon his seclusion, we affirm the dismissal.

I. BACKGROUND

We take the well-pleaded allegations from Spiegel's second amended complaint as true.[1] Marshall Spiegel has lived in a condominium building in Wilmette, Illinois for 22 years. In 2015, Corinne and William McClintic bought a unit in the building. Despite condominium association rules which prohibit renting

out units, the McClintics did so. They do not live in the building but use the building pool almost daily.

1. Spiegel's Surveillance of Corrine McClintic

Spiegel explains that, "to protect himself from false allegations," he began "documenting violations of the Association's rules by the McClintics." Specifically, he began photographing and videotaping the couple. His second amended complaint is interspersed with pictures of the McClintics around the building. In most of the photos, the person pictured is looking directly at the camera.

The tensions between Spiegel and the McClintics quickly escalated. Corrine filed numerous police reports between June and October 2016. In one report—in June 2016—Corrine told officers that Spiegel jumped in front of her car and photographed her. In response, Wilmette police officers warned Spiegel against causing further problems. Spiegel told the officers that the report contained false allegations and argued that his conduct did not violate the disorderly conduct ordinance, but the officers "insisted that Spiegel had broken the law." On September 20, 2016, Spiegel videotaped Corrine, William, and another unit owner talking near the pool. Corrine reported to the Wilmette police that Spiegel was videotaping her in her bathing suit (an allegation he denies) and asked that they arrest him for disorderly conduct. On October 7, 2016, Spiegel documented Corrine McClintic attempting to evade a process server in front of the condominium building. Corrine McClintic informed Spiegel that the Wilmette police had promised

to arrest him if he videotaped her again. She reported the incident.

Spiegel also videotaped Corrine McClintic at a later, unspecified Association meeting. Once again, she threatened Spiegel with arrest if he continued videotaping her. The second amended complaint does not clarify whether McClintic filed a police report.

2. Corrine McClintic's Surveillance of Spiegel

Spiegel alleges that Corrine McClintic, not he, is the one engaged in illegal surveillance. He contends that, between May 29 and June 4, 2016, she attempted to peer into Spiegel's unit on three occasions. He suspects she took pictures. Spiegel also caught Corrine McClintic "spying" on him by the pool and near the elevator. Spiegel does not specifically allege that he reported these incidents to the Wilmette police.

He does assert, however, that "Wilmette police have refused to act on Spiegel's claims against residents and others." The only specific example he gives in the second amended complaint involves an altercation at a "recent Association meeting" where "a resident's son-in-law battered Spiegel in front of roughly ten people until security guards pulled him off." Spiegel reported the incident to Wilmette police, but they declined to charge the man.

3. Procedural History

Spiegel filed suit against Corrine McClintic, alleging state law defamation and requesting a declaration that the First Amendment protected his public videotaping.

Two days later, he filed a first amended complaint which added the Village of Wilmette as a defendant. The district court dismissed the first amended complaint for lack of subject matter jurisdiction but granted Spiegel leave to file a second amended complaint. In that complaint, Spiegel sought relief against Corrine McClintic and the Village of Wilmette under 42 U.S.C. § 1983 and against Corrine McClintic for intrusion upon seclusion under Illinois law. On November 29, 2016, Spiegel filed a motion for a temporary restraining order or preliminary injunction, and the defendants moved to dismiss.

On September 27, 2017, the district court dismissed Spiegel's claims against McClintic and denied Spiegel's motion for a preliminary injunction. On November 7, 2017, after supplemental briefing, the district court dismissed Spiegel's claim against Wilmette and entered final judgment.

Approximately one month later, Spiegel filed a combined motion to vacate the judgment and to file a third amended complaint. In a text-only order, the district court denied the motion to vacate because it presented arguments already considered and rejected and denied the motion to amend for the same reasons articulated in the November 7, 2017, order. Spiegel's proposed third amended complaint was largely identical to his second amended complaint, but it offered several additional factual allegations and named three Wilmette officers as defendants. This appeal followed.

II. ANALYSIS

Spiegel frames his suit as one meant to vindicate his constitutional right to photograph and videotape in public. He essentially argues that the defendants violated his First Amendment rights by conspiring to prosecute him for lawful conduct. We need not reach the question of whether Spiegel has, in fact, identified a constitutional violation because his claims suffer from threshold deficiencies.

We review a district court's dismissal under Rule 12(b)(6) *de novo*. LaBella Winnetka, Inc. v. Vill. of Winnetka, 628 F.3d 937, 941 (7th Cir. 2010). Like the district court, we construe the second amended complaint in a light most favorable to Spiegel. *Id.*

1. Spiegel Has Not Stated a § 1983 Claim Against McClintic

The district court properly dismissed Spiegel's § 1983 claim against Corrine McClintic because she is a private citizen. "To state a claim for relief in an action brought under § 1983, respondents must establish ... that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). The under-color-of-state-law element means that § 1983 does not permit suits based on private conduct, "no matter how discriminatory or wrongful." *Id.* at 50, 119 S.Ct. 977 (citation omitted). But a private citizen can act under color of law if there is "evidence of a *concerted effort* between a state actor and that individual." *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998). We call this the "conspiracy theory" of § 1983 liability.

Spiegel argues that he can hold Corrine McClintic liable under § 1983 merely by alleging aid to or encouragement of state action by McClintic, not an actual conspiracy. That's inconsistent with the clear holding in *Fries*. "To establish § 1983 liability through a conspiracy theory, a plaintiff must demonstrate that: (1) a state official and private individual(s) reached an understanding to deprive the plaintiff of his constitutional rights, and (2) those individual(s) were willful participant[s] in joint activity with the State or its agents." *Id.*(internal citations omitted). "[M]ere allegations of joint action or a conspiracy do not demonstrate that the defendants acted under color of state law and are not sufficient to survive a motion to dismiss." *Id.* at 458.

Spiegel also argues that an "agreement among all the conspirators is not a necessary element of a civil conspiracy," quoting *Lenard v. Argento*, 699 F.2d 874, 882 (7th Cir. 1983). But he misquotes *Lenard*: the court actually stated that "[a]n *express* agreement" is not required. *Id.* (emphasis added).

With the proper standard established, we attempt to find a conspiracy within Spiegel's allegations. Spiegel quotes language in *Gramenos v. Jewel Cos.*, asserting that "[i]f the police promise to arrest anyone the shopkeeper designates, then the shopkeeper is exercising the state's function and is treated as if he were the state." 797 F.2d 432, 435 (7th Cir. 1986). But Spiegel doesn't allege that Wilmette police agreed to arrest Spiegel if directed to do so by McClintic. The

officers clearly retained full discretion, evidenced by their decision to *not* arrest Spiegel.

We have repeatedly held that "the mere act of furnishing information to law enforcement officers" does not constitute joint activity in an unconstitutional arrest. *Butler v. Goldblatt Bros.*, 589 F.2d 323, 327 (7th Cir. 1978); *see also Kelley v. Myler*, 149 F.3d 641, 649 (7th Cir. 1998) ("Bell called the police when Kelley refused to leave the property after being asked to do so and then described the situation to the officers; he had no further communication with the officers. Such evidence does not support her charge that a conspiracy existed to arrest her in violation of her civil rights."); *Gramenos*, 797 F.2d at 435 (confirming that "one who accuses someone else of a crime is [not] exercising the powers of the state"). In *Brokaw v. Mercer Cty.*, we distinguished *Gramenos* and *Butler* because "they did not involve an alleged agreement between the police and the private citizens; rather, the private individuals acted independently from the government in making the police reports." 235 F.3d 1000, 1016 (7th Cir. 2000). The difference in *Brokaw* was that two private citizens and a deputy sheriff agreed to work together to remove a child from a home by filing false allegations of child neglect. Thus, the state actor intentionally set in motion the seizure of the child, knowing that the removal was premised on false allegations.

So the mere act of filing false police reports is not actionable under § 1983. Spiegel never alleges that the officers were aware that the reports were false, much

less that they had previously agreed with McClintic to investigate such false reports. In fact, it's unclear whether Corrine McClintic's reports contained falsehoods. He summarily alleges that the police reports involved false allegations, but never identifies them. Rather, Spiegel emphasizes that the officers refused to listen to his explanations for why his conduct was lawful. That's not enough to establish a conspiracy.

Because Spiegel has not plausibly alleged a conspiracy between McClintic and Wilmette to violate his constitutional rights, he failed to state a § 1983 claim against McClintic.

2. Spiegel Has Not Stated a Monell *Claim Against Wilmette*

The district court properly dismissed Spiegel's claim against Wilmette because "a municipality cannot be held liable *solely* because it employs a tortfeasor." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Rather, a municipality can be liable under § 1983 only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694, 98 S.Ct. 2018.

We interpret that language as creating three bases for municipal liability: "(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an

allegation that the constitutional injury was caused by a person with final policymaking authority." *Estate of Sims ex rel. Sims v. Cty. of Bureau*, 506 F.3d 509, 515 (7th Cir. 2007) (citation omitted).

Spiegel argues that Wilmette's disorderly conduct ordinance constitutes the express policy of the City. The ordinance does not expressly criminalize public videography or photography. Wilmette, IL., Code ch. 12-4.1 (2017) (making it "unlawful for any person to knowingly do any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace in the village"). And, given the requirement that the person act in an "unreasonable manner," the ordinance does not raise facial constitutional concerns. *See Gower v. Vercler*, 377 F.3d 661, 670 (7th Cir. 2004) (explaining that the materially identical Illinois disorderly conduct statute does not run afoul of the First Amendment); *see also Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 602 (7th Cir. 2012) ("[W]hen 'speech' and 'nonspeech' elements are combined, and the 'nonspeech' element (e.g., prostitution) triggers the legal sanction, the incidental effect on speech rights will not normally raise First Amendment concerns."). Certainly, a person can photograph and videotape in a sufficiently disruptive way that it would be not unconstitutional to arrest the individual for disorderly conduct.

Spiegel's claim is thus about the enforcement of the statute, not its facial constitutionality. "[A] written policy that is facially constitutional, but fails to give detailed guidance that might have averted a

constitutional violation by an employee, does not itself give rise to municipal liability." *Szabla v. City of Brooklyn Park.*, 486 F.3d 385, 392 (8th Cir. 2007) (en banc). Spiegel does not allege that Wilmette anticipated or intended that the ordinance would be enforced to chill lawful, expressive conduct like photography. *See Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1280 (10th Cir. 2009) (explaining that enforcement of an ordinance can give rise to *Monell* liability if the injury "was caused by a straightforward enforcement of the ordinances, and not by any additional discretionary actions by the officers").

We do not think Spiegel has plausibly alleged an express policy by Wilmette to enforce the disorderly conduct ordinance unconstitutionally. He merely alleges that officers received reports of a disturbance, responded to the reports, and advised an apparent provocateur to stop his surveillance. That's not enough. *See Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 791 (7th Cir. 1991) (rejecting the argument that a municipality was liable because it "ha[d] a 'policy' of allowing or instructing its police officers to enforce the challenged statutes").

As for the other bases for *Monell* liability, Spiegel wisely declines to argue that they exist. Two visits by officers do not constitute a widespread policy or practice. And the complaint makes no mention of any Wilmette officials who might have policymaking authority.

Spiegel also argues that Wilmette can be held liable because the Village "ratified" its officers' actions. For a

municipality to be liable on a ratification theory, the municipality "must approve both the employee's conduct and the basis for that conduct, i.e., the employee's motivation." *Waters v. City of Chicago*, 580 F.3d 575, 584 (7th Cir. 2009). Spiegel relies upon briefing in which Wilmette argued that the threats to arrest Spiegel did not violate the constitution. But contending that no constitutional violation occurred is far different from asserting that the actions were appropriate even assuming the officers intended to chill free speech. Spiegel did not state a *Monell* claim against Wilmette.

3. Spiegel Has Not Stated a Claim for Intrusion Upon Seclusion

Under Illinois law, a plaintiff may sue for an intrusion upon seclusion. ***619** *Lawlor v. N. Am. Corp. of Ill.*, 2012 IL 112530, ¶ 34, 368 Ill.Dec. 1, 983 N.E.2d 414. The cause of action's elements are: "(1) the defendant committed an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion would be highly offensive or objectionable to a reasonable person; (3) the matter intruded on was private; and (4) the intrusion caused the plaintiff anguish and suffering." *Busse v. Motorola, Inc.*, 351 Ill.App.3d 67, 286 Ill.Dec. 320, 813 N.E.2d 1013, 1017 (2004). The district court dismissed Spiegel's claim after finding that he did not allege damages from the purported intrusions.

Spiegel argues, simply, that damages for intrusion upon seclusion are presumed. "Under Illinois law, a plaintiff must prove actual injury in the form of, for example,

medical care, an inability to sleep or work, or a loss of reputation and integrity in the community in order to recover damages for torts such as intrusion upon seclusion. *Injury is not presumed.*" Schmidt v. *Ameritech Ill.*, 329 Ill.App.3d 1020, 263 Ill.Dec. 543, 768 N.E.2d 303, 316 (2002) (citation omitted) (emphasis added); *see also* *McGreal v. AT & T Corp.*, 892 F.Supp.2d 996, 1015 (N.D. Ill. 2012) (collecting cases in which courts dismissed claims for intrusion upon seclusion for failure to allege damages specifically). Spiegel did not allege facts to support a required element of his state law privacy claim.

4. Spiegel's Remaining Motions

Spiegel also appeals the district court's denial of his motion for a preliminary injunction, motion to vacate the judgment, and motion for leave to file a third amended complaint. Because the district court correctly found that Spiegel had not stated a claim against the defendants, the court properly denied the motions for injunctive relief and to vacate the judgment.

The proposed third amended complaint included claims against three officers. The district court denied the motion to amend on futility grounds but did not address the addition of individual officers as defendants. Despite that oversight, the court properly denied the motion to amend. "When there has been an entry of final judgment, a complaining party may amend a complaint pursuant to Rule 15(a) only after that party has successfully altered or amended the judgment pursuant to Rule 59(e) or the judgment has been vacated pursuant to Rule 60(b)." *Dubicz v.*

Commonwealth Edison Co., 377 F.3d 787, 790 (7th Cir. 2004). Because the court entered final judgment and denied Spiegel's motion to vacate the judgment, the court had no jurisdiction to consider the motion to amend. *Id.*

III. CONCLUSION

The district court correctly found that Spiegel did not state constitutional or state law claims in his second amended complaint. McClintic did not conspire with Wilmette, and Spiegel has not identified an express policy by Wilmette that caused a constitutional deprivation. As to his state law privacy claim, Illinois law requires that damages be specifically alleged.

AFFIRMED.

Footnotes

1For reasons explained below, Spiegel's motion for leave to file a third amended complaint was untimely. Accordingly, the few additional factual allegations Spiegel advances in that proposed complaint are not relevant to our analysis. Spiegel also makes several new factual assertions in his brief. Those facts would not change our analysis even if Spiegel had included them in his complaint.

United States District Court, N.D. Illinois, Eastern Division.

Marshall SPIEGEL, Plaintiff,

v.

Corrine MCCLINTIC, Village of Wilmette, Defendants.

No. 16 C 9357

Signed 09/27/2017

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OPINION AND ORDER

SARA L. ELLIS, United States District Judge

This case is one in a long line of many Plaintiff Marshall Spiegel has brought arising out of his various disputes with his condominium association and other owners within the association. Here, Spiegel brings a § 1983 lawsuit against Defendants Corinne McClintic and the Village of Wilmette ("Wilmette") seeking a declaratory judgment, injunctive relief, and damages because Spiegel claims that McClintic and Wilmette police officers violated his constitutional rights by seeking to prevent him from videotaping McClintic and others in public places. Because McClintic allegedly peered

through his window, Spiegel additionally alleges that McClintic is liable for intrusion upon seclusion.

In October 2016, Spiegel filed his first complaint against McClintic, requesting declaratory relief and alleging a claim for defamation. He amended that complaint, adding a claim against Wilmette, and later moved for a temporary restraining order and preliminary injunction against Wilmette and McClintic. The Court denied the motion for a temporary restraining order and preliminary injunction because, based on the first amended complaint, the Court could not determine a basis for federal subject matter jurisdiction. The Court also dismissed Spiegel's first amended complaint without prejudice. Spiegel then filed his second amended complaint [14] and an amended second motion for a preliminary injunction [36],[1] which are currently before the Court. Wilmette and McClintic both move to dismiss the second amended complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction [31], [18]. McClintic also moves to dismiss the second amended complaint under Rule 12(b)(6) for failure to state a claim and requests attorneys' fees [18].

Because Spiegel has sufficiently alleged his standing to bring a claim against Wilmette, the Court denies Wilmette's motion to dismiss [31]. Although the Court finds it has subject matter jurisdiction over the case, the Court dismisses Spiegel's claims against McClintic for failure to plead their required elements. The Court declines to award McClintic her attorneys' fees, however. Finally, because the Court finds that Spiegel

is unlikely to succeed on his claim against Wilmette, the Court denies Spiegel's motion for a preliminary injunction [36].

BACKGROUND[2]

Spiegel owns a condominium located on Sheridan Road in Wilmette, Illinois, where he has resided for 22 years. McClintic and her husband also own a condominium unit located in the same building. McClintic does not live in her unit and instead rents it to tenants. However, she frequents the condominium building and uses the building pool. During her visits to the condominium building and pool, McClintic "spies on Spiegel by peering through his window, taking pictures, and harassing him." Doc. 14 ¶ 7.

McClintic has also filed "numerous police reports against Spiegel." *Id.* ¶ 8. One such report occurred in June 2016, when McClintic filed a report with the Wilmette police claiming that while she was leaving the condominium building, Spiegel jumped in front of her car and took pictures. A Wilmette police officer went to the building and discussed the complaint with Spiegel. The officer "erupted into a tirade" and "insisted that Spiegel had broken the law." *Id.* ¶ 10. Days later, two Wilmette detectives visited the building and "warned Spiegel about any further problems." *Id.* ¶ 12.

In October 2016, McClintic called the Wilmette police with another complaint regarding Spiegel. Spiegel had documented McClintic "trying to evade [a] process server on the public sidewalk in front of the building." *Id.* ¶ 14. McClintic then told Spiegel that the

Wilmette police advised her to call the police if Spiegel took videos of her in order to have Spiegel arrested. McClintic subsequently threatened Spiegel that he would be arrested for videotaping her in public places.

McClintic also complained to the Wilmette police regarding a September 2016 incident when Spiegel, from inside his condominium, videotaped McClintic, her husband, and another condominium owner talking at the pool. McClintic "told the police she felt threatened and wanted to report Spiegel for disorderly conduct." *Id.* ¶ 18. In addition, a Wilmette detective told Spiegel that if the police received another complaint, the detective would come to Spiegel's house and " 'execute the charges' against him." *Id.* ¶ 19.

Spiegel has also made his own complaints to the Wilmette police regarding condominium residents and others. However, the Wilmette police have "refused to act on Spiegel's claims." *Id.* ¶ 20.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(1) challenges the Court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The party asserting jurisdiction has the burden of proof. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012). The standard of review for a Rule 12(b)(1) motion to dismiss depends on the purpose of the motion. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009). If a defendant challenges the sufficiency of the allegations

regarding subject matter jurisdiction (a facial challenge), the Court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *See* *id.*; *United Phosphorus*, 322 F.3d at 946. If, however, the defendant denies or controverts the truth of the jurisdictional allegations (a factual challenge), the Court may look beyond the pleadings and view any competent proof submitted by the parties to determine if the plaintiff has established jurisdiction by a preponderance of the evidence. *See* *Apex Digital*, 572 F.3d at 443–44; *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir. 2006).

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint, not its merits. Fed. R. Civ. P. 12(b)(6); *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). In considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded facts in the plaintiff's complaint and draws all reasonable inferences from those facts in the plaintiff's favor. *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011). To survive a Rule 12(b)(6) motion, the complaint must not only provide the defendant with fair notice of a claim's basis but must also be facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed. 2d 868 (2009); *see also* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (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, 129 S.Ct. 1937.

ANALYSIS

In his second amended complaint, Spiegel brings one claim against Wilmette under § 1983 requesting (1) a declaration that videotaping or photographing while in his residence, on common elements of the condominium property, or on public property does not constitute disorderly conduct, and (2) an injunction prohibiting Wilmette from prosecuting disorderly conduct charges based on such conduct. Spiegel alleges that Wilmette threatens to apply state or local law, specifically Wilmette Ordinance § 12-4.1[3] or Illinois statute 5/26-1(a)(1),[4] in a way that violates his right to freedom of speech under the First Amendment and his rights to due process and equal protection under the Fourteenth Amendment. Spiegel also brings a § 1983 claim against McClintic alleging that she conspired with Wilmette and seeking the same declaration and an injunction against McClintic from pursuing disorderly conduct charges. In addition, Spiegel brings one claim against McClintic for intrusion upon seclusion requesting compensatory and punitive damages and attorneys' fees.

I. Wilmette's Motion to Dismiss

Wilmette asks the Court to dismiss Spiegel's claim against it under Rule 12(b)(1) because Spiegel lacks standing required for federal jurisdiction.[5] A plaintiff must establish Article III standing to bring an action in federal court for declaratory or injunctive relief. *Susan*

B. Anthony List v. Driehaus, —— U.S. ——, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246 (2014). Article III standing requires a plaintiff to show three elements: (1) "an injury in fact," (2) "a causal connection between the injury and the conduct complained of," and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992) (citation omitted) (internal quotation marks omitted). Wilmette argues that Spiegel has failed to show an injury in fact.

To establish standing, a plaintiff's injury must be " 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Susan B. Anthony List*, 134 S.Ct. at 2341 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). An alleged "future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.' " *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5, 133 S.Ct. 1138, 1147, 1150 n.5, 185 L.Ed.2d 264 (2013)). The injury-in-fact requirement is satisfied if a plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* at 2342 (quoting *Babbitt v. United Farm Workers Nat'l*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed. 2d 895 (1979)). It is not necessary that a plaintiff "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L Ed. 2d 505 (1974).

However, a plaintiff does not establish jurisdiction if he fails to allege that he has been threatened with prosecution, that a prosecution is likely, or that a prosecution is remotely possible. *Babbitt*, 442 U.S. at 298–99, 99 S.Ct. 2301. Although the threat of prosecution may be established by the existence of a statute, if a plaintiff's desired conduct is "clearly outside" the scope of that statute, the plaintiff must show "some indication of a nontrivial probability of prosecution" to establish standing for a pre-enforcement challenge to that statute. *Lawson v. Hill*, 368 F.3d 955, 957–58 (7th Cir. 2004) (collecting cases); *Schirmer v. Nagode*, 621 F.3d 581, 586–87 (7th Cir. 2010)(citing *Lawson*, 368 F.3d at 957).

Here, Spiegel has alleged an intention to engage in "conduct arguably affected with a constitutional interest, but proscribed by a statute." *Susan B. Anthony List*, 134 S.Ct. at 2342. Spiegel states in his opposition to Defendants' motions to dismiss that he "will continue to invoke his right to videotape" and argues that the conduct is protected by the First Amendment. Doc. 41 at 15–19. Although videotaping is not explicitly proscribed by the Illinois disorderly conduct statute or the Wilmette ordinance, Wilmette officers have allegedly threatened Spiegel with criminal prosecution for disorderly conduct if he videotapes others in public. In addition, courts have held that under certain circumstances, videotaping others in public may constitute disorderly conduct under Illinois law or provide probable cause to arrest an individual for disorderly conduct. *See Reher v. Vivo*, 656 F.3d 772, 776 (7th Cir. 2011) (holding that videotaping other

people in public is not illegal in Illinois but "videotaping other people, when accompanied by other suspicious circumstances, may constitute disorderly conduct" (citing *Graham v. Vill. of Niles*, No 02 C 4405, 2003 WL 22995159, at *6 (N.D. Ill. 2003)); *Graham*, 2003 WL 22995159, at *6 ("Illinois courts have sustained arrests for disorderly conduct where videotaping was accompanied by other suspicious circumstances.").

Spiegel has also alleged a credible threat of prosecution. He claims that Wilmette police officers have threatened to criminally charge him with disorderly conduct for videotaping others in public places. Spiegel alleges that on three occasions, Wilmette police officers visited his condominium building in response to complaints by McClintic about his videotaping. He alleges that during these visits, the Wilmette police officers and detectives "insisted that Spiegel had broken the law," "warned Spiegel about any further problems," and stated that they "would come to his house and 'execute the charges' against him" if they received another complaint. Doc. 14 ¶¶ 10, 12, 19. Based on these allegations, which the Court must accept as true for purposes of Wilmette's motion to dismiss, Spiegel faces a credible threat of prosecution. *See* *Vasquez v. Foxx*, No. 16-cv-8854, 2016 WL 7178465, at *4 (N.D. Ill. Dec. 9, 2016) (finding that plaintiffs had standing to bring a pre-enforcement challenge to a statute where police department threatened enforcement of statute if plaintiffs did not move from their homes in a given time period); *Pindak v. Dart*, No. 10 C 6237, 2011 WL 4337017, at *3 (N.D. Ill. Sept. 14, 2011) (finding that the possibility plaintiff will be arrested and charged is not "highly speculative"

where plaintiff alleged three specific incidents with law enforcement officers who told plaintiff his conduct was illegal or would result in arrest).[6]

Wilmette argues that Spiegel's allegations are insufficient to show an imminent threat of criminal charges because, to date, Spiegel has not been charged, arrested, or prosecuted for videotaping. However, a showing of prior enforcement is not necessary to establish the injury-in-fact requirement in a pre-enforcement challenge. *Steffel*, 415 U.S. at 459, 94 S.Ct. 1209. The plaintiff is only required to show that he "faces 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.' " *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 473 (7th Cir. 2012) (citing *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301). Wilmette's argument that Spiegel's claims are too speculative to establish standing ignores Spiegel's allegations that he has been threatened by Wilmette police officers and detectives on three separate occasions.

The Court finds that Spiegel has alleged an injury-in-fact sufficient to establish standing for federal jurisdiction and denies Wilmette's motion to dismiss under Rule 12(b)(1).

II. McClintic's Motion to Dismiss

McClintic asks the Court to dismiss Spiegel's claims against her under Rule 12(b)(1) for lack of federal subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim. The Court first considers

McClintic's 12(b)(1) motion to determine whether jurisdiction exists.

A. Subject Matter Jurisdiction

McClintic argues that Spiegel's § 1983 claim should be dismissed for lack of federal subject matter jurisdiction because Spiegel fails to allege that McClintic acted under color of law. To state a claim for relief under § 1983, a plaintiff must establish that the defendant acted "under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50, 119 S.Ct. 977, 143 L.Ed. 2d 130 (1999). However, failure to allege action under color of law "does not deprive a district court of jurisdiction over a § 1983 claim." *Miles v. Mirrorball, Inc.*, 65 Fed.Appx. 569, 570 (7th Cir. 2003) (collecting cases). Rather, such a deficiency "simply means that the plaintiff has failed to state a claim for which relief can be granted." *Id.* Therefore, McClintic's argument that Spiegel failed to allege conduct under color of law cannot form the basis for a Rule 12(b)(1) dismissal for lack of subject matter jurisdiction.

In her reply in support of her motion to dismiss, McClintic further argues that Spiegel's § 1983 claim lacks federal subject matter jurisdiction because Spiegel fails to allege a deprivation of a constitutional right. McClintic argues that § 1983 and the Declaratory Judgment Act do not on their own confer federal jurisdiction and because Spiegel does not allege a constitutional deprivation, there is no federal question in this case and therefore no federal subject matter jurisdiction.

McClintic is correct that § 1983 and the Declaratory Judgment Act do not confer federal jurisdiction. However, a plaintiff alleging a § 1983 claim "may invoke jurisdiction of a federal court under 28 U.S.C. § 1331, the general federal question statue, or 28 U.S.C. § 1343(3), the jurisdictional counterpart to § 1983." *Mattingly v. Allstate Ins. Co.*, No. 86 C 2914, 1986 WL 12836, at *2 (N.D. Ill. Nov. 10, 1986) (citing *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 280 n.2 (7th Cir. 1986); *Haldorson v. Blair*, 449 F.Supp. 1025, 1027 (D. Minn. 1978)). In his second amended complaint, Spiegel alleges that jurisdiction exists under § 1331.

To establish jurisdiction under § 1331, a plaintiff's claim "must arise under the laws of the United States and cannot be made for the sole purpose of obtaining jurisdiction." *Cortes v. Midway Games, Inc.*, No. 04 C 0510, 2004 WL 1611967, at *1 (N.D. Ill. July 16, 2004) (citing *Bell v. Hood*, 327 U.S. 678, 682–83, 66 S.Ct. 773, 90 L.Ed. 939 (1946)). A cause of action arises under the laws of the United States "when the federal question appears on the face of the well-pleaded complaint." *Anglin v. Sears, Roebuck & Co.*, No. 93 C 3438, 1993 WL 437430, at *1 (N.D. Ill. Oct. 27, 1993) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed. 2d 420 (1983)).

Spiegel alleges throughout his complaint that his constitutional rights under the First and Fourteenth amendments were violated when police officers or McClintic threatened to arrest or prosecute him for

videotaping others in public places. These allegations, which appear on the face of the complaint, raise a federal question under the United States Constitution. Although Spiegel's complaint includes allegations which are irrelevant to this federal question, his claim regarding his constitutional right to videotape comprises a substantial portion of his complaint. Therefore, the Court finds that his federal question claim is not made for the sole purpose of establishing jurisdiction and federal subject matter jurisdiction under § 1331 exists.[7] The Court denies McClintic's 12(b)(1) motion to dismiss.

B. Failure to State a Claim under § 1983 (Count II)

McClintic argues that Spiegel's § 1983 claim should be dismissed under Rule 12(b)(6) for failure to state a claim because Spiegel does not plausibly allege that McClintic acted under color of law and because Spiegel fails to allege a deprivation of any constitutional right.

To state a claim for relief under § 1983, a plaintiff must establish that the defendant acted "under color of state law." *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 49–50, 119 S.Ct. 977. Action under color of state law requires that the defendant "be a person who may fairly be said to be a state actor." *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed. 2d 482 (1982)). "Merely private conduct, no matter how discriminatory or wrongful," cannot be considered action "under color of state law." *Id.*

A private citizen may be held liable under § 1983 for acting under color of state law if the citizen conspires

with a state actor. *Brokaw v. Mercer County*, 235 F.3d 1000, 1016 (7th Cir. 2000) (citing *Bowman v. City of Franklin*, 980 F.2d 1104, 1107 (7th Cir. 1992)). "To establish Section 1983 liability through a conspiracy theory, a plaintiff must demonstrate that: (1) a state official and private individual(s) reached an understanding to deprive the plaintiff of his constitutional rights, and (2) those individuals were willful participants in joint activity with the State or its agents." *Id.* (quoting *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998)). "[I]t is not sufficient to allege that the (private and state) defendants merely acted in concert or with a common goal." *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir. 1980)(quoting *Sparkman v. McFarlin*, 601 F.2d 261, 268 (7th Cir. 1979)). "There must be allegations that the defendants had directed themselves toward an unconstitutional action by virtue of a mutual understanding" and such allegations "must further be supported by some factual allegations suggesting such a 'meeting of the minds.' " *Id.* (quoting *Sparkman*, 601 F.2d at 268).

Spiegel alleges in his second amended complaint that McClintic "has conspired or acted jointly with the Village of Wilmette." Doc. 14 at ¶ 36. However, Spiegel does not allege facts that show McClintic and Wilmette reached an understanding to deny Spiegel any of his constitutional rights. Spiegel alleges that McClintic has filed false reports against him and that, on three occasions, Wilmette police officers came to Spiegel's residence in response to complaints by McClintic. But police reports do not indicate that a private actor is

conspiring with the police. *See* Kelley v. Myler, 149 F.3d 641, 648–49 (7th Cir. 1998) (finding the private defendant's complaint to police officers about plaintiff's conduct did not support allegation of conspiracy between defendant and police to arrest plaintiff in violation of her civil rights); *Rodgers v. Lincoln Towing Serv., Inc.*, 596 F.Supp. 13, 21 (N.D. Ill. Mar. 29, 1984) (a "private citizen does not become a state actor just because he reports a crime and the police rely on his report to make an arrest," collecting cases). Spiegel also alleges that McClintic "stated that the Village of Wilmette police told her that she should call them to have Spiegel arrested" and that a Wilmette detective "told Spiegel that if they got another complaint, [the detective] would come to his house and 'execute the charges' against him." *Id.* ¶¶ 14, 19. However, the Court cannot draw a reasonable inference that McClintic conspired with Wilmette based on these statements and the fact that Wilmette police responded to McClintic's complaints. Allegations that require "some imagination and speculation to conclude that an agreement existed" are insufficient. *Turner v. City of Chicago, Ill.*, No. 12 C 9994, 2013 WL 4052607, at *6 (N.D. Ill. Aug. 12, 2013) (finding that plaintiffs failed to sufficiently plead a conspiracy claim because conspiracy allegations were conclusory and threadbare and failed to demonstrate any type of agreement); *see also* *Thompson v. Vill. of Monee*, No. 12 C 5020, 2013 WL 3337801, at *7–8 (N.D. Ill. July 1, 2013) (dismissing complaint against private party where plaintiff made "only conclusory allegations regarding any agreement" between the private party and officer).

Spiegel argues that under the Supreme Court's decision in *Lugar v. Edmondson Oil Company*, an agreement or conspiracy between the state actor and the private party is not required to establish state action under § 1983. He asserts that under *Lugar*, "a private individual need only 'act together with' or obtain 'significant aid' from a state official to be liable." Doc. 41 at 29. However, the Supreme Court's *Lugar* decision "is limited to the particular context of prejudgment attachment." *Lugar*, 457 U.S. at 939 n.21, 102 S.Ct. 2744. Furthermore, the Seventh Circuit has not adopted Spiegel's interpretation of the *Lugar* decision and continues to require an agreement or understanding among the state actor and the private actor.[8] *Brokaw*, 235 F.3d at 1016; *Tarkowski*, 644 F.2d at 1206.

Because Spiegel has failed to sufficiently allege that McClintic acted under color of law, the Court dismisses Spiegel's § 1983 claim against McClintic.

C. Failure to State a Claim for Intrusion Upon Seclusion (Count III)

McClintic also argues that the Court should dismiss Spiegel's claim against her for intrusion upon seclusion for failure to state a claim.[9] To state a claim for intrusion upon seclusion under Illinois law, a plaintiff must allege: "(1) an unauthorized intrusion or prying into the plaintiff's seclusion, (2) the intrusion would be 'highly offensive or objectionable to a reasonable person,' (3) the matters upon which the intrusion occurred were private, and (4) the intrusion caused anguish and suffering." *Vega v. Chicago Park Dist.*, 958

F.Supp.2d 943, 959 (N.D. Ill. 2013) (citing *Busse v. Motorola, Inc.*, 813 N.E.2d 1013, 1017, 351 Ill. App. 3d 67, 286 Ill.Dec. 320, (2004)). McClintic argues that Spiegel has failed to allege the second, third, and fourth elements.

Spiegel alleges that McClintic "repeatedly spied on Spiegel by peering through his windows and loitering around the common areas." Doc. 14 ¶ 13. He claims that on May 29, June 2 or 3, June 4, and September 20, McClintic "peered into" Spiegel's condominium or waved at Spiegel while he was inside his condominium. *Id.* "[P]eering into the windows of a private home" is an actionable intrusion upon seclusion under Illinois law. *Benitez v. KFC Nat'l Mgmt. Co.*, 714 N.E.2d 1002, 1033, 305 Ill. App. 3d 1027, 239 Ill.Dec. 705 (1999) (citing *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 989, 126 Ill. 2d 411, 128 Ill.Dec. 542 (1989)). Such conduct "involves 'highly offensive' intrusion into private matters." *Vega*, 958 F.Supp.2d at 959 (citing *Horgan v. Simmons*, 704 F.Supp.2d 814, 822 (N.D. Ill. 2010)). Spiegel's allegations that McClintic peered into his residence are therefore sufficient to plead the second and third elements of the intrusion upon seclusion claim.[10] However, Spiegel fails to plead any facts in support of the fourth required element of the claim—anguish and suffering caused by the alleged intrusion. Spiegel merely states that McClintic's actions "proximately damaged" him. Doc. 14 ¶ 47. A conclusory allegation of injury that is unsupported by facts is "not sufficient to plausibly suggest that [a plaintiff] is entitled to relief based on a claim of intrusion upon seclusion." *See McGreal v. AT&T Corp.*, 892 F.Supp.2d

996, 1015 (N.D. Ill. Sept. 24, 2012); *see also* *Heffron v. Green Tree Servicing, LLC*, No. 15-cv-0996, 2016 WL 47915, at *6 (N.D. Ill. Jan. 5, 2016) (dismissing intrusion upon seclusion claim for failure to state a claim and noting plaintiff did not plausibly allege how intrusion caused anguish and suffering); *Shea v. Winnebago County Sheriff's Office*, No. 12 CV 50201, 2014 WL 4449605, at *7 (N.D. Ill. Sept. 10, 2014) (citing failure to include allegations regarding any anguish or suffering resulting from the alleged intrusion as one of the reasons plaintiff's claim for intrusion failed).

Spiegel argues that damages are presumed for an intrusion upon seclusion. In support of his argument, Spiegel cites *Laba v. Chicago Transit Authority*, a case in which the court declined to dismiss an intrusion upon seclusion claim based on the fact that plaintiffs only alleged that they suffered damages as a result of the alleged intrusion. No. 14 C 4091, 2015 WL 3511483, at *5 (N.D. Ill. June 2, 2015). In *Laba*, the court found that it could infer "that any reasonable person could have suffered emotional distress or embarrassment after discovering that they were being filmed while changing their clothes at work." *Id.* However, in this case, the nature of the alleged intrusion is significantly different from that alleged in *Laba* and the Court cannot infer that McClintic's alleged peering into Spiegel's condominium caused Spiegel "anguish and suffering." Other cases cited by Spiegel are also distinguishable and do not support his argument that damages are presumed for intrusion upon seclusion.[11]

Because Spiegel fails to allege facts in support of an element required to state a claim for intrusion upon seclusion, the Court dismisses Spiegel's claim against McClintic for intrusion upon seclusion. *See* *McGreal*, 892 F.Supp.2d at 1015 (dismissing intrusion upon seclusion claim because plaintiff's "unsupported statement that she suffered injury is not sufficient to plausibly suggest that she is entitled to relief based on a claim of intrusion upon seclusion").

III. McClintic's Request for Attorneys' Fees

McClintic argues that the Court should award her attorneys' fees under § 1988. McClintic argues that Spiegel "ignored the law" and "pursued a course of litigation that is clearly barred by existing precedent." Doc. 18 at 10–11.

A court may award prevailing defendants attorneys' fees in a § 1983 case only if "the plaintiff's 'claim was frivolous, unreasonable, or groundless, or if the plaintiff continued to litigate after it clearly became so.' " *Cooney v. Casady*, 735 F.3d 514, 521 (7th Cir. 2013) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 54 L.Ed. 2d 648 (1978)). A suit may be frivolous if the plaintiff's claims were "clearly foreclosed" by case law. *Hamilton v. Daley*, 777 F.2d 1207, 1213 (7th Cir. 1985) (upholding award of fees based on district court's determination that suit was frivolous where plaintiff's claims were clearly foreclosed by case law regarding prosecutorial immunity).

McClintic argues that Spiegel's claim is frivolous because "basic case law and precedent shows that a private individual does not act under color of law by making a police report." Doc. 18 at 10. However, Spiegel's § 1983 claim against McClintic alleges that McClintic conspired or acted jointly with the Wilmette officers. As discussed in Section II(B), conspiracy with a state actor is a well-recognized basis for § 1983 liability against a private citizen. *See* Brokaw, 235 F.3d at 1016. Although Spiegel failed to plead sufficient facts in support of his conspiracy allegation, his claim was not clearly foreclosed by case law. The Court denies McClintic's request for attorneys' fees.

IV. Spiegel's Motion for Preliminary Injunction

Spiegel moves for a preliminary injunction against Wilmette and McClintic. Because the Court dismisses Spiegel's § 1983 claim against McClintic for failure to state a claim, it need only consider Spiegel's motion for a preliminary injunction against Wilmette.

The party seeking a preliminary injunction must first show: (1) it is reasonably likely to succeed on the merits, (2) it will suffer irreparable harm absent an injunction before final resolution of its claims, and (3) it has no adequate remedy at law. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). If the moving party fails to demonstrate any of these three requirements, the Court will deny the motion. *Id.* But if the moving party meets this threshold showing, the Court attempts to "minimize the cost of potential error" by "balanc[ing] the nature and degree of the plaintiff's injury, the

likelihood of prevailing at trial, the possible injury to the defendant if the injunction is granted, and the wild card that is the 'public interest.' " *Id.* "Specifically, the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief." *Id.* (citing *Abbott Labs. v Mead Johnson & Co.*, 971 F.2d 6, 11–12 (7th Cir. 1992)). The Seventh Circuit has described this balancing test as a "sliding scale" in which "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Id.* (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984)).

The Court first considers whether Spiegel is reasonably likely to succeed on the merits of his claim against Wilmette. "[T]he threshold for demonstrating a likelihood of success on the merits is low," with Spiegel needing only to demonstrate that his chances of prevailing are "better than negligible." *D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016). Spiegel brings a § 1983 claim against Wilmette for deprivation of his First and Fourteenth amendment rights. A municipality can be held liable under § 1983 on three particular grounds: "(1) an express policy that would cause a constitutional deprivation if enforced; (2) a common practice that is so widespread and well-settled that it constitutes a custom or usage with the force of law even though it is not authorized by written law or express policy; or (3) an allegation that a person with

final policy-making authority caused a constitutional injury." *Rossi v. City of Chicago*, 790 F.3d 729, 737 (7th Cir. 2015) (citing *Lawrence v. Kenosha County*, 391 F.3d 837, 844 (7th Cir. 2004)). "[A] municipality cannot be held liable solely on the grounds of *respondeat superior*." *Id.* (citing *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)); *see also Grieveson v. Anderson*, 538 F.3d 763, 771 (7th Cir. 2008) ("Government entities cannot be held liable for the unconstitutional acts of their employees unless those acts were carried out pursuant to an official custom or policy." (citing *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 765 (7th Cir. 2006)). A municipality cannot be held liable under § 1983 where a plaintiff has not alleged an unconstitutional custom or policy. *Hosea v. Slaughter*, 669 Fed.Appx. 791, 792 (7th Cir. 2016).

Spiegel does not assert any facts or theories to support municipal liability for his alleged constitutional deprivations. He seeks to hold Wilmette liable for the conduct of its individual police officers and detectives without alleging that the acts were carried out pursuant to an express policy or widespread practice or caused by a person with final policy-making authority. Although Spiegel alleges three incidents in which Wilmette officers and detectives threatened to arrest him for videotaping, he does not allege that these incidents were the result of a widespread practice. The Court cannot conclude from these three incidents alone that Wilmette police have a practice "so well-settled that it constitutes a custom or usage with the force of law." *See Grieveson*, 538 F.3d at 774 (plaintiff's evidence

of four incidents that he alone experienced failed to meet the test of a widespread unconstitutional practice so well settled that it constitutes a custom or usage with the force of law). Spiegel argues that "Wilmette is liable for [sic] because Spiegel's constitutional rights were 'directly injured by an ordinance or policy' " and "for acquiescing, approving or ratifying the police officer's acts." Doc. 41 at 34. However, Spiegel does not allege facts to support these conclusory statements. Conclusory allegations are not enough to establish § 1983 liability against a municipality. *See* *Mikolon v. City of Chicago*, No. 14 CV 1852, 2014 WL 7005257, at *4–5 (N.D. Ill. Dec. 11, 2014). As a result, the Court concludes that Spiegel has not shown a likelihood of success on his § 1983 claim against Wilmette.

Because failure to meet one of the three threshold requirements for a preliminary injunction results in a denial of the motion, the Court need not consider the remaining requirements. *See* *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1086. The Court denies Spiegel's motion for a preliminary injunction.

V. Failure to State a Claim against Wilmette

Wilmette has not moved to dismiss Spiegel's claims under Rule 12(b)(6). However, for the reasons stated above, the Court finds that Spiegel's second amended complaint fails to state a § 1983 claim against Wilmette because he does not sufficiently plead municipal liability. *See* Section IV. "A district court cannot *sua sponte* dismiss a complaint on the merits without notifying the parties and allowing the plaintiff an opportunity either to cure the defect in the complaint or

at least a chance to defend the merits of his claim." *Swanigan v. City of Chicago*, 775 F.3d 953, 959 (7th Cir. 2015). Thus, the Court will allow Spiegel file a response as to why the Court should not dismiss his claim against Wilmette for failure to state a claim. Spiegel's response is limited to three pages and must be filed by October 18, 2017. The Court sets a status date for November 8, 2017 at 9:30 a.m. for a ruling on whether the Court should dismiss Spiegel's claim against Wilmette.

CONCLUSION

For the foregoing reasons, the Court denies Wilmette's motion to dismiss [31], grants in part McClintic's motion to dismiss [18], denies McClintic's request for attorneys' fees [18], and denies Spiegel's motion for preliminary injunction [36]. The Court dismisses Spiegel's claims against McClintic without prejudice. The Court allows Spiegel to respond as to why the Court should not dismiss his claim against Wilmette for failure to state a claim. The Court sets a status date for November 8, 2017 at 9:30 a.m. for ruling.

All Citations

Not Reported in Fed. Supp., 2017 WL 4283727

Footnotes

1Spiegel also moved for a temporary restraining order. However, on February 8, 2017, Spiegel withdrew the motion for a temporary restraining order.

2The facts in the background section are taken from Spiegel's second amended complaint and are presumed

true for the purpose of resolving Defendants' motions to dismiss. *See* Virnich v. Vorwald, 664 F.3d 206, 212 (7th Cir. 2011); *Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO v. Exelon Corp.*, 495 F.3d 779, 782 (7th Cir. 2007).

3The Village of Wilmette Code of Ordinances § 12-4.1 states: "It is unlawful for any person to knowingly do any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace in the village. The causing or making of any unnecessary loud noise and shouting or yelling is considered disorderly conduct." Wilmette, Ill., Code of Ordinances § 12-4.1.

4Section 5/26-1(a)(1) of the Illinois statutes states: "A person commits disorderly conduct when he or she knowingly [ ] [d]oes any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 Ill. Comp. Stat. 5/26-1(a).

5In his opposition to Defendants' motions to dismiss, Spiegel argues that Wilmette's Rule 12(b)(1) motion should be treated as a Rule 12(b)(6) motion because it is an indirect attack on the merits of Spiegel's complaint. However, Wilmette's 12(b)(1) motion challenges Spiegel's Article III standing to bring a claim in federal court, specifically whether he has established injury-in-fact. A challenge to Article III standing is properly reviewed under Rule 12(b)(1). *Smith v. City of Chicago*, 143 F.Supp.3d 741, 747 n.1 (N.D. Ill. Nov. 9, 2015).

6Because courts have held that videotaping others in public, in and of itself, is not illegal in Illinois, *Reher*,

656 F.3d at 776, Spiegel's desired conduct could be considered "clearly outside" the scope of the statute. The Court finds that the threat of prosecution Spiegel faces is also sufficient to show a "nontrivial probability of prosecution," which is required for standing if Spiegel's desired conduct is "clearly outside" the scope of the statute at issue. *Lawson*, 368 F.3d at 957–58; *Schirmer*, 621 F.3d at 586–87 (citing *Lawson*, 368 F.3d at 957).

7This finding also defeats McClintic's argument that Spiegel's second amended complaint should be dismissed because it is "basically unchanged" from the first amended complaint, which the Court dismissed for lack of subject matter jurisdiction. Doc. 18 at 4. Spiegel's first amended complaint alleged a count for declaratory judgment and injunctive relief without sufficiently identifying an independent basis for federal subject matter jurisdiction. Although similar to his first amended complaint, Spiegel's second amended complaint identifies that his requests for declaratory and injunctive relief are based on a § 1983 claim for a violation of his constitutional rights. Because Spiegel has identified a basis for federal jurisdiction, he has addressed the deficiency that caused the dismissal of his first amended complaint. Therefore, the Court will not dismiss the second amended complaint for lack of subject matter jurisdiction solely based on the fact that it is similar to the first amended complaint.

8Other cases cited by Spiegel contradict his position that a conspiracy is not required to establish state action. In *Greco v. Guss*, the court found that the

private defendants acted under color of law based on evidence that they conspired with a deputy sheriff. 775 F.2d 161, 169 (7th Cir. 1985). In *Latosky v. Strunc*, the court ruled that the plaintiff's claim that a private defendant acted under color of law by conspiring with the police could survive summary judgment based on evidence that the police acted in concert with and at the direction of the plaintiff. No. 8-C-771, 2009 WL 1073680, at *8–10 (E.D. Wisc. Apr. 21, 2009).

9In his second amended complaint, Spiegel asserts that the Court has supplemental jurisdiction over this state law claim against McClintic under § 1367(a). Section 1367(a) permits supplemental jurisdiction over all claims that are "so related" to and "form the same case or controversy" with the claims over which original jurisdiction exists. 28 U.S.C. § 1367(a). Under § 1367 supplemental jurisdiction extends to "claims that involve the joinder or intervention of additional parties." *Id.* Claims form the same case or controversy for purposes of supplemental jurisdiction when they "derive from a common nucleus of operative facts." *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995) (internal citations omitted). "A loose factual connection between the claims is generally sufficient." *Id.* Although the Court dismisses Spiegel's federal claim against McClintic for failure to state a claim, the Court retains supplemental jurisdiction over the state law claim against McClintic based on Spiegel's federal claim against Wilmette. Spiegel argues that he videotapes McClintic to document and protect himself from McClintic's unlawful conduct. Therefore, his allegations that McClintic intrudes upon his seclusion

have a loose factual connection to his federal claim against Wilmette regarding his right to videotape others in public.

10Spiegel also alleges that McClintic is liable for intrusion upon seclusion based on her alleged false police reports. However, the basis of the tort of intrusion upon seclusion is the act of offensively prying into the private domain of another, "not publication or publicity." *Mlynek v. Household Fin. Corp.*, No. 00 C 2998, 2000 WL 1310666, at *3 (N.D. Ill. Sept. 13, 2000)(citing *Lovgren*, 128 Ill.Dec. 542, 534 N.E.2d at 989). According to the facts alleged in the second amended complaint, only one of McClintic's alleged police reports occurred as a result of an offensive prying into Spiegel's private domain (the September 2016 report). The other police reports allegedly occurred based on incidents that occurred in public (in front of her car, on the sidewalk, and at a public meeting). Therefore, the Court does not consider the alleged conduct related to these police reports as intrusion upon seclusion.

Spiegel argues that the decisions in *Vega v. Chicago Park District* and *Webb v. CBS Broadcasting Inc.* support his argument that damages are presumed. However, in *Vega*, the court stated that the anguish and suffering element of the intrusion claim was not contested by the parties. *Vega*, 958 F.Supp.2d at 959 ("[O]nly the second and third elements are contested."). In *Webb*, the court found that the plaintiffs did allege harm resulting from the intrusion. *Webb v. CBS Broad. Inc.*, No. 08 C 6241, 2009 WL 1285836, at

*1, 3 (N.D. Ill. May 7, 2009) ("[plaintiffs] claim that the actions of CBS caused them 'severe emotional distress' and 'public humiliation' " and plaintiffs "alleged that they were harmed by the acts of videotaping itself").

United States Court of Appeals, Seventh Circuit.

Marshall SPIEGEL, Plaintiff-Appellant,

v.

Corrine MCCLINTIC and Village of Wilmette, Defendants-Appellees.

No. 18-1070

3/19/2019

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 16 C 9357 — **Sara L. Ellis**, *Judge*.

Before Bauer, Kanne, and Brennan, Circuit Judges.

O R D E R

On consideration of the petition for rehearing and rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and all members of the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are **DENIED**.