No. __-____

IN THE

Supreme Court of the United States

THE CITY OF LONG BEACH, THE LONG BEACH POLICE DEPARTMENT, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH, OFFICERS JOHN DOES 1-10,

Petitioners,

v.

RICKY JOSHUA BENNY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented for review are:

1. Whether the Second Circuit departed from this Court's precedents, none of which it cited or discussed, when it concluded that two police officers responding to a bar fight at 3:00 A.M. and confronted by an increasingly hostile individual who refused to comply with approximately 19 of their directives and final warnings to back away from the scene of an arrest, and who also resisted the physical efforts of civilian bystanders to restrain and pull him away from the officers, were not entitled to qualified immunity because it was unclear from the video footage whether the individual had the opportunity to comply with the officers' 20th directive prior to an officer's initial attempt to effectuate his arrest?

2. Whether the Second Circuit disregarded this Court's repeated instruction regarding clearly established law when it denied qualified immunity in reliance upon precedents that do not squarely govern the facts at issue?

3. Whether, given the Second Circuit's failure to adhere to this Court's precedents, the Second Circuit's own inconsistent body of caselaw, and conflicting holdings from Circuit Court of Appeals across the country, the time has come for this Court to hold that a police officer is entitled to qualified immunity unless a plaintiff

can point to a decision of the United States Supreme Court that squarely puts the police officer on notice that his or her conduct is unlawful?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

> Ricky Joshua Benny ("Mr. Benny"), an individual, Plaintiff, Appellee below, and Respondent here;
>
> City of Long Beach, Police Officers Joseph Wiemann and Rocco Walsh, Defendants, Appellants below and Petitioners here.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

Benny v. City of Long Beach, No. 20-CV-1908 (E.D.N.Y.)

Benny v. City of Long Beach, No. 22-1863 (2d Cir.)

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The district court's July 27, 2022 order denying summary judgment to petitioners is available on Westlaw at 2022 WL 2967810 and attached to the Appendix to this petition at pages 9a-78a.

The Second Circuit Court of Appeals' December 14, 2023 opinion is available on Westlaw at 2023 WL 8642853 and is reproduced in the Appendix at pages 1a-8a.

JURISDICTION

This Court has jurisdiction to review the Second Circuit's December 14, 2023 decision on writ of certiorari under 28 U.S.C. § 1254(1).

TIMELINESS

This petition, filed within ninety (90) days of the Second Circuit's Order, is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. § 1983. Respondent alleges petitioners violated the rights secured by the United States Constitution's Fourth Amendment. These provisions are quoted verbatim in the Appendix, at pages 132a-133a.

STATEMENT OF THE CASE

On December 8, 2018, sometime between 3:00 and 3:30 A.M., Mr. Benny was with a group of friends outside an establishment in the City of Long Beach known as Whale's Tale. *Benny v. City of Long Beach*, 2022 WL 2967810, at *2 (E.D.N.Y. July 27, 2022). He and the rest of the bar's patrons had been instructed to leave the premises because of a fight. *Id*. Police officers, including the individual Petitioners, responded to the scene following a call for assistance. *Id*.

The police began to arrest Cedric Coad, a friend of Mr. Benny's. *Id*. While several officers attended to Coad, other officers attempted to keep bystanders, including Mr. Benny, a safe distance away from the arrest location. *Id*. at *3. Those officers, which included Petitioners, repeatedly directed Mr. Benny and others to "back up" and "clear the area." *Id*. at *4.

Hearing those orders, Mr. Benny would repeatedly step away, but then reapproach (Video "A")[1]. His protracted non-compliance prompted an officer to approach Mr. Benny and yell "Stay on the sidewalk" (*Id.*, 00:44-00:47). At that point, the volume

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[1] Video recordings were provided to the Second Circuit as part of the hardcopy Joint Appendix. Video "A" references the recording identified as Exhibit "A" below, Video "B" references the recording identified as Exhibit "B" below, and Video "C" references the recording identified as Exhibit "C" below.

of Mr. Benny's voice and the intensity of his defiance increased. He began pointing and waving his hand and finger close to an officer's face, demanding his name (*Id.*, 00:45-00:54). Still unable to obtain Mr. Benny's compliance, an officer removed handcuffs from his belt and brought them to the front of his waist. That demonstration did not deter Mr. Benny, who continued to insist "I have the right" (*Id.*, 00:57-01:01). The officer then advised Mr. Benny that he was acting disorderly and directed him, yet again, to "clear the area" (*Id.*, 1:01-1:08). Mr. Benny continued to insist "I'm not", while gesturing toward the officer with his hands (*Id.*).

In total, officers can be heard issuing their directives to move away *approximately 19 times* (Video "A"). An officer then issued a "last warning" to Mr. Benny several more times. Still undeterred, Mr. Benny yelled "no! I have the right!" (Video "B", 00:08-00:14), now also ignoring a bystander's plea to "come on, come on" (Video "A", 1:10-1:12).

Two (2) civilian bystanders then attempted to physically restrain Mr. Benny and pull him away from the officers as they issued "last warnings". One placed Mr. Benny in a bear hug. Another reached around him with his left arm and tried to

move Mr. Benny away (Video "B", 00:04 to 00:07)[2]. A bystander cautioned Mr. Benny that "he [the officer] said last warning", but Mr. Benny screamed "no, no! I have the right!" and struggled to escape the civilians' grasp (Video "B", 00:10-00:14; Video "A", 1:10-1:14). At that point, an officer informed Mr. Benny he was under arrest (Video "A", 1:13) and directed him to "turn around and put your hands behind your back" (Video "B", 00:15-00:16). Mr. Benny alleges he was not given time to comply with that final order before force was used to effect his arrest. *Benny,* 2022 WL 2967810, at *3.

Seconds after informing Mr. Benny he was under arrest, an officer placed his arms around him, attempting to gain control. However, Mr. Benny spun and broke free of the officer's grasp (Video "B", 00:17-00:21); *Benny*, 2022 WL 2967810, at *5. In the process of breaking free, his hands and knees momentarily contacted the ground. *Id*. Mr. Benny's Complaint establishes that he was not injured as a result of this initial interaction (Complaint at 87a-88a, ¶¶ 26-28)[3]; *see also Benny*, 2022 WL 2967810, at *5.

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[2] The district court's extensive discussion of the facts depicted on the videotapes does not include any reference to the physical struggle between Mr. Benny and the bystanders in the seconds immediately preceding the "initial takedown".

[3] The relevant provisions of the Complaint read as follows (Complaint at 87a-88a; italics added):

After breaking free, Mr. Benny quickly sprang up and "lunge[d] towards and scuffle[d] with the officers." *Benny*, 2022 WL 2967810, at *21. During that "scuffle", Plaintiff thrust his arms upward, contacting an officer's upper body (Video "A", 1:19-1:20). The officers then brought Mr. Benny to the ground. *Benny*, 2022 WL 2967810, at *5. He alleges that the injuries he suffered were incurred during this "second takedown" when the right side of his body struck the concrete (Complaint at 88a, ¶¶ 27-28).

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26. As Plaintiff was lawfully recording the abusive actions of Police and standing on the sidewalk POLICE OFFICER JOSEPH WIEMANN and POLICE OFFICER ROCCO WALSH approached Plaintiff from behind and picked Plaintiff up and body slammed him onto the concrete. No such action was taken against the white persons engaged in the fight. Not fully clear as to what had happened and who had assaulted him, Plaintiff then immediately attempted to get back up from the ground.

27. POLICE OFFICER JOSEPH WIEMANN and POLICE OFFICER ROCCO WALSH *once again* grabbed Plaintiff and with great force and with an intent to cause serious and permanent injury body slammed him onto the concrete *causing the Plaintiff to strike his face, head and upper torso against the concrete and rendering him semi or unconscious.*

28. POLICE OFFICER JOSEPH WIEMANN and POLICE OFFICER ROCCO WALSH, without legal authority or legal cause of any kind, used unnecessary and unwarranted force and grabbed Mr. Benny, and in doing so grabbed Mr. Benny about his body, and forcibly lifted him and propelled Plaintiff with the full force of his *body onto the right side of his face and shoulders onto the concrete pavement beneath him*.

Once on the ground, an officer placed his knee on the left side of Mr. Benny's face/neck area for approximately fifteen (15) seconds while he and others attempted to place him in handcuffs. As the officers attempted to secure Mr. Benny, the crowd encroached upon and screamed at them (Video "B", 1:32-1:47). The officers stood up after Mr. Benny was fully handcuffed (*Id.*, 1:55). Approximately forty-one (41) seconds elapsed between and including the time of the initial physical interaction and the time that the officers stood up after cuffing Mr. Benny (*Id.*, 1:14-1:55).

Mr. Benny was arrested for obstruction of governmental administration, resisting arrest, and disorderly conduct. *Benny*, 2022 WL 2967810, at *3. The district court concluded that the officers had probable cause to support his arrest on all of those charges. *Id.* at *17.

A. The Lawsuit.

Mr. Benny filed a complaint asserting multiple causes of action against the City of Long Beach and the Officers Walsh and Wiemann (Complaint at 79a). The district court granted Petitioners summary judgment dismissing Mr. Benny's false arrest, malicious prosecution, abuse of process, fabrication of evidence, Equal Protection, and First Amendment claims, but denied Petitioners' motion requesting qualified immunity with respect to the claims of excessive force and failure to intervene. On that issue, the district court held there was an

issue of fact as to whether Mr. Benny had time to comply with the officers' final order to turn around and offer his hands prior to the initial take down[4], then cited inapposite Second Circuit case law on passive-compliant arrestees to support its denial of qualified immunity.

B. The Appeal.

The Second Circuit affirmed, ignoring this Court's precedent on qualified immunity, as well as its own precedent granting qualified immunity to police officers confronted by similar circumstances. The Second Circuit's Order does not even acknowledge the circumstances the police officers confronted immediately preceding Mr. Benny's arrest. In fact, the Order does not contain any discussion of the facts at all.

Instead, the Second Circuit seized on the absence of video footage showing precisely what transpired in the few seconds immediately preceding the officer wrapping his arms around Mr. Benny. Accepting Mr. Benny's allegation that he was not given an opportunity to comply with the order to turn around, while entirely ignoring Mr. Benny's protracted, increasingly hostile conduct and his defiance of the officers' directives leading up to that moment, the Second Circuit endorsed the district

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[4] The District Court appeared to hold that it was only the initial take down of Benny that was not subject to the qualified immunity defense.

court's reliance upon inapposite case law that involved fully compliant/passive arrestees who were subjected to extreme and gratuitous force. Under the Second Circuit's reasoning, Officers Wiemann and Walsh should have waited until Mr. Benny fought-off their attempt to arrest him, precisely as he did after breaking free from the officer's grasp the first time, before employing any measure of force.[5]

REASONS WARRANTING CERTIORARI

Instances of belligerent individuals and groups confronting police officers under the pretense of "protest" are increasing at an alarming rate. These tense confrontations can and often do turn violent in the blink of an eye, with officers too often the victims.

Police officers, whose safety is in jeopardy the moment they put on their uniforms, often have a split-second, under tense and rapidly evolving circumstances, to determine whether to bring a suspect to the ground or risk their own safety and the safety of others by waiting to see if the suspect strikes first. Qualified immunity is intended to protect police officers faced with such Hobson's choices and allows them to err on the side of caution even if they make a reasonable mistake of fact. The doc-

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[5] The Second Circuit, like the district court, focused only on the initial physical contact with Mr. Benny.

trine is intended to prevent second-guessing, with the benefit of 20/20 hindsight, from the peace and tranquility of a courtroom, and to protect these public servants from financial ruin if their actions are later judged to fall on the wrong side of conflicting precedents. *See Wilson v. Layne,* 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

As this Court has unfortunately been required to repeatedly state, in a qualified immunity analysis "[t]he relevant, dispositive inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful *in the situation he confronted*" (emphasis added). *Saucier v. Katz*, 533 U.S. 194, 194–95 (2001). Before that question can be answered, this Court has stressed the need to "identify a case where an officer acting under similar circumstances" was "held to have violated the Fourth Amendment." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam). "[P]olice officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018), *quoting Mullenix v. Luna*, 577 U.S. 7, 13 (2015).

In 2021, the Court reiterated these bedrock principles yet again in *Rivas-Villegas v. Cortesluna,* 595 U.S. 1 (2021) (reversing Ninth Circuit Court of Appeals' denial of qualified immunity because neither plaintiff "nor the Court of Appeals identified

any Supreme Court case that addresses facts like the ones at issue here") and *City of Tahlequah v. Bond*, 595 U.S. 9, 14 (2021) ("Neither the panel majority nor the respondent has identified a single precedent finding a Fourth Amendment violation under similar circumstances").

Yet, despite this Court's efforts, the Second Circuit here, like the lower courts in *Rivas-Villegas* and *City of Tahlequah*, failed to cite a single case that addressed facts like the ones that confronted the officers here and that resulted in a finding that the Fourth Amendment had been violated. Instead, ignoring all that transpired prior to the officers' use of force, the Second Circuit cited inapposite precedents that involved passive and compliant arrestees. Under any reasonable view of the facts, Mr. Benny was *not* a passive and compliant arrestee.

Not only did the Second Circuit disregard this Court's holdings, it ignored its own precedents that hold *there is no violation* of the Fourth Amendment under facts similar to those confronted by the officers here. Those authorities are discussed further below.

Moreover, and critically given the procedural posture of this case, this Court has made clear that "to deny summary judgment if a material issue of fact remains on the excessive force claim—could undermine the goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on sum-

mary judgment." *Saucier*, 533 U.S. at 195. Here, Mr. Benny's allegation that he did not have an opportunity to comply with the officer's final directive, after he had so aggressively refused to comply with a multitude of prior orders, should not have resulted in the denial of qualified immunity to these officers.

This Honorable Court should hear this case because it is sadly apparent that the Second Circuit, or at least various panels of that Court, will continue, as have other circuits, to disregard or misapply this Court's holdings on qualified immunity, perhaps confident that the Court's burdensome docket will shield them from its scrutiny. *See, e.g.*, *Slater v. Deasey*, 943 F.3d 898, 898-99 (9th Cir. 2019) (Collins, J., dissenting) ("By repeating—if not outdoing—the same patent errors that have drawn such repeated rebukes from the high Court, the panel here once again invites summary reversal."); *Cole v. Carson*, 935 F.3d 444, 479 (5th Cir. 2019) (en banc) (Ho, J., dissenting) ("Our circuit, like too many others, has been summarily reversed for ignoring the Supreme Court's repeated admonitions regarding qualified immunity. There's no excuse for ignoring the Supreme Court again today.").

Another critical issue warrants this Court's review. On several occasions this Court has left open the question of whether decisions from a circuit court of appeals qualify as controlling authority for the purposes of qualified immunity. *See, e.g.*, *D.C. v. Wesby,* 583 U.S. 48, 66 n.8 (2018) ("We have not

yet decided what precedents-other than our own-qualify as controlling authority for purposes of qualified immunity."); *Rivas-Villegas*, 595 U.S. at 4; *Reichle v. Howards,* 566 U.S. 658, 665-66 (2012) (reserving question whether court of appeals decisions can be a "dispositive source[s] of clearly established law"); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity). Respectfully, it is now time to reach that issue.

In *Rivas-Villegas*, *City of Tahlequah*, and now this case, the Circuit Court of Appeals engaged in a tortured construction of its own precedent to rule against police officers on qualified immunity. If this Court were to now rule that only a decision of the Supreme Court squarely on point can defeat qualified immunity, courts of appeal will no longer be in position to use their own precedent to find clearly established law despite such law not involving similar circumstances.

Given the sheer volume of decisions from this Court that continue to be disregarded by lower courts, and the inherently inconsistent holdings that emanate from those lower courts, a rule should be established whereby a police officer facing a volatile situation and needing to make a split-second decision as to how to safely effectuate an arrest is entitled to qualified immunity unless a court can point to a decision of the United States

Supreme Court that puts that officer on notice that their conduct is unlawful in the specific circumstances they face. In the absence of such a holding, courts of appeal, like the Second Circuit in this case, will be free to fit the definition of clearly established law into whatever construct fits a particular panel's personal views of how an officer should act with the benefit of 20/20 hindsight from the comfort of their own chambers.

I. REVIEW IS NECESSARY TO COMPEL COMPLIANCE WITH THE LEGION OF SUPREME COURT CASES ON QUALIFIED IMMUNITY IN EXCESSIVE FORCE CASES.

A. SUPREME COURT PRECEDENT ON QUALIFIED IMMUNITY

The standards for qualified immunity established by the Supreme Court have been cemented in case law for decades. In its most basic sense, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The law (the constitutional right being violated) must be clearly established, such that it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 577 U.S. at 11, *quoting Reichle*, 566 U.S. at 664 (internal quotation marks and alteration omitted). Under this Court's precedents, Officers Wiemann and Walsh are entitled to qualified immunity

unless "existing precedent . . . placed the statutory or constitutional question '*beyond debate*.'" *Kisela*, 138 S. Ct. at 1152 (emphasis added).

The exacting standards for defeating a police officer's entitlement to qualified immunity are moored to the broad societal concerns protected by the doctrine. This Court has made clear that the purpose of qualified immunity is to "give government officials breathing room to make reasonable but mistaken judgments." *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (per curiam), *quoting Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). To ensure that the "breathing room" accorded police officers is not rendered hollow, as it was in this case, the Supreme Court has further made clear that the "inquiry requires analyzing the totality of the circumstances" that confronted the police officers. *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014).

Indeed, as the Supreme Court explained in *Graham v. Connor*, 490 U.S. 386, 396-97 (1989):

> 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' *Johnson v. Glick*, 481 F.2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolv-

> ing—about the amount of force that is necessary in a particular situation.

See also Ryburn v. Huff, 565 U.S. 469, 477 (2012) (courts should avoid "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation"). This case quintessentially involves a hostile situation requiring Petitioner officers to "make on-the-spot judgments in tense circumstances" that were exacerbated by Mr. Benny's conduct. However, rather than consider the "totality of the circumstances," the Second Circuit did not consider *any* of the circumstances.

In determining whether a police officer has violated a clearly established constitutional right, it is not enough for a court to rely on general or generic principles of law espoused in factually dissimilar cases. Rather, courts must focus on the "particular circumstances before" the police officer. *D.C.*, 583 U.S. at 63. Defining clearly established law with "specificity is especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *City of Tahlequah*, 595 U.S. at 12-13.

For example, in *City of Escondido v. Emmons* police officers responded to a report of domestic violence at an apartment. *Emmons*, 139 S. Ct. at 503. When the plaintiff opened the door, one of the police officers directed the plaintiff not to close the

door, but the man closed the door and tried to brush past the police officer. The police officer stopped the plaintiff and immediately took him to the ground. On those facts the Court of Appeals held that the police officer was not entitled to qualified immunity based on its own precedent involving passive resistance. In a Per Curiam opinion, this Court reversed and remanded, holding, "[i]n this case, the Court of Appeals contravened those settled principles. The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man *in these circumstances*." (emphasis added).

This is precisely what happened in this case. In sharp contrast to the painstaking analysis of qualified immunity exercised by this Court, the Second Circuit gave this case short shrift, disposing of it in a cavalier summary order that omitted any discussion of facts.

Second Circuit Case Law Prior to This Case

The Second Circuit disregarded the specific circumstances faced by Officers Wiemann and Walsh, ignoring Mr. Benny's increasingly belligerent and aggressive conduct and his protracted disobedience in the moments preceding the officers' initial use of force to effect his arrest. Incredibly, particularly in light of this Court's precedents, the Second Circuit instead focused solely upon Mr. Benny's allegation that he did not have an opportunity to comply with

the officers' 20th directive, ignoring that he had disobeyed 19 prior orders to clear the area and that civilians' efforts to restrain and pull him away from the police were unsuccessful. Somehow, despite those facts, the Second Circuit held that its "passive/compliant arrestee" body of caselaw provided a reasonable officer with notice that taking Mr. Benny to the ground was unlawful.

Precedent involving "passive/compliant arrestees" does not "squarely govern" the facts confronted by Petitioners. It was 3:00 a.m., following a bar fight, and an arrest was in process. A defiant and yelling Mr. Benny had just openly disobeyed approximately nineteen (19) lawful orders to clear the area, and an additional three (3) "last warnings". He was verbally aggressive, pointing and waving his hand near an officer's face, and had just broken free from the hold of two (2) bystanders who tried to pull him away from the officers and compel him to comply with their orders. Mr. Benny made clear that he did not and would not follow the directives given to him by the police and, even under his version of the facts, it was completely reasonable for the officers to believe that he would not peacefully follow their final order to turn around and put his hands behind his back so that they could arrest him.

Officers Wiemann and Walsh were forced to make the type of split-second judgment, while facing an angry and aggressive arrestee, that Courts

had previously and repeatedly held ought not be second guessed in the peace of judicial chambers.

Certainly, not every reasonable police officer, confronted with similar circumstances, would expect Mr. Benny, once advised he was under arrest, to suddenly "turn off the switch," assume a calm and compliant demeanor, and peacefully submit to arrest. To the contrary, a reasonable officer would anticipate continued noncompliance and resistance. *See, e.g., Bauer v. City of Hartford*, 2010 WL 4429697, at *11 (D. Conn. Oct. 29, 2010) ("Given that Plaintiff had repeatedly resisted or ignored police requests prior to her arrest, it was reasonable for [the officer] to believe that she would resist arrest as well"); *MacLeod v. Town of Brattleboro*, 2012 WL 1928656, at *7 (D. Vt. May 25, 2012) (holding that use of taser and taking plaintiff to the ground constituted reasonable use of force given "Plaintiff's noncompliance with police orders"), *aff'd*, 548 F. App'x 6 (2d Cir. 2013); *Brown v. Gilmore*, 278 F.3d 362, 369 (4th Cir. 2002) ("It was not unreasonable for the officers to believe that a suspect who had already disobeyed one direct order would balk at being arrested."); *Jackson v. City of Bremerton*, 268 F.3d 646, 652-53 (9th Cir. 2001) (stating law enforcement officers' use of force to effect arrest for "failure to disperse" was not excessive where officers "were faced with a group that refused to obey the officers' commands"); *Mecham v. Frazier*, 500 F.3d 1200, 1205 (10th Cir. 2007) (granting qualified immunity to officer who deployed pepper spray to remove plaintiff from ve-

hicle after traffic stop for speeding and failure to wear a seatbelt in light of her prior "disregard for the officers' instructions, the length of the encounter, and the implausibility of [her] rationale for not cooperating").

Even if the officers were mistaken as to how Mr. Benny would react upon being advised he was under arrest, this Court has made clear they are still entitled to qualified immunity. Indeed, "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Saucier*, 533 U.S. at 205. Certainly, it was not "beyond debate" that Officers Wiemann and Walsh were required to wait to see if Mr. Benny would suddenly morph into a passive/calm arrestee. *See Ashcroft*, 563 U.S. at 741.

Police officers' safety and livelihoods should not be subjected to the luck of the draw regarding which panel of a court will hear their case. These officers were entitled to rely upon prior precedent from the Second Circuit that squarely governed the facts of this case. There are multiple examples of such precedents.

In *Brown v. City of New York*, 862 F.3d 182, 189–90 (2d Cir. 2017), at approximately 2:00 A.M., the plaintiff had gone to observe a "raid" of an Occupy Wall Street crowd. She left at approximately 5:00 A.M. to find a bathroom, arriving at a store where she was informed it would not be open for another 15 or 20 minutes. She waited on the sidewalk. A

store employee called 911, complaining that six people were outside "making nasty comments" and knocking on the door "really really bad trying to get in" to use the bathroom. Two (2) police officers responded. The plaintiff alleged that when they arrived, she and two (2) others were still waiting outside the store. She approached the police car, asked the officers where she could find a bathroom, and was answered rudely and told she should go home. As she walked away from the car, the officers got out and asked her for identification. When she refused that directive, she was advised she was under arrest. When she asked why, no explanation was provided to her. *Brown v. City of New York*, 798 F.3d 94, 95-97 (2d Cir. 2015). An officer asked her to place her hands behind her back so that handcuffs could be applied. She refused. *Brown*, 862 F.3d at 189-90. One of the officers then kicked her legs out from under her, causing her to fall to the ground. Plaintiff's face was pushed onto the pavement. She did not offer her arms to be handcuffed and a burst of pepper spray was twice administered directly to her face before the handcuffing was completed. *Id.* at 189. Granting the officers qualified immunity, a panel of the Second Circuit stated as follows:

> The issue presented, therefore, is whether, under clearly established law, every reasonable officer would have concluded that these actions violated [plaintiff's] Fourth Amendment rights in the particular circumstance presented by the uncontested

> facts and the facts presumed in [plaintiff's] favor. Here, those circumstances involved a person's repeatedly refusing to follow the instructions of police officers who were attempting to apply handcuffs to accomplish an arrest.
>
> No precedential decision of the Supreme Court or this Court "clearly establishes" that the actions of [the officers], viewed in the circumstances in which they were taken, were in violation of the Fourth Amendment. The excessive force cases on which [plaintiff] relies do not suffice for this purpose.

Id. at 190. *See also Kalfus v. New York & Presbyterian Hosp.*, 476 F. App'x 877, 879 (2d Cir. 2012) (affirming grant of summary judgment in favor of patrolman who pushed trespasser onto his stomach in order to handcuff him).

In prior similar cases, far more force than employed here was deemed lawful by the Second Circuit. For example, in *Lieberman v. City of Rochester*, 2011 WL 13110345 (W.D.N.Y. Apr. 29, 2011), *aff'd*, 558 F. App'x 38 (2d Cir. 2014), the plaintiffs were walking home from a bar "sometime after midnight" when they passed a group of people standing on a porch. According to plaintiffs, the group verbally harassed, then followed and attacked them. When the police arrived, the plaintiffs identified their alleged assailants and the officers told everyone to "go home." Upset with that limited

response, the plaintiffs "began to demand" that the police take further action against the alleged attackers. Plaintiffs became "embroiled in an argument with the officers [and] [t]he confrontation quickly escalated." Two (2) of the plaintiffs were eventually arrested for disorderly conduct. *Lieberman*, 2011 WL 13110345, at *1-2.

Plaintiff Lieberman alleged that when he attempted to verbally intervene in the confrontation between the officers and his co-plaintiffs, an officer grabbed his "arm, [and] told him 'that's it . . . you're going to jail.'" Lieberman alleged that he was "body slammed to the ground, handcuffed and placed in the back" of a police vehicle. *Id*. at *5. The District Court dismissed his excessive force claim, noting that "[t]he only force alleged by Lieberman is that he was thrown to the ground and handcuffed" and opining that "[c]onsidering the volatility of the situation and the fact that there had recently been a scuffle between the two groups of people present, I find that the force used was not excessive, as a matter of law." *Id*.

The Second Circuit affirmed, holding that "[g]iven the volatility of the situation into which the officers intervened, we conclude that the force allegedly used against Lieberman was reasonable, and thus Lieberman's excessive force claim was correctly dismissed by the district court." *Lieberman*, 558 F. App'x at 39. The factual similarities between *Lieberman* and this case, together with this Court's most recent edicts and reminders in

Rivas-Villegas and *City of Tahlequah*, warranted the grant of qualified immunity to these Petitioners. This is especially true given that the Plaintiff in *Lieberman* did not defy 19 directives like Mr. Benny did in this case.

Likewise, in *Style v. Mackey*, 2020 WL 3055319 (E.D.N.Y. June 8, 2020), *aff'd*., 2021 WL 5022657 (2d Cir. Oct. 29, 2021), the District Court considered an excessive force claim arising from the arrest of a non-resisting plaintiff for making a false statement on a passport application. The officers were granted qualified immunity. The facts underlying such grant were set forth by the District Court as follows:

> As [plaintiff] tells it, there were approximately ten deputies in his apartment, two or three of whom were in the utility room at the time of the encounter. He testified at his deposition that one of the deputies grabbed him and 'pushed [his] face down on the ground,' and that [plaintiff] yelled 'my back' when he felt a deputy 'ram [ ] his knee into [his lower] back.' [Plaintiff] does not recall whether the arresting deputy responded to his outcry, but that if there was a response, it was to tell [plaintiff] to 'shut up.' [Plaintiff] *believes that one of the other deputies signaled to the arresting deputy, who had his knee on* [plaintiff's] *back, to 'get off him.' The arresting deputy kept his knee on [plaintiff's] back while placing him*

> *in handcuffs. Style did not resist arrest. In total, [plaintiff] was on the ground for two to three minutes.*

Style, 2020 WL 3055319, at *1 (internal citations to record omitted) (emphasis added).

A panel of the Second Circuit, different from the panel that decided this case, affirmed the District Court's holding. The Court noted that, like here, the non-resisting "[plaintiff] has 'not brought to our attention any cases of controlling authority' or 'a consensus of cases of persuasive authority such that,' at the time of his arrest in 2016, 'a reasonable officer could not have believed that [the Defendants-Appellees'] actions were lawful." *Style*, 2021 WL 5022657, at *1, *quoting Wilson*, 526 U.S. at 617.

Antic v. City of New York, 273 F. Supp. 3d 445, 459 (S.D.N.Y. 2017), *aff'd*, 740 F. App'x 203 (2d Cir. 2018) is also on point. There, plaintiff and several friends were outside a nightclub in the early morning hours and were directed to move away from the location because the police had responded to a reported stabbing there. Plaintiff entered a car, however, one of his friends engaged the police and was placed under arrest. As plaintiff's friend was being arrested, he exited the vehicle he had just entered, approached the scene of the arrest, and tapped an officer on the shoulder to inquire "what was going on". The officer turned around and pushed the plaintiff, who then fell to the ground. The Court

granted the officer qualified immunity, explaining that:

> With 20/20 hindsight—and the knowledge that Antic's motives may well have been pure—[the officer's] push could perhaps be viewed as unreasonable. But the Court must 'make allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.' *Tracy v. Freshwater*, 623 F.3d 90, 96 (2d Cir. 2010) (quoting *Graham*, 490 U.S. at 397, 109 S.Ct. 1865). Making that allowance here, the Court concludes that no reasonable jury could find that [the officer's] force was objectively unreasonable. Indeed, 'to conclude that a 'push' that does not cause the slightest of physical injuries to the plaintiff is nonetheless an actionable use of excessive force would be to hold that any physical contact by an arresting officer with an arrested person is actionable.' *Roundtree v. City of New York*, 778 F.Supp. 614, 622 (E.D.N.Y. 1991).

Petitioners here also faced "circumstances that [were] tense, uncertain, and rapidly evolving" and should have been afforded the same "allowance" the officers were afforded by this Court in *Antic*. *See also Griggs v. Brewer*, 841 F.3d 308, 313-14

(5th Cir. 2016) (takedown of drunken, erratic suspect was not excessive force where officer body-slammed plaintiff to ground, placed his weight on top of him, and punched him to gain control over his arms and handcuff him).

Given the foregoing precedents, and others like them, it cannot be said "it would be clear *to a reasonable officer"* that the initial takedown of spinning Benny to the ground "was unlawful in the situation [the officer] confronted." *Saucier*, 533 U.S. at 202. *See also Garcia v. Blevins*, 957 F.3d 596, 602 (5th Cir. 2020) ("Here, we cannot say the law was *so* clearly established that—in the blink of an eye—every reasonable officer would know it immediately.") (emphasis in the original; internal citations and quotations omitted).

Contrary to the decision of the Second Circuit, the law does not require an officer to first suffer harm before utilizing reasonable force to effect an arrest. As another panel of the Second Circuit recently held, "the police are entitled to err on the side of caution when faced with an uncertain or threatening situation.'" *McKinney v. City of Middletown*, 49 F.4th 730, 743 (2d Cir. 2022), *quoting Johnson v. Scott*, 576 F.3d 658, 659 (7th Cir. 2009). In *McKinney*, the Second Circuit reiterated, "[i]t is not a violation of clearly established law for the police to ensure that a violent suspect has been secured before *withdrawing* the significant force required to subdue the suspect" (emphasis in original). *McKinney*, 49 F.4th at 742–43. There, the

plaintiff argued that the officers violated clearly established law by allowing a police dog to continue biting him "after he ceased actively resisting." *Id.* at 741. Though the Court agreed that "a reasonable jury could find that [the dog] continued to bite [plaintiff] after [plaintiff] stopped actively resisting the officers", it nevertheless held that the officers were entitled to qualified immunity because the plaintiff failed to show "that police officers violate clearly established law by allowing a canine bite to continue until a previously violent suspect can be secured." *Id.* at 741-42.

Qualified immunity was also granted to an officer who "body slammed" a female who defied orders to exit her vehicle when suspected of driving while intoxicated in *Mael v. Howard*, 2022 WL 263235, at *6 (W.D.N.Y. Jan. 27, 2022), with the Court explaining as follows:

> Here, [the officer] used a single-arm takedown maneuver to control [plaintiff] and pulled her arms behind her back to handcuff her. He did so only after [plaintiff] refused [the officer's] verbal demands to exit the vehicle, rolled up the car window, tried to close the car door, and clung onto the steering wheel while [plaintiff] attempted to extract her from the vehicle. [Plaintiff] alleges significant injuries, but qualified immunity simply asks whether any reasonable officer would believe use of this

> maneuver, in this context, was constitutional.

Other jurisdictions are in accord. For example, in *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019), a mother and her three children went swimming at a public pool. At some point the mother's male friend came up behind her as if he was going to throw her in the pool. Onlookers thought that the mother was being assaulted and called the police. The mother later said that she and her friend were just playing. At some point, the mother began to walk toward a woman who she thought had called the police. A police officer told the mother to "get back here." The mother responded, "some bitch is talking shit to my kid and I want to know what she is saying" as she continued to walk away from the police officer. As she continued to walk, the officer placed her in a bear hug, threw her to the ground, and placed her in handcuffs. The district court denied qualified immunity, reasoning that where a nonviolent misdemeanant poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully.

On appeal the Eighth Circuit reversed, holding:

> *Decisions concerning the use of force against suspects who were compliant or engaged in passive resistance are insufficient to constitute clearly established law that governs an officer's use of force against a*

> *suspect who ignores a command and walks away.*
>
> Although the principal dissent suggests that there is a factual dispute about whether Kelsay complied with Ernst's command by momentarily stopping and turning around, the relevant question is not whether Kelsay complied as a factual matter. The issue is whether a reasonable officer could have believed that Kelsay was not compliant. Whether the officer's conclusion was reasonable, or whether he was "reasonably unreasonable" for purposes of qualified immunity, *see Anderson*, 483 U.S. at 643-44, 107 S.Ct. 3034, are questions of law, not fact. They are matters for resolution by the court, not by a jury. And Ernst's conclusion that Kelsay failed to comply was objectively reasonable. A reasonable police officer could expect Kelsay to understand his command to "get back here" as an order to stop and remain, not as a directive merely to touch base before walking away again.

(emphasis added).

Other cases have also granted qualified immunity of facts similar to those at bar. *See, e.g., White v. Jackson*, 865 F.3d 1064, 1080 (8th Cir. 2017) ("[I]t was not an unreasonable use of force to push Matthews to the ground and place a knee on his back."); *Wertish v. Krueger*, 433 F.3d 1062, 1065-68

(8th Cir. 2006) (rejecting excessive force claim where an officer threw plaintiff to the ground, pinned him down, and placed his weight onto plaintiff's back before handcuffing him, even though the plaintiff was only passively resistant); *Scott v. D.C.*, 101 F.3d 748, 759-60 (D.C. Cir. 1996) (finding no excessive force where officers in a "quickly developing situation" grabbed plaintiff who had been arrested for DUI and was attempting to flee, slammed him to the ground, and put their knees on his back in the course of handcuffing him); *Thomas v. City of Eastpointe*, 715 F. App'x 458, 461 (6th Cir. 2017) ("Thomas argues that Officer Barr should have warned him prior to deploying the taser. But however prudent it may have been for Officer Barr to warn Thomas, no clearly established law required him to do so. . . And in the absence of clearly established law, Officer Barr is entitled to qualified immunity."). As the Eighth Circuit Court of Appeals explained in granting qualified immunity to an officer that employed a spin takedown:

> First, Officer Dirkes did not violate a constitutional right by executing the takedown. Officer Dirkes's dash camera video shows Dirkes approach Ehlers, point to him, and twice order him to put his hands behind his back. Instead of complying, Ehlers continued walking towards the Civic Center, passing Dirkes closely as Dirkes gave the instruction a second time. A reasonable officer in Dirkes's position

> would interpret this behavior as noncompliant. Thus, Ehlers's argument that no force was appropriate because he was being arrested for a nonviolent misdemeanor and was not resisting is inapplicable because he at least appeared to be resisting. . . . Accordingly, Dirkes was entitled to use the force necessary to effect the arrest. . . Dirkes provided two warnings before executing the takedown procedure. Even accepting Ehlers's account that he did not hear Dirkes's instructions, an arrestee's subjective motive does not bear on how reasonable officers would have interpreted his behavior... As a result, the takedown did not violate a constitutional right.

Ehlers v. City of Rapid City, 846 F.3d 1002, 1011 (8th Cir. 2017).

Based on the foregoing authority, Officers Wiemann and Walsh, as any reasonable officer would have, had every reason to believe that their conduct was lawful in the light of the specific circumstances they faced. *See White v. Pauly*, 580 U.S. at 79 ("As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case.").

Cases Cited by the Second Circuit in this Case

The Second Circuit disregarded the law discussed above, all of which was fully briefed and presented

to it. Moreover, neither the district court nor the Second Circuit cited a case that squarely governed the facts confronted by the officers, as this Court's precedents require.

In prior cases where this Court has reversed a circuit court's denial of qualified immunity, it has held that the cases those courts relied upon were not on point with the specific fact-pattern at issue. Here, it requires very little analysis to see that the cases relied upon by the Second Circuit to deny qualified immunity are materially distinguishable on their facts.

In *Rogoz v. City of Hartford*, 796 F.3d 236 (2d Cir. 2015), the undisputed facts established that the plaintiff was unaware he was being pursued by police; that upon hearing lights and sirens he pulled his vehicle over; that he then complied with officers' directives to exit the vehicle with his hands up; that he complied with the subsequent order to lay face down on the ground with his hands behind his back; and that, despite such compliance, an officer jumped on plaintiff's back, landing knees first. The Court denied qualified immunity, concluding that "no officer in 2009 could reasonably have believed it permissible under the Fourth Amendment to jump on the back of a prone and compliant suspect gratuitously, with sufficient force to break his spine and rib." *Id.* at 251. Nothing like the facts in *Rogoz* occurred in this case. Mr. Benny was not compliant and was not injured during the initial take-down.

In *Calamia v. City of New York*, 879 F.2d 1025, 1035 (2d Cir. 1989), the Court affirmed the trial court's submission of an excessive force claim to the jury and the denial of a motion for a judgment notwithstanding the verdict where the "record showed that as soon as [plaintiff] answered [the officer's] knock at his door, [the officer] shoved him to the floor and immediately cuffed his hands behind his back", then left him "there in a painful posture without circulation in his hands" *for five or six hours* while the officers collected property. Again, *Calamia* is nothing like this case. Benny was belligerent and noncompliant. He was not left in a painful position for any time, let alone five or six hours.

In *O'Hara v. City of New York*, 570 F. App'x 21, 24 (2d Cir. 2014), the Court reviewed the denial of qualified immunity on a post-trial motion, construing the evidence in the light most favorable to the prevailing plaintiff. First, the Court assumed, as it must on such review, "that in effectuating [plaintiff's] arrest for a relatively minor matter, [the defendant officer]—who was one of six armed officers on the scene—punched [plaintiff] in the face *without* provocation and then proceeded to punch him repeatedly after the 17–year old fell to the ground." *Id.* at 23. On the issue of qualified immunity, the Court concluded that "no reasonable officer confronting the circumstances of this case . . . could have thought that the law authorized him repeatedly to punch an unarmed, non-menacing 17-year-old in effecting an arrest." *Id.* at 25. In contrast to

O'Hara, Mr. Benny was aggressive, defiant, and non-compliant. Moreover, Mr. Benny, a grown man, was not punched at all, let alone repeatedly.

To the extent that the Second Circuit was of the view that the fact pattern of this case did not fall squarely within the holdings of its prior precedents, then qualified immunity should have been granted. The absence of a specific case on point is precisely what does *not* deprive a police officer of qualified immunity. *See Thomas*, 715 F. App'x at 461 ("This unresolved question provides all the answer that we need: How the law applied to this set of facts was not "beyond debate" in May 2013."), *citing Ashcroft*, 563 U.S. at 741.

II. THE COURT SHOULD GRANT REVIEW TO FINALLY DECIDE THAT PRECEDENTS OF COURTS OF APPEAL CANNOT CONSTITUTE CONTROLLING AUTHORITY FOR PURPOSES OF QUALIFIED IMMUNITY

As discussed above, on several occasions, this Court has left open the question whether a Circuit Court of Appeals' decision can constitute controlling precedent for the purposes of qualified immunity. *See D.C.*, 583 U.S. at 591 n.8; *Rivas-Villegas*, 595 U.S. at 5; *Reichle*, 566 U.S. at 665-66; *Emmons*, 139 S. Ct. at 503. Respectfully, it is now time for the Court to squarely address this issue.

Leaving aside the countless cases that have not had the good fortune of this Court's review, there

have been too many occasions where the Court has been compelled to reverse circuit court decisions that deny qualified immunity upon factually dissimilar caselaw. Yet, despite this Court's admonishment, the lower courts keep doing it. *See Cole,* 935 F.3d at 479 (Ho, J., dissenting) ("Our circuit, like too many others, has been summarily reversed for ignoring the Supreme Court's repeated admonitions regarding qualified immunity. There's no excuse for ignoring the Supreme Court again today.").

Police officers should lose qualified immunity only when they violate clearly established law, *i.e.*, when no reasonable officer could conclude that their actions were lawful. But this case, like others before it, did not turn on whether Officers Wiemann and Walsh violated clearly established law on the specific facts they confronted. Rather, qualified immunity turned on the caprice of one panel of a court of appeals. Had that panel been required to point to a case from this Court, instead of a case from another panel of the Second Circuit, it would have been far more difficult to shoehorn the facts of this case in a manner that defeats qualified immunity.

As it now stands, qualified immunity has been relegated to frontier justice. There is no uniformity between circuits in cases involving similar facts nor is there even uniformity within circuits as to what constitutes excessive force. *Stari decisis* has no meaning in this context and police officers are left to guess how any given court may view their con-

duct. Result oriented decisions are the inevitable result of the conflicting case law with it now being all too easy to dispose of a police officer's claim to qualified immunity via a summary order that leaves the ultimate decision to a jury. This, of course, defeats the very purpose of qualified immunity.

An additional reason for a uniform body of law coming from this Court, as opposed to circuit courts, is that the Second Circuit, in purporting to rely on its own precedent, failed to give even a cursory nod to the impact a runaway verdict could have upon Officers Wiemann and Walsh and their families. The Second Circuit's failure to pause for even a moment to consider the stakes involved violates the concerns expressed by this Court. As stated in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (internal quotations and citations omitted):

> At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irre-

> sponsible [public officials], in the unflinching discharge of their duties.

The *Harlow* Court's concern with qualified people turning away from public service has proven prescient. Increasingly, police officers are facing angry and often violent individuals who do not respect their authority and, as a result, their numbers are decreasing to the point that there are staffing shortages across the Country. *See* Ryan Young, Devon M. Sayers & Ray Sanchez, *'We need them desperately' US police departments struggle with critical staffing shortages*, CNN (last modified July 20, 2022), https://www.cnn.com/2022/07/19/us/police-staffing-shortages-recruitment/index.html; Ashley Southall, *When Officers Are Being Doused, Has Police Restraint Gone Too Far?*, N.Y. TIMES, July 25, 2019, at A22; Martin Kaste & Lori Mack, *Shortage of Officers Fuels Police Recruiting Crisis*, NPR (Dec. 11, 2018, 5:05 AM), https://n.pr/2Qrbrnq; Jeremy Gorner, *Morale, Policing Suffering in Hostile Climate, Cops Say; 'It's Almost Like We're the Bad Guys,' Veteran City Officer Says*, CHI. TRIB., Nov. 27, 2016, at 1. *See also Cole*, 935 F.3d at 478, and n.2 ("Those social costs are particularly stark today given widespread news of low officer morale and shortages in officer recruitment").[6]

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[6] *See also* Dean Balsamini & Tina Moore, *Record 5,363 NYPD Cops Injured on Job in 2023—with Over 1,200 Hurt in Struggles with Suspects in Last 3 Months*, N.Y. POST (Feb. 18, 2024, 8:50 AM), https://nypost.com/2024/02/18/us-

These policy considerations are part of the fabric of qualified immunity and should not have been cast aside by an unchecked panel of the Second Circuit. In light of the deliberate and strict language used by the Supreme Court in its most recent edicts on qualified immunity, we ask the following rhetorical question: if police officers are forced to stand trial and risk financial ruin for their families in a case like this, then who will ever want to become a police officer? *Cf*. *Kisela*, 138 S. Ct. at 1153 (An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it."). The time has come to protect police officers from rogue panels of court of appeals contorting their own precedents to fit their own brand of rough justice.

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news/more-than-1200-nypd-cops-were-hurt-by-suspects-in-last-3-months-of-2023 ("Radical protests, an influx of criminal migrants, bail reform, anti-cop rhetoric and soft-on-crime prosecutors is the brew that fuels the dangerous and disturbing trend, experts told The Post. Police Benevolent Association President Patrick Hendry called the assaults on NYPD cops a 'full-blown epidemic.' He added: 'Even the simplest summonses are turning into all-out brawls. Our justice system needs to send a clear message, once and for all—is [sic] you assault a police officer, you will stay in jail.' The number of cops hurt by suspects surged 20% in 2022, when 4,724 uniformed officers suffered injuries in attacks, compared to 3,933 in 2021. The 5,363 attacks in 2023 was 13% higher than the previous year (4,737).").

At bottom, the status quo is not workable. When, as here, a court of appeals feels no obligation to even cite precedent from this Court, a dramatic change is in order. Officers Wiemann and Walsh should not have to stand trial. This Court should hear this case and enforce its edicts with vigor.

CONCLUSION

For all of the foregoing reasons the United States Supreme Court should hear this case.

Dated: March 7, 2024

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

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_____
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of December, two thousand twenty-three.

PRESENT:

GERARD E. LYNCH,
MICHAEL H. PARK,
Circuit Judges.

OMAR A. WILLIAMS,
District Judge.*

22-1863

Ricky Joshua Benny,

Plaintiff-Appellee,

v.

The City of Long Beach, The Long Beach Police Department, Police Officer Joseph Wiemann, Police Officer Rocco Walsh, Officers John Does 1-10,

Defendants-Appellants.

FOR PLAINTIFF-APPELLEE:

SCOTT A. KORENBAUM, New York, NY (Frederick K. Brewington, Law Offices of Frederick K. Brewington, Hempstead, NY, *on the brief*)

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* Judge Omar A. Williams, of the United States District Court for the District of Connecticut, sitting by designation.

FOR DEFENDANTS-APPELLANTS:

HOWARD M. MILLER (Richard S. Finkel *on the brief*), Bond, Schoeneck & King, PLLC, Garden City, NY

Appeal from a judgment of the United States District Court for the Eastern District of New York (Matsumoto, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Plaintiff Ricky Joshua Benny filed a complaint against the City of Long Beach, the Long Beach Police Department, and individual police officers, bringing claims under 42 U.S.C. §§ 1981 and 1983 as well as under New York state law. Benny alleged claims of racial discrimination, deprivation of rights, privileges, and immunities under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments, false arrest, malicious prosecution, fabrication of evidence, unreasonable and excessive use of force, abuse of process, municipal liability, and failure to intervene. The district court dismissed the City of Long Beach and the Long Beach Police Department as defendants, the § 1983 municipal liability claim, and the § 1981 claim, but denied without prejudice Defendants' motion to dismiss Benny's remaining claims, with leave to file a motion for summary judgment. The individual officer defendants (the "Officer Defendants") moved for summary judgment on Benny's remaining

claims, which the district court granted except for Benny's excessive force and failure to intervene claims, finding genuine material issues of fact in dispute. The Officer Defendants now appeal the district court's denial of qualified immunity at summary judgment on Benny's claims for excessive force and failure to intervene. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

At the outset, Benny argues that we lack subject-matter jurisdiction because the Officer Defendants contest the genuineness of disputed facts identified by the district court, falsely "claim[ing] they have accepted Benny's version of the facts." *See Jones v. Parmley*, 465 F.3d 46, 55 (2d Cir. 2006) ("Although we must examine whether a given factual dispute is material for summary judgment purposes, we may not review whether a dispute of fact identified by the district court is genuine."). But it is the materiality of disputed facts that the Officer Defendants contest, not the existence of a genuine dispute. In any event, here, we view "the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381 (2007). We thus have jurisdiction to review this appeal.

This Court reviews *"de novo* a district court's denial of a summary judgment motion based on a defense of qualified immunity." *Jones*, 465 F.3d at 55. We limit our review to "circumstances where the qualified immunity defense may be established as a matter of law." *Id.*

I. Benny's Excessive-Force Claim

The Officer Defendants argue that they are entitled to qualified immunity. Officers are entitled to qualified immunity "if either (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003). To evaluate whether the Officer Defendants violated clearly established law, we consider "whether the officials' actions violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Jones*, 465 F.3d at 55. "A right is clearly established if . . . a reasonable defendant [would] have understood from the existing law that [his] conduct was unlawful." *Anderson*, 317 F.3d at 197 (internal quotation marks omitted).

The district court properly considered whether the Officer Defendants violated clearly established law. Because it is not clear from the video, we accept as true Benny's allegation that he was not given the opportunity to comply with the Officer Defendants' order to turn around to be handcuffed before he was thrown to the ground. Appellee's Br. at 2, 15. In light of the Officer Defendants' apparent initiation of force without warning or the opportunity to comply, we see no error in the district court's reliance on cases involving the use of excessive force against unresisting individuals. *See*, *e.g.*, *Rogoz v. City of Hartford*, 796 F.3d 236, 240-41 (2d Cir. 2015) (denying immunity when an

officer jumped knee-first on a plaintiff who had laid down on the ground with his hands behind his back); *O'Hara v. City of New York*, 570 F. App'x 21, 23 (2d Cir. 2014) (denying immunity to an officer who "punched [plaintiff] in the face *without* provocation and then proceeded to punch him repeatedly after [he] fell to the ground"); *Calamia v. City of New York*, 879 F.2d 1025, 1035 (2d Cir. 1989) (denying immunity to an officer who shoved the plaintiff to the floor as soon as he answered the door and cuffed him).

Considering the facts in the light most favorable to Benny, the district court identified clearly established law that would place a reasonable officer on notice that his use of force was unlawfully excessive. We thus affirm the district court's denial of the Officer Defendants' motion for summary judgment on the excessive force claim based on qualified immunity.

II. Benny's Failure to Intervene Claim

"It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994). An officer is "under a duty to intercede and prevent fellow officers from subjecting a citizen to excessive force, and may be held liable for his failure to do so if he observes the use of force and has sufficient time to act to prevent it." *Figueroa v. Mazza*, 825 F.3d 89, 106 (2d Cir. 2016).

"Whether the officer had a 'realistic opportunity' to intervene is normally a question for the jury, unless, 'considering all the evidence, a reasonable jury could not possibly conclude otherwise.'" *Terebesi v. Torreso*, 764 F.3d 217, 244 (2d Cir. 2014).

Because a question of material fact exists as to whether the force used was excessive and whether other Officer Defendants failed to intervene, we cannot conclude at this stage of the proceedings that the Officer Defendants are protected by qualified immunity on Benny's failure to intervene claim. We thus affirm the district court's denial of the Officer Defendants' motion for summary judgment on the failure to intervene claim based on qualified immunity.

III. State-Law Claims

Benny raises new state-law claims for assault and battery against the City of Long Beach on appeal. Benny did not assert these claims in his Complaint and raises them for the first time on appeal, so we decline to consider them here. *See Green v. Dep't of Educ.*, 16 F.4th 1070, 1078 (2d Cir. 2021) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.").

* * *

We have considered all of the parties' remaining arguments and find them to be without merit. For the foregoing reasons, we **AFFIRM** the July 27, 2022 order of the district court to the extent that it

denied the Officer Defendants' motion for summary judgment on Benny's excessive force and failure to intervene claims. We decline to consider Benny's remaining state-law claims raised for the first time on appeal.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

[SEAL]

/s/ CATHERINE O'HAGAN WOLFE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

20-CV-1908 (KAM) (ST)

RICKY JOSHUA BENNY,

PLAINTIFF,

–against–

THE CITY OF LONG BEACH, THE LONG BEACH POLICE DEPARTMENT, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10,

Defendants.

MEMORANDUM AND ORDER

MATSUMOTO, United States District Judge:

On April 24, 2020, Plaintiff Ricky Joshua Benny ("Mr. Benny") filed a complaint against the City of Long Beach ("City"), the Long Beach Police Department ("LBPD"), and individual Defendants Police Officer Joseph Wiemann, Police Officer Rocco Walsh, and Officers John Does 1-10 (collectively, "Defendants") pursuant to 42 U.S.C. §§ 1981 and 1983, alleging violations of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments, and New York law. (ECF No. 1, Complaint ("Compl.").) On September 23, 2021, this Court dismissed the City of

Long Beach and the Long Beach Police Department as defendants, as well as the § 1981 claim. Mr. Benny's claims of false arrest, malicious prosecution, abuse of process, fabrication of evidence, excessive force, failure to intervene, racial discrimination, and a deprivation of his First Amendment right to free speech remain. (See *id.* ¶¶ 15, 18, 23, 32, 36, 104.)

Defendants now seek summary judgment, asserting that they are entitled to judgment on the remaining claims, and alternatively, that they are entitled to qualified immunity for acting as reasonable police officers when arresting and using force against Mr. Benny, and allegedly causing physical injuries. Mr. Benny counters that he should not have been arrested, subjected to excessive force and ongoing abuses of process, which he contends were due to his race and his video recordings of Defendants on the night of his arrest. This Court has reviewed three videos that Defendants and Mr. Benny have submitted of the circumstances leading to, and during, Mr. Benny's arrest on December 8, 2018.

For the reasons set forth below, the Defendants' motion for summary judgment is GRANTED in part and DENIED in part.

BACKGROUND

I. FACTUAL BACKGROUND

A. The Parties' Submissions

Defendants filed a statement of material facts that purportedly are not in dispute, pursuant to Local Civil Rule 56.1. (ECF No. 44-7, Defs. Rule 56.1 Statement.) Defendants' "statement of material facts . . . required to be served by the moving party will be deemed to be admitted for the purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party" pursuant to Local Civil Rule 56.1(c). Defendants support their 56.1 Statement with admissible evidence, but do not provide any affidavits or declarations from the Defendant officers themselves. Mr. Benny filed the required counter statement and declarations of himself and his counsel, deposition excerpts and other exhibits in opposition to Defendants' motion for summary judgment. (ECF No. 45-1, Pl. Rule 56.1 Counter Statement; ECF. No. 45-2, Pl. Decl. in Opp'n.)

In support of their summary judgment motion, along with their Rule 56.1 Statement and exhibits, which this Court recounts for completeness, the Defendants also provide three video recordings which the parties agree depict the incident on December 8, 2018, taken by others with Mr. Benny. (ECF No. 44-3, Defs. Mot. for Summ. J., Exhibit A – C (individually "Exhibit A", "Exhibit B", and

"Exhibit C").) Defendants' counsel, Mr. Howard Miller ("Mr. Miller"), filed an affirmation to which he annexed three video exhibits, and designated the Exhibits as follows: Exhibit A is "a copy of a video recording that was provided to me by Mr. Benny's counsel," Exhibits B and C are "two additional videos provided to me by the Corporation Counsel of the City of Long Beach that show the incident recorded in Exhibit 'A' from slightly different angles," and Exhibit D contains "exhibits of Mr. Benny's examination pursuant to Section 50-h of the General Municipal Law." (ECF No. 44-2, Affirmation of Howard Miller, Esq., ¶¶ 2-4 ("Miller Aff.").) Defendants' counsel, Mr. Richard Finkel ("Mr. Finkel"), also filed an affirmation to which he annexed Exhibit "E," described as "a copy of the portion of Mr. Benny's 50-h transcript cited in Defendants' Reply Memorandum of Law." (ECF No. 46-2, Affirmation of Richard Finkel, Esq. ("Finkel Aff.) at ¶¶ 2, 3.)

In opposition to Defendant's motion, Mr. Benny's counsel, Mr. Frederick Brewington ("Mr. Brewington") submitted a declaration, identifying video Exhibit A[1] as a video that Mr. Benny provided to him, which Mr. Brewington then provided to defense counsel. (ECF No. 45-3, Declaration of Frederick Brewington, Esq. in Opposition to Defs. Mot. for Summ. J. ("Brewington Decl. in Opp'n.") at ¶ 3.) Mr.

[1] The videos identified as Exhibit A to the Brewington Declaration and as Exhibit A to the Miller Affirmation are identical, though Mr. Brewington labeled the actual video file, "File 1," in Plaintiff's submissions to the Court. The Court will refer to the video as Exhibit A.

Brewington states the Exhibit A video "contains the fullest depictions of the events giving rise to Mr. Benny's claims" and is a "true and accurate recording of Mr. Benny's arrest." (*Id.* at ¶¶ 4-7.) Mr. Brewington also submitted photos of Mr. Benny following his release by the police, medical records pertaining to Mr. Benny's injuries and treatment rendered following his release, the decision and order from the Hon. William Miller, Long Beach City Court Judge, and the accusatory instruments Defendants filed against Mr. Benny. (*Id.* at ¶¶ 7-11.)

In reviewing the parties' Rule 56.1 statements, the Court has considered and relies on the undisputed facts, and the three video recordings which the parties agree depict the December 8, 2018 incident giving rise to the action. Because this Court relies on the video evidence in deciding Defendants' instant motion, the Court will also recount the videos for completeness, including portions that contradict the parties' accounts of the night. Where facts, even with the available video evidence, are in dispute, the Court considers the facts in the light most favorable to Mr. Benny, the nonmoving party, while resolving all reasonable inferences and ambiguities against the moving party. *See Flanigan v. Gen. Elec. Co.,* 242 F.3d 78, 83 (2d Cir. 2001). The Court also considers if the disputed fact is supported by admissible evidence and is material. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

B. The Incident of December 8, 2018

On December 8, 2018, at approximately 3:00 to 3:30 a.m., Mr. Benny, a 25-year-old African-American and Hispanic-American male, was involved in an incident with the individual LBPD Defendants outside an establishment known as Whale's Tale located in Long Beach, New York.[2] Mr. Benny was with a group of his friends outside of Whale's Tale after employees instructed all parties to leave the premises. (*See* Defs. Rule 56.1 Statement, ¶¶ 1-2; *see also* Pl. Rule 56.1 Statement, ¶¶ 1-2.) The individual LBPD Defendants were at the scene because of a fight. (*See* Defs. Rule 56.1 Statement, ¶ 3; *see also* Pl. Rule 56.1 Counter Statement, ¶ 2.) In Mr. Benny's account of the night, the disturbance reportedly involved "Caucasian persons" who were fighting; Mr. Benny alleges that those Caucasian persons were confronted by the police but were permitted to leave without charges. (Pl. Rule 56.1 Counter Statement, ¶ 6.)

As Mr. Benny and his friends, including Cedric Coad ("Mr. Coad") and Rashawn Weed ("Mr.

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[2] Defendants' Rule 56.1 Statement alleged Mr. Benny was 27 years old and that the incident occurred on December 18, 2018. Mr. Benny's Rule 56.1 Counter Statement clarifies he was 27 years old at the time of the filing of his Complaint—roughly a year and a half after the police encounter here—and that the incident occurred on December 8, 2018, not December 18, 2018. Mr. Benny also clarifies the establishment's name was Whale's Tale, and not Wales and Tales. (Pl. Rule 56.1 Counter Statement, ¶¶ 1-2. These minor disputed facts are not material for purposes of deciding Defendants' motion for summary judgment.

Weed"), also African-American males, proceeded down the street and waited for their ride-share car service, the three men and the officers engaged with each other. (*See Id.* at ¶ 3; ECF. No. 45-2, Pl. Decl. in Opp'n. at ¶¶ 2-5; *see also* Defs. Rule 56.1 Statement, ¶ 2-3.) Mr. Benny states that he was approached by the officers as he, Mr. Coad, and Mr. Weed proceeded down the street, whereas Defendants assert that Mr. Benny first approached the officers as they were in the process of arresting an individual. (*See* Pl. Rule 56.1 Counter Statement, ¶ 3; *see also* Defs. Rule 56.1 Statement, ¶¶ 3.) Mr. Benny claims that the police had first focused on Mr. Coad, because Mr. Coad had raised his hands as protestors had done during the Black Lives Matter movement, and this "seemed to enrage the officers," who then "approached Mr. Coad, grabbed him from behind, and forcefully body slammed [Mr. Coad] to the ground." (Pl. Rule 56.1 Counter Statement, ¶ 4; Pl. Decl. in Opp'n. at ¶¶ 5-6.)

The Defendants began to place Mr. Coad under arrest, with some of the officers surrounding Mr. Coad and others keeping bystanders, like Mr. Benny and Mr. Weed, at a distance from where Mr. Coad's arrest was occurring. (Pl. Rule 56.1 Counter Statement, ¶ 4-5.) Mr. Coad made no effort to resist the officers and remained on the ground as officers placed handcuffs on him.[3] (Pl. Decl. in Opp'n. at ¶¶ 6-8.) It is undisputed that Mr. Benny repeatedly

[3] Mr. Benny's sworn 50-h hearing testimony states that when he started recording, the police "[told] everybody to give them space," and "not to be so close" to where the officers were arresting Mr. Coad. (Miller Aff., Exhibit D at 20-21.)

inquired of the officers why they were arresting Mr. Coad and recorded the encounter on his cellphone. (Pl. Rule 56.1 Counter Statement at ¶¶ 5-10.) The officers did not respond to Mr. Benny's inquiries regarding Mr. Coad's arrest. (*Id.*) Instead, they instructed Mr. Benny to leave the area and "back up" across the street. (*See* Pl. Rule 56.1 Counter Statement, ¶ 6; *see also* Defs. Rule 56.1 Statement, ¶ 4.)

Mr. Benny declares that the officers told him to back up and he complied, eventually standing on the sidewalk across the street from Mr. Coad's arrest. (Pl. Decl. in Opp'n. at ¶ 7.) Mr. Benny asked the officers why he and his friends were being treated differently from the people engaged in the fight, as they "all grew up in the Long Beach community," to which an officer responded "yea, we all did, now back up." (*Id.* at ¶ 8.) Mr. Benny was directed to the opposite side of the street from where Mr. Coad had been arrested and stood approximately twenty feet away. (*Id.* at ¶ 9.) Mr. Benny declares that he was "physically shoved backward by police" when he stepped off the sidewalk, so he stepped back onto the sidewalk, but continued to demand their names and badge numbers. (*Id.* at ¶¶ 10-11.)

Mr. Benny acknowledges that during this encounter, he repeatedly yelled at the officers to request their badge numbers and asked for an explanation for Mr. Coad's arrest. (*See* Pl. Rule 56.1 Counter Statement, ¶¶ 5,8,9; Pl. Decl. in Opp'n. at ¶ 9; *see also* Defs. Rule 56.1 Statement,

¶5.) It is undisputed that as Mr. Benny and other bystanders continued to inquire and record with their cellphones, an officer gave Mr. Benny a "final warning" to leave the area. (*See* Pl. Rule 56.1 Counter Statement, ¶6; *see also* Defs. Rule 56.1 Statement, ¶6.) Mr. Benny, however, denies that he refused to leave the area and asserts that the "final warning" was "unlawful" because it followed his repeated requests for identifying information from the officers. (*See* Pl. Rule 56.1 Counter Statement, ¶6.) Mr. Benny also denies disregarding any order including a "final warning," or that he refused to leave the area. (Pl. Rule 56.1 Counter Statement, ¶7.)

Mr. Benny was placed under arrest and charged with obstructing governmental administration, disorderly conduct, and resisting arrest. (*See* Pl. Rule 56.1 Counter Statement, ¶9; *see also* Defs. Rule 56.1 Statement, ¶¶8-9.) Defendants state that after Mr. Benny disregarded a final warning, "the police officers attempted to arrest him." (Defs. Rule 56.1 Statement at ¶8.) They characterize Mr. Benny's actions as resisting arrest, as he "caus[ed] a brief struggle on the ground before his arrest [sic]." (*Id.* at ¶9.)

Mr. Benny disputes the account of his arrest and says that he was "told he was under arrest and ordered to turn around" but "before [he] could comply," he was "grabbed from behind, picked up in a bear-hug and viciously slammed to the ground" by an officer he cannot identify. (Pl. Decl. in Opp'n. at ¶13; Pl. Rule 56.1 Counter Statement, ¶11.) Mr. Benny contends that he was not given sufficient

time to submit to the arrest before the officer's initial physical contact with him. He declares that he did not know who grabbed him and that he "reflexively attempted" to stand up and was immediately "body slammed" again. (Pl. Decl. in Opp'n. at ¶ 13.) Although Defendants contend that Mr. Benny resisted arrest, Mr. Benny denies that he provided any resistance or "caus[ed] a brief struggle on the ground before his arrest"; instead, Mr. Benny declares that he was "knocked unconscious for brief period of time." (*See* Pl. Rule 56.1 Counter Statement, ¶ 11-12; *see also* Defs. Rule 56.1 Statement, ¶ 9.) Mr. Benny also asserts that he "never pushed, shoved or hit any police officer." (Pl. Rule 56.1 Counter Statement at ¶ 12.)

Mr. Benny declares that, since, and because of, his arrest by Defendants, he has experienced significant "mental and physical injuries." (*Id.* at ¶¶ 15-20; Pl. Decl. in Opp'n. at ¶¶ 16-20.) Mr. Benny submitted photographs showing cuts and abrasions on his head and face and medical records that he allegedly sustained during the incident. (Brewington Decl. in Opp'n., Exhibits B and C.) Mr. Benny further alleges his arrest impacted his career as a musical artist by compelling him to cancel a scheduled performance and rendering him "unable to make music for over a year." (Pl. Decl. in Opp'n. at ¶ 22.)

Mr. Benny states he wants the Defendants "to address the clear difference in their treatment of [Mr. Benny and his friends], who had done nothing wrong, and the White people who were actually in the fight." (*Id.* at ¶ 23.)

A. Video Exhibits

The parties agree that Exhibit A, which is approximately three minutes and fifty-three seconds long, is "the fullest depiction of the events giving rise to Mr. Benny's claims." (Brewington Decl. in Opp'n. at ¶ 4; *see generally* Exhibit A.) Exhibit B and Exhibit C, provided by Defendants' counsel, "show the incident recorded in Exhibit 'A' from slightly different angles." (Miller Aff. at ¶ 2.) Exhibit B, which is approximately two minutes and three seconds long, shows a different angle of the physical interactions between Mr. Benny and Defendants after he is told he is under arrest. (*See generally* Exhibit B.) Exhibit C, which is approximately forty-two seconds long, shows the multiple bystanders and officers at the scene, the distance between where the Defendants are effecting the arrest of Mr. Coad and the bystanders, and ends as Mr. Benny reapproaches the officers. (*See generally* Exhibit C.) The Court will primarily recount Exhibit A and portions of Exhibit B for background on Mr. Benny's arrest.

The first minute of Exhibit A shows that the Defendants, to secure the area in which multiple bystanders had gathered, repeatedly ask Mr. Benny and other bystanders to "back up" and "clear the area."[4] (Exhibit A, 00:00-00:58.) Exhibit A starts with a Defendant officer telling Mr. Benny

[4] In Exhibit A, various individual Defendants direct Mr. Benny and others to "back up" at least ten times before Mr. Benny ultimately is told he is under arrest. (Exhibit A, 00:00-00:58.)

and the bystanders, including the individual recording Exhibit A, "He's under arrest and that's it."[5] (*Id.* at 00:00-00:04.) The individual recording video Exhibit A says, "For what? For what? He didn't do nothing. He was walking away." (*Id.* at 00:04-00:07.) At least one Defendant officer responds with "back up, back up," including, "back up across the street." (*Id.* at 00:07-00:28.) The individual recording the video responds, "I'm backing up, I'm backing up" while others, including Mr. Benny, though it is not clear as Mr. Benny is off camera in the recording at this time, also ask, "For what? For what?" (*Id.*) The Defendant officer continues to instruct the bystanders to move back while saying, "let's go, gentlemen," and "sir, back up across the street" and then, "thank you, thank you," because the men appear to be moving backward. (*Id.*)

Mr. Benny, then, clearly appears in the video to reapproach the Defendants and says, "we all grew up over here..." to which an individual Defendant officer responds, "we all did." (*Id.* at 00:27-00:33.) Mr. Benny responds, "Exactly, exactly—so why-then why you feel differently?"[6] (*Id.*) Mr. Benny again walks into the street toward the officers, where the Defendants had just asked everyone to "back up," and walks directly up to a Defendant

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[5] The officers are presumably talking about Mr. Coad.

[6] In their motion papers, the parties do not identify who any of the individuals are in the Exhibits. The Court will presume that Mr. Benny is the individual in the green toned jacket.

officer. (*Id.* at 00:33-00:40.) Mr. Benny says to the Defendant officer, who continues to instruct him to move back, "you're touching me, I'm not touching you," and the Defendant officer responds, "I can touch you," as he walks away. (*Id.* at 00:40-00:42). Mr. Benny then reapproaches the Defendant officer, once again, and says, "Exactly, you're touching me." (*Id.*) At this point, the Defendant officer uses his hand to push Mr. Benny back and another officer swiftly approaches Mr. Benny and yells, "Stay on the sidewalk." (*Id.* at 00:42-00:46). Mr. Benny, then, increases the volume of his voice, and the verbal exchange between Mr. Benny and the Defendants begin to overlap.

Defendants stand in front of Mr. Benny and direct the onlookers, including Mr. Benny, to "clear the area right now" no less than seven times with Mr. Benny repeatedly refusing and responding, "no, I have the right." (*Id.* at 00:46-01:06.) During this time, one of Mr. Benny's friends tells Mr. Benny "come on" in an apparent attempt to get Mr. Benny to comply and step away, and Mr. Benny also responds "no" to his companion. (*Id.*) When Defendants thereafter state, at least three times, that this is the "last warning" to "clear the area" and that Mr. Benny is "acting disorderly," Mr. Benny responds with several "no"s and "I'm not, though." (*Id.* at 01:06-01:10.) It is during this last moment of Mr. Benny's noncompliance with Defendants' orders that Defendants advise Mr. Benny that he is under arrest. (*Id.* at 01:13.) Exhibit B and Exhibit C also show that Mr. Benny defied repeated orders to step back and clear the area

while continuing to yell at the Defendants who were attempting to effect an arrest and control the crowd. (Exhibit B, 00:01-00:13; Exhibit C, 00:12-00:25.)

The actions of Mr. Benny and the Defendant officers in the seconds leading up to Mr. Benny's actual arrest are not clearly discernable in video Exhibits A through C. The camera in Exhibit A is pointed at a Defendant officer who informs Mr. Benny that he is under arrest and directs him to turn around. (Exhibit at 01:14-01:15.) The camera does not show Mr. Benny, so it is unclear what Mr. Benny was doing in response, or how close Mr. Benny was to the officer. (*Id.*) Approximately one second after the Defendant officer informed Mr. Benny he was under arrest and directed him to turn around, the camera shows that either the same officer or another officer (it is not clear in any of the videos) wraps his arms around Mr. Benny and attempts to physically place him under arrest. (*Id.* at 01:15-01:16.) In Exhibit B, the video recording also does not capture what happens between the time when a Defendant officer tells Mr. Benny he is under arrest and when an officer physically attempts to arrest him. (Exhibit B, 00:13-00:19.)

When the camera in Exhibit A's video is pointed at Mr. Benny again, it shows Mr. Benny's hands and knees momentarily make contact with the ground after the Defendant officer's initial attempt to physically arrest him. (Exhibit A, 01:17-01:18.) Mr. Benny then to spins and breaks free of the officer's grasp. (*Id.*) Then Mr. Benny quickly stands and at least two officers scuffle with Mr. Benny

before they attempt and successfully bring Mr. Benny's body onto the ground. (*Id.* at 01:19-01:26.) The amount of force used to bring Mr. Benny to the ground is not clear from the video in Exhibit A.

In Exhibit B, the video recording's camera angle confirms that Mr. Benny spins and breaks free of the Defendant officer's initial attempt to effect Mr. Benny's arrest before Mr. Benny's knees momentarily make contact with the ground and he stands up. (Exhibit B, 00:17-00:21.) At this time, other voices can be heard saying "chill," although it is not clear who the statements are directed to and who is making the statements. (*Id.* at 00:21-00:28.) Exhibit B also shows that Mr. Benny and the officers scuffle for seconds as they push one another, until the officers bring Mr. Benny to the ground face down. (*Id.*)

Once Mr. Benny is on the ground, at least two officers are holding him down, while his hands are placed behind his back, while the officers attempt to handcuff him. (Exhibit A, 01:26-01:48.) While Mr. Benny's face and body are fully on the sidewalk, a Defendant officer has his knee on Mr. Benny's left cheek for approximately twenty seconds, but the amount of weight applied by the officer to Mr. Benny's cheek is not clear.[7] (*Id.*) For approximately twenty seconds, while the officers attempt to handcuff Mr. Benny, other bystanders ask "why are you on his face" until a Defendant

[7] It is unclear to the Court from the video which officer has his knee on Mr. Benny's cheek and whether it is the same officer who initially attempted to restrain Mr. Benny with his arms.

officer moves his knee to Mr. Benny's back. (*Id.*) Another Defendant officer asks the individual recording the video to "back up" while the individual yells that the Defendants should not have had a knee on Mr. Benny's face. (*Id.* at 01:48-02:18.)

The rest of the Exhibit A video, after the Defendants have placed Mr. Benny in handcuffs, is not clear. The individual recording the Exhibit A video backs away from the Defendants effecting Mr. Benny's arrest as a Defendant officer directs his flashlight in the direction of the individual. (*Id.* at 02:20-02:29.) The individual recording the video asks Mr. Benny for his phone code, and Mr. Benny intermittently responds from the ground. (*Id.* at 02:21-03:20.) As Mr. Benny is taken to the police car, another bystander is heard saying, "he didn't do nothing" and "please" to the Defendants as another voice, apparently from Mr. Benny's direction, urges this person to "relax." (*Id.* at 03:21-03:53.)

II. PROCEDURAL BACKGROUND

Mr. Benny commenced this action on April 24, 2020 and filed proof of service on the Defendants. (*See generally,* ECF No. 1, Compl.; ECF Nos. 8, 10.) On July 10, 2020, Defendants' counsel filed a letter with the Court seeking a pre-motion conference to file a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and the Court's individual motion practices. (ECF No. 13, Defs. Letter.)

On September 4, 2020, Defendants served a motion to dismiss pursuant to Rule 12(b)(6). Defen-

dants moved to dismiss on the following bases: (1) the Long Beach Police Department is not a proper defendant, (2) Mr. Benny's Section 1981 claim is subsumed by his Section 1983 claims, (3) the Complaint fails to adequately plead a *Monell* claim, (4) the Complaint fails to state a claim for excessive force and failure to intervene, (5) the Complaint fails to state claims for false arrest, malicious prosecution, and abuse of process claims, (6) the race discrimination claim should be dismissed for failure to state a claim, (7) the Complaint fails to state a claim under the First Amendment, and (8) Mr. Benny's requests for punitive damages against the city are not viable. (ECF No. 24, Defs. Mot. to Dismiss.) In Defendants' moving submission for their motion to dismiss, Mr. Miller filed, an affirmation, identical to the affirmation he filed for the instant summary judgment, to which he annexed three video Exhibits and represented each as follows: Exhibit A is "a copy of a video recording that was provided to me by Mr. Benny's counsel that is referenced in paragraph '31' of the Complaint," and Exhibits B and C are "two additional videos provided to me by the Corporation Counsel of the City of Long Beach that show the incident recorded in Exhibit 'A' from slightly different angles." (ECF No. 23, Affirmation of Howard Miller for Defs. Mot. to Dismiss, at ¶¶ 2, 3.)

Mr. Benny filed a memorandum in opposition to the motion to dismiss on October 19, 2020, along with a declaration from Mr. Brewington. (*See* ECF No. 25, Brewington Decl. in Opp'n. to Mot. to Dismiss); *see also* ECF No. 26, Pl. Opp'n. to Mot. to

Dismiss.) Mr. Brewington's declaration stated that Mr. Benny agreed: (1) the Long Beach Police Department was not a proper defendant, (2) that all Mr. Benny's Section 1981 claims were subsumed by his section 1983 claims, and (3) punitive damages are unavailable against the City.[8] (Brewington Decl. in Opp'n. to Mot. to Dismiss, ¶ 8.)

Given Mr. Benny's agreement that certain of his claims were not viable, the Court considered those claims withdrawn, and accordingly 1) dismissed the Long Beach Police Department as a defendant, 2) dismissed Mr. Benny's Section 1981 claims, and 3) to the extent Mr. Benny sought punitive damages against the City of Long Beach, the requested relief was denied and stricken. (*See* Defs. Mot. to Dismiss; *see also* ECF No. 38, Memorandum and Order on Defs. Mot. to Dismiss at 13.) The Court considered only Mr. Benny's remaining claims. (*Id.*)

The Court granted in part and denied in part Defendants' motion to dismiss. (Memorandum and Order on Defs. Mot. to Dismiss at 32-33.) The Court dismissed Mr. Benny's Fifth Count, the claim for municipal liability against the City of Long Beach

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[8] The Court notes that in Mr. Benny's motion to dismiss briefing, Mr. Benny did not defend against, and instead conceded, Defendants' arguments regarding his claims against the LBPD, claims pursuant to § 1981, and any claim for punitive damages against the City, and thus the Court considered those claims to be abandoned and dismissed them. (ECF No. 38); *see e.g., Jennings v. Hunt Companies,* 367 F. Supp. 3d 66, 69 (S.D.N.Y. 2019) (dismissing claims where plaintiff acknowledged the issues could not survive and mounted no defense of them).

pursuant to Section 1983, for failure to state a claim. (*Id.*) The Court denied without prejudice Defendants' motion to dismiss Mr. Benny's excessive force, failure to intervene, false arrest, malicious prosecution, abuse of process, race discrimination, and First Amendment claims, with leave to file a motion for summary judgment. (*Id.*)

The Court's opinion deciding Defendants' motion to dismiss described the unproductive and drawn-out process in which Mr. Benny's counsel and Mr. Benny failed to clarify which video Mr. Brewington relied on in drafting his complaint and noted that consequently the video evidence could not be considered in a motion pursuant to Rule 12(b)(6). Because the Court further noted that any "available, uncontested video evidence of the events that gave rise to the action" could be considered in a motion for summary judgment (*id.* at 31), the Court granted leave to the parties to move for summary judgment pursuant to Federal Rules of Civil Procedure 56 on the remaining, undismissed claims. (*Id.*) In considering a motion for summary judgment, the Court stated it would review the video evidence previously submitted by the parties, along with any other relevant, admissible evidence either party submitted into the record. (*Id.* at 32.) The Court notes that no new video was ever provided by Mr. Brewington, but the parties have nonetheless consented to the Court considering the three videos designated Exhibits A through C in support of the Defendants' motion for summary judgment and the evidence in their respective filings in support of, or in opposition to, summary judgment.

On November 9, 2021, pursuant to Federal Rules of Civil Procedure 56, Defendants filed a motion for summary judgment to dismiss Mr. Benny's remaining claims. (*See generally,* ECF No. 44-1, Defs. Mot. for Summ. J.) Defendants move for summary judgment on the following bases: (1) the undisputed evidence demonstrates there was no excessive force or failure to intervene, and if the excessive force claim survives summary judgment, Defendants are entitled to qualified immunity (Counts III and VI); (2) the false arrest, malicious prosecution, and abuse of process claims should be dismissed because the video evidence establishes the existence of probable cause to arrest and prosecute Mr. Benny (Count III and IV); (3) the Equal Protection claim based on race discrimination should be dismissed because the evidence is insufficient for a jury to find that officers acted with racial animus (Count II); and (4) the First Amendment claims should also be dismissed because the video evidence establishes no infringement of Plaintiff's exercise of free speech (Count II). (*Id.*) In Defendants' moving submission for their motion for summary judgment, Defendants' counsel, Mr. Miller, filed an affirmation to which he annexed three video exhibits (Exhibits A-C) which were the original exhibits submitted with the Defendants' motion to dismiss. (Miller Aff., Exhibits A-C.) Mr. Miller also filed an affidavit to which he annexed Exhibit "D" as excerpts from "Mr. Benny's examination pursuant to Section 50-h of the General Municipal Law." (ECF No. 44-6, Miller Aff. at ¶ 4.) Mr. Benny's sworn testimony in the Exhibit D excerpt describes Mr. Benny's view of

the officers approaching him and his friends, the abrupt arrest of Mr. Coad, and the officers' instructions to the crowd to move back to provide space to effect Mr. Coad's arrest. (Miller Aff., Exh. D at 19-21.) Defendants also filed the required statement of undisputed material facts pursuant to Local Civil Rule 56.1 of this Court. (*See generally* Defs. Rule 56.1 Statement.)

On November 19, 2021, Mr. Benny filed the required Local Civil Rule 56.1 response and counter-statement, responding to the Defendants' statement of undisputed facts including separate and concise paragraphs of disputed material facts. Mr. Benny's 56.1 Statement cites to his declaration and the allegations in his complaint. (*See generally* Pl. Rule 56.1 Statement; Pl. Decl. in Opp'n.)

Mr. Benny's counsel, Mr. Brewington, also submitted a declaration in opposition to Defendants' motion for summary judgment, providing information regarding the video submission by plaintiff's counsel (also marked as, and identical to, Defendants' Exhibit A) and identifying the foregoing Exhibit A as "contain[ing] the fullest depictions of the events giving rise to Mr. Benny's claims" and representing Exhibit A as a "true and accurate recording of Mr. Benny's arrest." (*See generally* Brewington Decl. in Opp'n.) Mr. Brewington confirms Exhibit A (the longest of the three videos Defendants also submitted in their exhibits) is a "true and accurate copy of the video recording of Plaintiff's arrest. (*Id.* at ¶ 7.) He also submits "true and accurate" copies photos of Mr. Benny's injuries that were taken following his release by the police

and medical records pertaining to Mr. Benny's injuries and treatment rendered after his release. (*Id.* at ¶¶ 8-9.) Mr. Brewington also identifies Exhibit D as a "true and accurate copy of the Decision and Order of Hon. William Miller" "dismissing all three accusatory instruments and all charges" against Mr. Benny, and Exhibit E as a "true and accurate copy of the criminal complaints in the form of Misdemeanor Informations and a Violation Information," signed by Officer Joseph Wiemann on December 8, 2018. (*Id.* at ¶¶ 10-11.)

Mr. Benny also filed an opposing memorandum of law. (*See generally* ECF No. 45, Pl. Mem. in Opp'n.) Mr. Benny first contends that Defendants are not entitled to an adverse inference regarding the still unidentified and unproduced video upon which Mr. Benny's counsel relied in drafting the complaint. (Pl. Mem. in Opp'n, 5-7.) Mr. Benny also argues that a jury could find that Mr. Benny was unlawfully arrested, subjected to excessive force, maliciously prosecuted, and that other officers failed to intervene and are not entitled to qualified immunity. (*Id.* at 7-20.) Mr. Benny also asserts that Defendants did not move for summary judgment on Mr. Benny's fabrication of evidence claim, and that he sufficiently establishes the claim of fabrication of evidence. (*Id.* at 12-13.) Mr. Benny alleges that his Equal Protection and First Amendment claims are supported by his declarations and the video evidence. (*Id.* at 21-24.)

Defendants filed a reply memorandum in further support of their motion for summary judgment. (ECF. No 46, Defs. Reply Br.) Defendants' reply

contends that: (1) the evidence and applicable law establish that the officers' actions did not constitute excessive force (*id.* at 2); (2) the officers are entitled to qualified immunity (*id.* at 3-4); (3) there was probable cause to arrest Mr. Benny for "either or both disorderly conduct and obstruction of governmental administration, and/or for resisting arrest" based on the video evidence in the record (*id.* at 4); (4) given that the video evidence establishes probable cause, Mr. Benny's malicious prosecution claim should be dismissed (*id.* at 6), and (5) Mr. Benny's abuse of process, First Amendment, Equal Protection, and fabrication of evidence claims fail because he merely relies on his complaint allegations but failed to present evidence that created a disputed fact regarding his claims. (*Id.* at 7-10.) Defendants' counsel, Mr. Finkel, filed an affidavit to which he annexed Exhibit "E," identified as "a copy of the portion of Mr. Benny's 50-h transcript cited in Defendants' Reply Memorandum of Law." (Finkel Aff. at ¶¶ 2-3.) Mr. Benny's sworn testimony at his 50-h hearing states that as he faced the Defendant officers as they were approaching him, he did not see or know who had "slammed" him to the ground from behind, and that he got back up before he was "slammed to the ground" again. (Finkel Aff., Exh. E at 26-28.) Mr. Benny testified at this 50-h hearing that at the time the officers were approaching him, Mr. Benny and six or seven of his friends and other individuals were also on the sidewalk behind him. (*Id.* at 26-28.)

LEGAL STANDARD

I. SUMMARY JUDGMENT

Summary judgment is appropriate "only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law." *See* Fed. R. Civ. P. 56(a); *Kaytor v. Electric Boat Corp.,* 609 F.3d 537, 545 (2d Cir. 2010). The governing law in each case determines which facts are material, and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, the Court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *See Zalaski v. City of Bridgeport Police Dep't,* 613 F.3d 336, 340 (2d Cir. 2010).

The moving party bears the initial burden of demonstrating the absence of any genuine dispute or issue of material fact by pointing to evidence in the record, "including depositions, documents . . . [and] affidavits or declarations," Fed. R. Civ. P. 56(c)(1)(A), "which it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The moving party may support its assertion that there is no genuine dispute by "showing . . . that [the] adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B).

Once the moving party has fulfilled its preliminary burden, the onus shifts to the nonmoving party to raise the existence of a genuine dispute of material fact. Fed. R. Civ. P. 56(c)(1)(A); *Anderson*, 477 U.S. at 252. A genuine dispute of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248; *accord Benn v. Kissane*, 510 F. App'x 34, 36 (2d Cir. 2013); *Gen. Star Nat'l Ins. Co. v. Universal Fabricators, Inc.*, 585 F.3d 662, 669 (2d Cir. 2009); *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008); *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005). Courts must "consstru[e] the evidence in the light most favorable to the non-moving party and draw[] all reasonable inferences in its favor." *Fincher v. Depository Trust & Clearing Corp.,* 604 F.3d 712, 720 (2d Cir. 2010) (quoting *Allianz Ins. Co. v. Lerner,* 416 F.3d 109, 113 (2d Cir. 2005)).

To defeat a motion for summary judgment, the nonmoving party must identify probative, admissible evidence in the record from which a reasonable fact-finder could find in his or her favor. *Anderson,* 477 U.S. at 256–57. The non-movant must do more than simply show that there is some "metaphysical doubt as to the material facts" and, toward that end, "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec.,* 475 U.S. at 586. The nonmoving party may not rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Knight v. U.S. Fire Ins. Co.,* 804 F.2d 9, 12 (2d Cir. 1986). Summa-

ry judgment "therefore requires the nonmoving party to go beyond the pleadings and by [his or] her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324.

Local Civil Rule 56.1 requires that the movant also file a "short and concise statement . . . of the material facts as to which the moving party contends there is no genuine issue to be tried," and each proffered fact will be deemed admitted "unless specifically controverted by a correspondingly numbered paragraph[.]" Loc. Civ. R. 56.1(a)-(c). Each statement must be supported by a citation to admissible evidence. *Id.* at 56.1(d). The response by the non-moving party must be supported by a "citation to evidence which would be admissible" as required by Federal Rule of Civil Procedure 56(c). *Id.* A reviewing court "may not rely solely on the statement of undisputed facts[,] . . . [i]t must be satisfied that the citation to evidence in the record supports the assertion." *Vermont Teddy Bear Co. v. 1-800 Beargram Co.,* 373 F.3d 244 (2d Cir. 2004) (citing *Giannullo v. City. of New York,* 322 F.3d 139, 143 n.5 (2d Cir. 2003)). A district court "must ask not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Simpson v. City of New York,* 793 F.3d 259, 265 (2d Cir. 2015). It is not appropriate for the Court to make credibility assessments or resolve conflicting versions of the events pre-

sented; these are essential questions for a jury. *See id.*

II. VIDEO EVIDENCE

In certain circumstances, video evidence may be so clear and unambiguous that a court deciding a summary judgment motion may rely on the video and need not give credit to assertions that are "blatantly contradicted" by the video evidence. *See Scott v. Harris,* 550 U.S. 372, 378-80 (2007). In *Scott,* the Supreme Court concluded that, at summary judgment, the appellate court afforded undue weight to the non-movant's account of his cautious and careful driving, despite contradicting video evidence that "more closely resembles a Hollywood-style car chase of the most frightening sort . . . ." *Id.* at 380. In discussing the parties' burdens, the *Scott* court stated: "When 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." *Id.; see also Pratt v. Nat'l R.R. Passenger Corp.,* 709 Fed. App'x 33, 34 (2d Cir. 2017) (concluding that "objective video and data evidence furnished by the defendants on summary judgment was sufficient to overcome all contrary eyewitness testimony and preclude any genuine dispute of material fact as to the train's speed and horn blasts.")

On the other hand, if the video evidence does not conclusively resolve material fact issues, summary

judgment based on that evidence alone is not appropriate. *See Hulett v. City of Syracuse,* 253 F. Supp. 3d 462, 482 (N.D.N.Y. 2017) (stating that "while the video evidence submitted by the parties will certainly be considered and carefully reviewed at this juncture, *Scott* is best understood to permit the summary adjudication of a plaintiff's civil rights claim only in those exceptional cases where the video evidence in the record is sufficient to 'blatantly contradict[]' one party's version of events"); *Zachary v. City of Newburgh,* No. 13-cv-5737 (VB), 2016 WL 4030925, at *8 (S.D.N.Y. July 25, 2016) ("Although the video evidence casts significant doubt on plaintiff's version of the events . . . a reasonable juror could [still] credit plaintiff's account."); *Rasin v. City of New York,* No. 14-cv-5771 (ARR) (CLP), 2016 WL 2596038, at *7 (E.D.N.Y. May 4, 2016) ("The parties have testified to two different stories, and the video evidence is not so conclusive as to determine this factual dispute as a matter of law.")

As the Court will further discuss below, the video evidence in this case is not nearly so clear-cut as to all of Plaintiff's claims as the video described in *Scott,* and, in some instances, portions of the video appear to contradict both parties' accounts of Mr. Benny's arrest. Although the parties submit the same video, Exhibit A, in support of their positions, and do not dispute the accuracy of any of the videos, they advance conflicting interpretations of whether aspects of the videos require a fact-finder to resolve disputes regarding certain claims. *See Mack v. Howard,* No. 11-cv-303-A (RJA), 2014 WL

2708468, at *3 (W.D.N.Y. June 16, 2014) (denying summary judgment where the "case boil[ed] down to two credible interpretations of the same video."). As discussed below, the videos are clear and unambiguous as to some of Plaintiff's claims and the Court need not resolve the parties' conflicting assertions that are inconsistent with the video evidence.

As a threshold matter, the Court will not draw any adverse inference with regard to the unproduced video originally described and referenced by Mr. Brewington as providing evidentiary support for Mr. Benny's complaint. After extensive delays and submissions by the parties in response to orders of this Court seeking to identify and produce that video, Mr. Benny and his counsel submitted a video designated by both parties as Exhibit A, and which is identical to Defendant's Exhibit A, and the Court will refer to the video as Exhibit A. The parties agree that Exhibit A, which is at three minutes and fifty-eight seconds long, is accurate and "the fullest depiction of the events giving rise to Mr. Benny's claims." (Brewington Decl. in Opp'n at ¶ 4.)

Defendants argue that to "the extent the videos before the Court on this motion somehow do not resolve all issues of fact, an adverse inference that the missing footage would have been unfavorable to Mr. Benny on all remaining claims is warranted." (Defs. Br. for Summ. J. at 5.) Pursuant to the Second Circuit's decision in *Residential Funding Corp. v. DeGeorge Financial Corp.*, a party seeking an adverse inference instruction is required only to demonstrate:

> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense

306 F.3d 99, 107 (2d Cir. 2002). Under this standard, a movant is not required to demonstrate that the spoliator acted with a "culpable state of mind"; a court has discretion to sanction a party for even negligent spoliation. *See Residential Funding,* 306 F.3d at 108.

In this case, Mr. Brewington has repeatedly represented to this Court that he "remain[s] at a loss as to who showed [the video footage]" to him and that he provided to Defendants' counsel the video that Mr. Benny provided to him. (Brewington Decl. in Opp'n. at ¶¶ 2-11; ECF No. 37-1, Second Brewington Decl. in Opp'n to Defs. Mot. to Dismiss at ¶ 4.) Although the elusive footage discussed by Mr. Benny and his counsel delayed much of this Court's prior adjudication of Defendant's motion to dismiss, Mr. Brewington has stated that he does not have possession or control of the initial video that he viewed and used to prepare the complaint. (Brewington Decl. in Opp'n. at ¶¶ 2, 4.) There is no evidence before this Court, from Defendants or otherwise, that there was a video in Mr. Brewington's actual possession that was destroyed due to a culpable mind or negligence. Thus, the Court declines

to apply any adverse inference, especially because both parties agree that there are these "true and accurate" video recordings of Mr. Benny's arrest, specifically Exhibits A through C. (*Id.* at ¶¶ 7-9.) The Court will consider the videos designated Exhibits A through C and the other evidence submitted by parties in deciding Defendants' motion for summary judgment.

DISCUSSION

I. SECTION 1983 AND QUALIFIED IMMUNITY

Section 1983 of Title 42 provides in relevant part that:

> 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 . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan,* 443 U.S. 137, 144 n.3 (1979); *see also Thomas v. Roach,* 165 F.3d 137, 142 (2d Cir. 1999). To maintain a Section 1983 claim, Mr. Benny must satisfy two elements. First, "the conduct complained of must have been committed by a person

acting under color of state law." *Pitchell v. Callan,* 13 F.3d 545, 547 (2d Cir. 1994) (citation omitted). It is undisputed that the Defendants were acting under color of state law during Mr. Benny's arrest and other alleged acts and omissions relating to his claims. Second, "the conduct complained of must have deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Id.; see also McCugan v. Aldana-Brnier,* 752 F.3d 224, 229 (2d Cir. 2014). Where, as here, Mr. Benny seeks monetary damages, the "personal involvement of defendants in alleged constitutional deprivations is a prerequisite" to recovery. *Farid v. Ellen,* 593 F.3d 233, 249 (2d Cir. 2010) (*citing Farrell v. Burke,* 449 F.3d 470, 484 (2d Cir. 2006)).

To prevail, moreover, Mr. Benny must overcome the doctrine of qualified immunity—the individual Defendants' "entitlement not to stand trial under certain circumstances." *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985). For any alleged violation, the qualified immunity analysis proceeds in two parts. First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001); s*ee also Garcia v. Does,* 779 F.3d 84, 92 (2d Cir. 2015) (*quoting Russo v. City of Bridgeport,* 479 F.3d 196, 211 (2d Cir. 2007)).

The second step of the qualified immunity analysis requires the Court to consider "whether [the] right is clearly established"—i.e., "whether it would be clear to a reasonable officer that his con-

duct was unlawful in the situation he confronted." *Id.* at 202; *Anderson v. Creighton,* 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . and that in light of pre-existing law the unlawfulness must be apparent."). "Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Moore v. Vega,* 371 F.3d 110, 114 (2d Cir. 2004) (*citing Townes v. City of New York,* 176 F.3d 138, 144 (2d Cir. 1999)).

In determining whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted, the Court may not evaluate the officer's conduct "with 20/20 hindsight." *Salim v. Proulx,* 93 F.3d 86, 91 (2d Cir. 1996). Instead, "[t]he doctrine of qualified immunity serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances," *Lennon v. Miller,* 66 F.3d 416, 424 (2d Cir. 1995) (citations omitted), and the Court must therefore evaluate challenged conduct "from the perspective of a reasonable officer on the scene." *Kerman v. City of New York,* 261 F.3d 229, 239 (2d Cir. 2001) (quoting *Graham v. Connor,* 490 U.S. 386, 396 (1989)); *Hunter v. Bryant,* 502 U.S. 224, 229 (1991) ("The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' ")

II. THE FALSE ARREST (COUNT III), MALICIOUS PROSECUTION (COUNT III), FABRICATION OF EVIDENCE (COUNT III), AND ABUSE OF PROCESS (COUNT IV) CLAIMS

A. FALSE ARREST (COUNT III)

"In analyzing Section 1983 claims for false arrest, courts 'generally look to the law of the state in which the arrest occurred.'" *Ying Li v. City of New York,* 246 F. Supp. 3d 578, 600 (E.D.N.Y. 2017) (quoting *Dancy v. McGinley,* 843 F.3d 93, 107 (2d Cir. 2016)). For purposes of the instant action, "[a] claim for false arrest under [S]ection 1983, resting on the Fourth Amendment right to be free from unreasonable seizures, including arrest without probable cause, is substantially the same as that under New York law." *Id.* (citing *Jenkins v. City of New York,* 478 F.3d 76, 84 (2d Cir. 2007)). Under New York law, the elements of a false arrest claim are: (1) defendant intended to confine plaintiff; (2) plaintiff was conscious of the confinement; (3) plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. *Singer v. Fulton Cty. Sheriff,* 63 F.3d 110, 118 (2d Cir. 1995).

The existence of probable cause constitutes a "complete defense" to a false arrest claim under Section 1983 and New York state law. *Alvarado v. City of New York,* 453 F. App'x 56, 58 (2d Cir. 2011) (*citing Weyant v. Okst,* 101 F.3d 845, 852 (2d Cir. 1996). "Probable cause to arrest exists when the

authorities have knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *McGuire v. City of New York,* 142 F. App'x 1, 1 (2d Cir. 2005). "[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause," and therefore, the officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *Devenpeck v. Alford,* 543 U.S. 146, 153 (2004) (citations omitted). When assessing whether probable cause existed, the reviewing court "must consider [only] those facts available to the officer at the time of the arrest and immediately before it." *Stansbury v. Wertman,* 721 F.3d 84, 89 (2d Cir. 2013) (alteration in original) (internal quotation marks omitted) (*quoting Panetta v. Crowley,* 460 F.3d 388, 395 (2d Cir. 2006)).

Defendants argue that, as a matter of law, they cannot be liable for false arrest because they had probable cause to arrest Mr. Benny or, in the alternative, they are entitled to qualified immunity. Further, because qualified immunity protects officers who reasonably believe their conduct to be lawful, the existence of "arguable probable cause" establishes a qualified immunity defense. *Martinez v. Simonetti,* 202 F.3d 625, 634 (2d Cir. 2000) (citations omitted); *see also Zalaski v. City of Hartford,* 723 F.3d 382, 390 (2d Cir. 2013). As with the probable cause inquiry, the Court's inquiry regarding arguable probable cause is confined to the facts

known to the arresting officer at the time of the arrest. *Betts v. Shearman,* 751 F.3d 78, 82-83 (2d Cir. 2014); *Picott v. Chatmon,* No. 12-cv-7202, 2017 WL 4155375, at *5 (S.D.N.Y. Sept. 18, 2017). The Second Circuit has affirmed that "'[a]rguable' probable cause should not be misunderstood to mean 'almost' probable cause . . . . If officers of reasonable competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close does not immunize the officer." *Jenkins,* 478 F.3d at 87. Arguable probable cause exists "if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Golino v. City of New Haven,* 950 F.2d 864, 870 (2d Cir. 1991) (citations omitted); *see also Caldarola v. Calabrese,* 298 F.3d 156, 162 (2d Cir. 2002) ("[I]n situations where an officer may have reasonably but mistakenly concluded that probable cause existed, the officer is nonetheless entitled to qualified immunity." (citing *Lennon,* 66 F.3d at 423)).

Based on the record before the Court, including the undisputed video evidence in Exhibits A through C, the Court finds that Defendants had probable cause to arrest Mr. Benny for obstructing governmental administration, disorderly conduct, and resisting arrest. *See Marcavage v. City of New Yor*k, 689 F.3d 98, 109–10 (2d Cir. 2012) ("A Fourth Amendment claim turns on whether probable cause existed to arrest for any crime, not whether proba-

ble cause existed with respect to each individual charge (internal citation omitted)).

1) Obstruction of Governmental Administration

New York Penal Law § 195.05 defines the crime of obstructing governmental administration in the second degree and provides, in relevant part, that:

> A person is guilty of obstructing governmental administration in the second degree when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act . . . .

N.Y. Penal Law § 195.05.

The offense has four elements: "(1) prevention or attempt to prevent (2) a public servant from performing (3) an official function (4) by means of intimidation, force or interference." *Cameron v. City of New York,* 598 F.3d 50, 68 (2d Cir. 2010) (quoting *Lennon* 66 F.3d at 424). New York courts have confirmed that the fourth element requires physical interference, although the interference can be minimally physical, and "inappropriate and disruptive conduct at the scene of the performance of an official function" will suffice. *Basinski v. City of New York,* 706 F. App'x 693, 698 (summary order) (discussing cases interpreting New York obstruction of governmental administration statute) (quot-

ing *Kass v. City of New York,* 864 F.3d 200, 209 (2d Cir. 2017, and collecting cases). For example, in *Davan L.,* the New York Court of Appeals affirmed a finding that, where a juvenile had been "put on specific, direct notice" of a "confined and defined" area of police activity and told to keep away, and the juvenile "intentionally intruded himself into the area" to warn others of police presence, the juvenile's conduct met the elements of obstruction of governmental administration. *See Matter of Davan L.,* 689 N.E.2d 909, 910-11 (N.Y. 1997). This Court has held that when individuals disobey officers' orders to step back during an arrest of another individual, the facts establish probable cause for arrest. *See Leibovitz v. City of New York,* No. 14-CV-7106(KAM)(LB), 2018 WL 1157872, at *1 (E.D.N.Y. Mar. 2, 2018).

In the Second Circuit's *Kass* decision, the plaintiff had been speaking with protestors on a sidewalk adjacent to a protest site. 864 F.3d at 208. In their efforts to regulate pedestrian traffic and address crowd-control issues, officers directed the plaintiff "to either keep walking or enter [the] designated protest area." *Id.* at 209. The plaintiff "verbally and physically refused to obey the officers' orders" and was arrested. *Id.* at 210. The district court denied a motion for judgment on the pleadings based on qualified immunity and was reversed by the Second Circuit which held that the officers had at least arguable probable cause to arrest the plaintiff for obstructing governmental administration in violation of New York Penal Law § 195.05. *Id.* at 203.

In considering the instant motion, and as discussed above, the Court finds that Exhibit A clearly and indisputably establishes that Mr. Benny repeatedly defied Defendant officers' multiple orders to "back up" and "clear the area" as they sought to secure the area in which multiple bystanders had gathered while the officers were arresting an individual. (Exhibit A, 00:14-00:58.) Under the circumstances, the police orders were proper, as the officers were attempting, at the time, to arrest Mr. Coad and maintain order among onlookers in the vicinity where police had been called to respond to a fight. Mr. Benny, for at least one minute while on camera is repeatedly seen retreating and reapproaching the officers as he raises his voice at the officers and requestions them. (*Id.*) The officers repeatedly direct Mr. Benny to move back and "clear the area". (*Id.*) The video also shows Mr. Benny moving towards the individual Defendant officers who were continuing to direct the onlookers to "back up" and "clear the area" as Mr. Benny points a finger in their direction and tells the officers, "no". (*Id.* at 00:40-00:46.) Defendants stand in front of Mr. Benny and direct the onlookers, including Mr. Benny, to "clear the area right now" no less than seven times with Mr. Benny repeatedly refusing and responding, "no, I have the right." (*Id.* at 00:46-1:06.) During this time, one of Mr. Benny's friends tells Mr. Benny "come on" in an attempt to get him to comply and step away, and Mr. Benny also responds "no" to his companion. (*Id.*) When Defendants thereafter state, at least three times, that this is the "last

warning" to "clear the area" and that Mr. Benny is "acting disorderly," Mr. Benny responds with several "no"s and "I'm not, though." (*Id.* at 01:06-01:10.) It is during this last moment of Mr. Benny's noncompliance with Defendants' orders that Defendants advise Mr. Benny that he is under arrest. (*Id.* at 01:13.) Exhibit B and Exhibit C also clearly establish that Mr. Benny defied repeated orders by the police officers to step back and clear the area while continuing to yell at police who were attempting to effect an arrest and control the crowd. (Exhibit B, 00:01-00:13; Exhibit C, 00:12-00:25.)

Mr. Benny communicated his intent, multiple times, to disobey Defendants' orders to move back and clear the area, and in fact disobeyed the orders. Taken as a whole, and even when viewed in the light most favorable to Mr. Benny, the video recordings, which the parties agree accurately depict the events surrounding Mr. Benny's arrest, establish that the officers had probable cause to arrest Mr. Benny for obstruction of governmental administration for his repeated intentional efforts to prevent the officers from performing their official functions by his physical interference and intrusions.

Mr. Benny contends that his own arrest could not have been supported by probable cause, because he was protesting the false arrest of Mr. Coad. (See generally ECF No. 45, Pl. Mem. in Opp'n.) There is no evidence before the Court that the officers lacked probable cause at the time to arrest Mr. Coad, and in any case, disagreeing with an officer's

arrest of another is not a defense to obstructing governmental administration. Regardless of whether the arrest of another individual is appropriate, the law does not protect onlookers who obstruct governmental administration, based on their own view of whether police conduct is appropriate. Although bystanders may legally record police action, they may not repeatedly intrude into the area of police activity or an area that police are attempting to control, while disregarding police orders to "back up" and "clear the area". *See Bruno v. City of Schenectady,* No. 12-CV-285 (GTS) (RFT), 2016 WL 1057041, at *12 (N.D.N.Y. Mar. 14, 2016) (finding probable cause to arrest where "Plaintiff's repeated and deliberate disregard of Defendant['s] . . . order to stay behind the police tape, which was exacerbated by her disruptive harangue, interfered with [Defendant's] performance of his [official] dut[ies]."") Because probable cause is an absolute defense to a false arrest claim, Mr. Benny's false arrest claim fails and must be dismissed.

2) Disorderly Conduct

To prove the crime of disorderly conduct under New York Penal Law § 240.20, Defendants must establish three elements: (i) the defendant's conduct must be "public" in nature, (ii) it must be done with "intent to cause public inconvenience, annoyance or alarm" or with recklessness as to "a risk thereof," and (iii) it must match at least one of the descriptions set forth in the statute. N.Y. Penal Law § 240.20. The Defendants reported that Mr.

Benny violated subdivision six of N.Y. Penal Law § 240.20, because Mr. Benny "congregate[d] with other persons in a public place and refuse[d] to comply with a lawful order of the police to disperse." (*See* ECF No. 45-4, Brewington Decl. in Opp'n., Exh. E, Misdemeanor Information filed on December 8, 2018.)

With respect to disorderly conduct, the Court concludes that Mr. Benny's conduct on December 8, 2018, as depicted in the video Exhibits A through C, satisfies all of the elements to establish probable cause for his arrest. Mr. Benny's interaction with the Defendants on the night of his arrest was in public, taking place on the sidewalk outside of the Whale's Tale, in the vicinity of a fight where others had gathered. (*See generally* Exhibit A-C.) The Court finds that based on the undisputed video evidence, reasonable officers would agree that Mr. Benny's continued refusal to step away or leave the area after Defendants repeatedly asked him to do so, "recklessly creat[ed] a risk" of "caus[ing] public inconvenience, annoyance or alarm." *See* N.Y. Penal Law § 240.20(6); *see also Provost v. City of Newburgh,* 262 F.3d 146, 157 (2d Cir. 2001) (holding that if a reasonable person in the same circumstances of an officer would have believed defendant's conduct satisfied all three elements of § 240.20, the defendant had committed or in fact committed the crime of disorderly conduct). Although "the risk of public disorder does not have to be realized[,] the circumstances must be such that defendant's intent to create such a threat (or reckless disregard thereof) can be readily inferred."

Monahan v. City of New York, No. 20-CV-2610 (PKC), 2022 WL 954463, at *4 (S.D.N.Y. Mar. 30, 2022) (citation omitted).

The video evidence before the Court establishes that Mr. Benny grew increasingly agitated, as he repeatedly approached the officers who directed him multiple times to step back and raised his voice to question and object to the officers' actions as the officers were arresting Mr. Coad and were attempting to keep the crowd from approaching. (Exhibit A, 00:14-00:58, Exhibit B, 00:01-00:13; Exhibit C, 00:12-00:25.)

Mr. Benny argues that he did not refuse to comply with a lawful order to disperse, as required by New York Penal Law § 240.20(6), because he was acting alone and his failure to disperse was not done with the intent to cause public inconvenience. The videos demonstrate that Mr. Benny was among a group of onlookers and was directed by Defendants to "back up" and "clear the area," after he continued to approach the officers. Exhibit A, filmed by another individual, shows both Mr. Benny and others repeatedly being directed by the officers to "back up" and "clear the area," and Mr. Benny repeatedly responds "no." (*See generally* Exhibit A.) He was in a crowd and appears to be the only one approaching the officers and being told to step back. (*Id.*) Moreover, Mr. Benny testified in his 50-h hearing that he estimated there were "maybe six to seven" "other people" around him when the Defendants approached him. (Finkel Aff.,

Exh. E at 28.)[9] The Exhibit C video also clearly shows there are at least five bystanders in the background as Mr. Benny interacts with the officers before his arrest. For the foregoing reasons, the Court concludes that the Defendants had probable cause to arrest Mr. Benny for disorderly conduct.

1) Resisting Arrest

New York Penal Law § 205.30 defines the crime of resisting arrest and provides, in relevant part, that: a person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrested of himself or another person.

Exhibits A through C clearly show that Mr. Benny defied repeated orders to step back and clear the area while continuing to yell at police who were attempting to effect an arrest and control the crowd. In Exhibit B, the video shows that after Mr. Benny was told he was under arrest and to turn around, he spins and tries to break free of the Defendant officer's initial attempt to arrest him. (Exhibit B, 00:17-00:21.) At this time, other voices say "chill," although it is not clear who the statements are directed to or who is making the statements. (*Id*.) Exhibit B shows that after the officers

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[9] The Court also notes that Mr. Benny stated he did "not want to give an exact count" of the people on the sidewalk, but he confirmed that "there were people other than [his] friends on the sidewalk with [him]." (Finkel Aff, Exh. E at ¶¶ 28-29.)

stated their intention to put Mr. Benny under arrest, Mr. Benny and the officers scuffled for seconds as they pushed one another, until the officers brought Mr. Benny to the ground face down. The officers held Mr. Benny down while attempting to place him in handcuffs. (Exhibit B, 01:15-01:24.) Despite what Mr. Benny asserts in his Rule 56.1 counter statement and declaration, all of the videos undeniably demonstrate that Mr. Benny "intentionally prevent[ed] or attempt[ed] to prevent" Defendants from effecting the arrest of Mr. Coad. (*See generally* Exhibits A-C.) Moreover, with regards to Mr. Benny's own arrest, after he was advised under arrest, the video shows that he spun free of the officers and engaged in a physical tussle with the officers. (*Id.*)

Accordingly, Defendants demonstrated with undisputed, clear and unambiguous, and admissible video evidence that the officers had probable cause to arrest Mr. Benny for any and all offenses with which he was charged. *See Jaegly v. Couch,* 439 F.3d 149, 154 (2d Cir. 2006) ("Following *Devenpeck,* . . . a claim for false arrest turns only on whether probable cause existed to arrest a defendant, and . . . it is not relevant whether probable cause existed with respect to each individual charge, or, indeed, any charge actually invoked by the arresting officer at the time of arrest.").

Here, Exhibits A through C depict the indisputable facts and circumstances known to the officers sufficient to establish probable cause to arrest Mr. Benny for obstruction of governmental administration in violation of New York Penal Law

§ 195.05, disorderly conduct in violation of New York Penal Law § 240.20(6), and resisting arrest in violation of New York Penal Law § 203.30. Mr. Benny's own declaration, to the extent he seeks to contradict what is clear from the video evidence, fails to create a genuine disputed factual issue regarding his Section 1983 false arrest claim. Consequently, Defendants' motion for summary judgment is granted as to Mr. Benny's false arrest claim.

2) Qualified Immunity

Alternatively, based on the authorities discussed above, the Court finds that Defendants had "arguable probable cause" to arrest Mr. Benny. *Golino,* 950 F.2d at 870. Mr. Benny's continued reapproaching of the officers, after repeated directives to step back, could cause a reasonable officer to believe that Mr. Benny intended to interfere with the officers' exercise of their authority to effect another arrest and maintain control of multiple bystanders. N.Y. Penal Law § 195.05. Given the context in which Mr. Benny repeatedly stated his refusal, and in fact refused, to comply with the officers' orders, it was also objectively reasonable for the officers to infer that Mr. Benny's continued defiance of their orders recklessly created a risk that he would "cause public inconvenience, annoyance or alarm," including a public disturbance. N.Y. Penal Law § 240.20(6). Lastly, an officer reasonably could believe that they had "arguable probable cause" to believe that Mr. Benny was resisting

arrest as he scuffled with the police officers after they notified him that he was under arrest, and based on Defendants' attempts to not once, but twice, to physically place Mr. Benny under arrest. N.Y. Penal Law §§ 203.30. The individual Defendants are therefore entitled to qualified immunity with respect to Mr. Benny's Section 1983 claim for false arrest.

B. MALICIOUS PROSECTUION (COUNT III)

For the reasons provided below, the Court also grants Defendants' motion for summary judgment on Mr. Benny's claims for malicious prosecution claims. "[I]n recognizing a malicious prosecution claim when the prosecution depends on a violation of federal rights, [Section 1983] adopts the law of the forum state so far as the elements of the claim for malicious prosecution are concerned." *Cornejo v. Bell,* 592 F.3d 121, 129 (2d Cir. 2010) (citation omitted). To establish a [S]ection 1983 claim for malicious prosecution, a plaintiff must prove the following four elements under New York law: "'(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions'—as well as a violation of the plaintiff's rights under the Fourth Amendment." *Ying Li,* 246 F. Supp. 3d at 604 (quoting *Manganiello v. City of New York,* 612 F.3d 149, 160–61 (2d Cir. 2010)); *see also Boyd v. City of*

New York, 336 F.3d 72, 76 (2d Cir. 2003). Probable cause for purposes of malicious prosecution is different from probable cause for arrest. *Ying Li,* 246 F. Supp. 3d at 611 (citing *Posr v. Court Officer Shield No. 207,* 180 F.3d 409, 417 (2d Cir. 1999)). Probable cause to prosecute exists where there are "such facts and circumstances as would lead a reasonably prudent person to believe the plaintiff guilty." *Boyd,* 336 F.3d at 76. To determine whether probable cause exists sufficiently to defeat a malicious prosecution claim, a court must separately analyze each "charge[. . .] claimed to have been maliciously prosecuted." *Morris v. Silvestre,* 604 F. App'x 22, 25 (2d. Cir. 2015) (quoting *Posr v. Doherty,* 944 F.2d 91, 100 (2d Cir. 1991)); *see also D'Angelo v. Kirschner,* 288 F. App'x 724, 726–27 (2d Cir. 2008) ("a finding of probable cause to arrest as to one charge does not necessarily defeat a claim of malicious prosecution as to other criminal charges"). Thus, the relevant question is "whether sufficient probable cause existed to charge [Mr. Benny] with each of the crimes." *Lowth v. Town of Cheektowaga,* 82 F.3d 563, 571 (2d Cir. 1996)

Here, it is undisputed that the Defendants had probable cause to prosecute Mr. Benny for (1) obstruction of government administration, (2) disorderly conduct, and (3) resisting arrest. The Exhibit B video, which provides a clear angle of Mr. Benny scuffling with the police officers as they attempt to arrest him, in particular highlights Mr. Benny's actions that provided probable cause for the officers to bring all the charges against Mr. Benny. (*See generally* Exhibit B.) As discussed,

supra, Exhibit B very clearly shows that Mr. Benny defied repeated orders to step back and clear the area while he continued to yell at police officers who were attempting to effect an arrest and control the crowd. (Exhibit B, 00:13-00:17.) In Exhibit B, Mr. Benny also spins and breaks free of the officer as he attempts to place him under arrest. (Exhibit B, 00:17-00:21.) Exhibit B shows that Mr. Benny and the officers scuffled for seconds as they pushed one another, until the officers brought Mr. Benny to the ground face down. (*Id.* at 00:21-00:28.) Based on the Court's consideration of the video evidence demonstrating that there was probable to arrest Mr. Benny for obstructing governmental administration, disorderly conduct, and resisting arrest, this Court further concludes that there was probable cause for a reasonably prudent person to commence the prosecution and to believe Mr. Benny to be guilty of both charges.

Mr. Benny also provides no evidence that the officers were motivated by malice while carrying out their duties and including the three charges of obstruction of governmental administration, disorderly conduct, and resisting arrest against Mr. Benny in their three accusatory instruments. (*See* Brewington Decl. in Opp'n., Exh. E, Misdemeanor Information filed on December 8, 2018.) Even though a judge ultimately dismissed the charges, at the time Mr. Benny's prosecution was commenced, based on the record before the Court, probable cause existed to do so. Moreover, there is no evidence from which a jury could find that the Defendants acted with actual malice. The Court

therefore grants Defendants' motion for summary judgment as to Mr. Benny malicious prosecution claims.

C. ABUSE OF PROCSES (COUNT IV)

The Court also grants Defendant's motion for summary judgment as to Mr. Benny's abuse of process claims. The Second Circuit has stated that "[a]buse of process, however, does not depend upon whether or not the action was brought without probable cause or upon the outcome of the litigation." *Lodges 743 and 1746, Int'l Ass'n of Machinists & Aerospace Workers, AFL–CIO v. United Aircraft Corp.,* 534 F.2d 422, 465 n. 85 (2d Cir.1975). In explaining a claim for abuse of process, the Second Circuit has stated:

> [T]he gist of the tort of abuse of process, [as] distinguished from malicious prosecution, is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance.

See Weiss v. Hunna, 312 F.2d 711, 717 (2d Cir.1963) (quotation omitted).

Consistent with the Second Circuit's analysis in *United Aircraft Corp.* and *Weiss,* a plaintiff may prove an abuse of process claim where a defendant: "(1) employs regularly issued legal process to compel performance or forbearance of some act (2) with

intent to do harm without excuse or justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of the process." *Savino v. City of N.Y.,* 331 F.3d 63, 76 (2d Cir. 2003) (quoting *Cook v. Sheldon,* 41 F.3d 73, 80 (2d Cir. 1994)).

Here, Mr. Benny provides no evidence from which a jury could find that Defendants prosecuted Mr. Benny to "compel" Mr. Benny to perform or forebear from an act, with intent to do harm without justification. Mr. Benny also fails to provide evidence of the third element, that Defendants had a "collateral objective that is outside the legitimate ends of the process." There is no genuine dispute of material fact that the Defendants were performing their official duties during the events undergirding this action, when they responded to an altercation at or near a bar, maintained control of the crowd, and effected Mr. Benny's arrest. Mr. Benny's bare argument that his continued prosecution was to "block [him] from access to the Court and seeking justice against them for wrongful acts" is not supported by any evidence. (Pl. Mem. in Opp'n. at 19.) Furthermore, Mr. Benny's unsupported contention that Defendants' utilization of the "process" is symptomatic of the Defendants' "own warped sense of power" (*id.*) is insufficient to establish that Defendants acted with an illegitimate collateral objective. *See Hauser v. Bartow,* 273 N.Y. 370, 374 (1973) ("If [one] uses the process of the court for its proper purpose, though there is malice in his heart, there is no abuse of process."). The Court therefore

grants Defendants' motion for summary judgment as to Mr. Benny abuse of process claims.

D. FABRICATION OF EVIDENCE (COUNT III)

As a threshold matter, this Court notes that although Defendants did not move for summary judgment on Mr. Benny's fabrication of evidence claim, pursuant to Federal Rule of Civil Procedure 56(f), both parties had "reasonable time to respond" and thus this Court will "consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." (*See* Pl. Mem. in Opp'n at 11-13; Defs. Reply Br at 9-10.) *See also Bridgeway Corp. v. Citibank,* 201 F.3d 134, 139 (2d Cir. 2000) ("a *sua sponte* grant of summary judgment against that party may be appropriate" when "there are circumstances under which it is not a reversible error for a district court to grant summary judgment against a party without notice or opportunity to defend"); *In re 650 Fifth Ave. & Related Properties,* 830 F.3d 66, 96 (2d Cir. 2016) (grants of summary judgment are only appropriate "where the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried" (citing *Schwan-Stabilo Cosmetics GmbH v. Pacificlink Int'l Corp.,* 401 F.3d 28, 33 (2d Cir. 2005)). The Second Circuit has said that in instances where the district court failed to give notice before *sua sponte* granting summary judg-

ment, if the party "either cannot claim to have been surprised by the district court's action or if, notwithstanding its surprise, the party had no additional evidence to bring, it cannot plausibly argue that it was prejudiced by the lack of notice." *Bridgeway Corp.,* 201 F.3d at 140.

To succeed on a fabricated-evidence claim, Mr. Benny must establish that an (1) investigating official (2) fabricate[d] information (3) that is likely to influence a jury's verdict, (4) forward[ed] that information to prosecutors, and (5) the plaintiff suffer[red] a deprivation of life, liberty, or property as a result. *See Ashley v. City of New York,* 992 F.3d 128, 139 (2d Cir. 2021) (citation omitted).

Here, given Mr. Benny's opportunity to defend his fabrication of evidence claims, the Court grants summary judgment to Defendants on Mr. Benny's fabrication of evidence claim. Mr. Benny briefed his fabrication of evidence claim in his memorandum of law in opposition to Defendants' motion for summary judgment. (*See* Pl. Mem. in Opp'n at 11-13.) Mr. Benny alleged that Officer Wiemann fabricated evidence by signing accusatory instruments that claimed Mr. Benny "physically resist[ed] the defendants' efforts to arrest him." (*Id;* Brewington Decl. in Opp'n., Exh. E, Misdemeanor Information filed on December 8, 2018.) The Court has considered the parties' evidence for the related claims of false arrest, malicious prosecution, and abuse of process, and presumes that Mr. Benny has had no additional evidence to bring for his fabrication of evidence claim. Accordingly, this Court relies on the video evidence recounted in extensive detail above and

finds that Mr. Benny and the officers scuffled for some time during Mr. Benny's arrest. (*See generally* Exhibit A and B.) The video recordings of Mr. Benny and Defendants struggling, after Mr. Benny was told he was under arrest and spun out of an officer's grasp, blatantly contradicts Mr. Benny's account that he did not "physically resist[] the defendants' efforts to arrest him" as alleged by the Officer Wiemann in the accusatory instruments. (*See* Brewington Decl. in Opp'n., Exh. E, Misdemeanor Information filed on December 8, 2018.) Mr. Benny fails to identify or provide any evidence of the information he claims is fabricated, that he resisted arrest, and therefore, the Court grants summary judgment as to Mr. Benny's fabrication of evidence claim.

III. EXCESSIVE FORCE (COUNT III) & FAILURE TO INTERVENE (COUNT VI)

A. EXCESSIVE FORCE (COUNT III)

The Court denies Defendants' motion for summary judgment as to Mr. Benny's claims of excessive force and failure to intervene. Mr. Benny alleges that Defendants violated the Fourth and Fifth Amendments by using excessive force in effecting his arrest. Here, the Court finds that there are genuine disputes of material fact, whether the Defendants used excessive force in effecting Mr. Benny's arrest. Based on the lack of clarity in the video evidence as to the Defendants' use of force, the parties' differing interpretations of the videos, and the parties' differing accounts of the force used to effect

Mr. Benny's arrest, the Court finds that summary judgment on Mr. Benny's excessive force claim must be denied. The jury must resolve the dispute of whether the Defendants' use of force was excessive or reasonable.

The Fourth Amendment, which guarantees the right to be free from unreasonable seizures, prohibits police officers from using excessive force in effecting an arrest. *Tracy v. Freshwater,* 623 F.3d 90, 96 (2d Cir. 2010) (citing *Graham,* 490 U.S. at 395)). Courts apply an objective reasonableness standard to determine whether the force used was excessive. *Id.* (quoting *Bryant v. City of New York,* 404 F.3d 128, 136 (2d Cir. 2005)). Thus, "the inquiry is necessarily case and fact specific and requires balancing the nature and quality of the intrusion on the plaintiff's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* (citing *Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 123 (2d Cir. 2004)).

To determine whether the force used was reasonable, courts consider "(1) the nature and severity of the crime leading to the arrest, (2) whether the suspect pose[d] an immediate threat to the safety of the officer or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Id.* (citing *Graham,* 490 U.S. at 396; *Papineau v. Parmley,* 465 F.3d 46, 61 (2d Cir.2006)). The Court recognizes that evidence is viewed "from the perspective of a reasonable officer on the scene," allowing for "the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain,

and rapidly evolving-about the amount of force that is necessary in a particular situation." *Id.* at 96. This Court also notes that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a[n] [individual's] constitutional rights." *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir. 1973).

The video evidence clearly reveals the following events: after the officer gave repeated directives to "back up" and "clear the area" and warned Mr. Benny, "final warning," he informed Mr. Benny that he was under arrest and directed him to turn around. (Exhibit A, 01:14-01:15.) The camera does not show Mr. Benny, so it is unclear what Mr. Benny was doing or if Mr. Benny was within reaching distance of the officer. (*Id.*) Approximately one second after the Defendant officer informed Mr. Benny he was under arrest and directed him to turn around, the camera shows that either the same officer or another officer (it is not clear in any of the videos) wraps his arms around Mr. Benny and attempts to place him under arrest. (*Id.* at 01:15- 01:16.) In Exhibit B, the video recording also does not capture what happens between a Defendant officer telling Mr. Benny he is under arrest and part of Mr. Benny's body being lowered toward the ground. (Exhibit B, 00:13-00:19.)

It is undisputed that Exhibit A and B demonstrate that once a Defendant officer tries to take Mr. Benny into custody, Mr. Benny tries to spin and break free of the officer's grasp before his hands and knees momentarily make contact with the ground. (Exhibit A, 01:17-01:18.) What remains

unclear in all three video exhibits, however, is what happened in the second between a Defendant officer telling Mr. Benny he was under arrest and, potentially another or the same, Defendant officer putting his arms around Mr. Benny in an attempt to place him in custody. Furthermore, after Mr. Benny spun and broke free of the officer, and then engaged in a tussle with the officers, Mr. Benny is seen on the ground, with at least two officers holding him down, while his hands are behind his back, as the officers try to put handcuffs on him. (Exhibit A, 01:26-01:48.) Mr. Benny's face and the front of his body are fully on the sidewalk, a Defendant officer has his knee on Mr. Benny's cheek by the officer, and the amount of weight applied to Mr. Benny's cheek is not clear. But approximately twenty seconds, other bystanders ask "why are you on his face" until a Defendant officer moves his knee to Mr. Benny's back. (*Id.*) Another Defendant officer asks the individual recording the video to "back up" while the individual yells that the Defendants should not have had their knee on Mr. Benny's face. (*Id.* at 01:48-02:18.) The Court cannot and should not determine whether the level of force used to arrest Mr. was reasonable or excessive, during the fast-paced "split-second" physical encounter between Mr. Benny and the officers. After careful consideration of the videos and declarations, this Court finds that there are genuine material issues of fact in dispute, and this Court cannot conclusively determine whether the elements of excessive force were met.

The Court also highlights that the video evidence indeed reveals discrepancies or gaps in both Defendants' and Mr. Benny's accounts of the arrest. Though Mr. Benny's declaration stated that he did not resist arrest, the video clearly shows a prolonged struggle between Mr. Benny and Defendants, where Mr. Benny twists away and stands upright after being initially restrained and Mr. Benny then lunges towards and scuffles with the officers. (*Id.* at 01:19-01:33.) Despite the existence of probable cause to arrest Mr. Benny and charge him with obstruction of governmental administration, disorderly conduct, and resisting arrest, a reasonable juror could also find that the use of force in effecting Mr. Benny's arrest was excessive, under the circumstances to be presented at trial. (*Id.*) Based on the video evidence, Defendants assert that Mr. Benny pushed an officer on the chest, which may have occurred during the scuffle between Mr. Benny and the officers depicted in the videos. But the videos still do not show what, if anything, Mr. Benny did to prompt the officer's initial attempt to restrain Mr. Benny and place him on the ground. Furthermore, the Defendants assert that they removed their knee off Mr. Benny "as soon as [Mr. Benny] was brought to his feet," which is not depicted in the videos. (Defs. Reply Br. at 6.)

Even with video evidence, Mr. Benny and Defendants' accounts of the events on December 8, 2018 differ substantially, raising disputed issues of material fact. Because there are multiple questions left unanswered in the record before the Court of what transpired immediately prior to and during

Mr. Benny's arrest, and the amount of force used, to explain whether the officers used reasonable force, this Court must leave fact-finding to the jury. *See Amnesty,* 361 F.3d 113 ("Because a reasonable jury could also find that the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances, however, the determination as to the objective reasonableness of the force used must be made by a jury following a trial."); *Curry v. City of Syracus*e, 316 F.3d 324, 335–36 (2d Cir. 2003) ("In sum, based on the two starkly different narratives of the incident at issue, genuine issues of material fact preclude summary judgment on plaintiff's false arrest and unlawful search claims.").

Indeed, even if a genuine issue exists as to whether force was excessive, officers may invoke qualified immunity's second prong, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Anderson,* 483 U.S. 640. The qualified immunity analysis hinges on whether under the totality of the circumstances, the officers used reasonable force or "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In other words, the Court must look to "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202.

It is clearly established in the Second Circuit that "it [is] a Fourth Amendment violation to use 'significant' force against arrestees who no longer

actively resisted arrest or posed a threat to officer safety." *See Muschette on Behalf of A.M. v. Gionfriddo*, 910 F.3d 65, 70 (2d Cir. 2018); *see also Rogoz v. City of Hartford*, 796 F.3d 236, 251 (2d Cir. 2015) (finding that officers who jumped on the back of a non-resisting arrestee were not entitled to summary judgment on the merits or on the defense of qualified immunity); *O'Hara v. City of New York,* 570 F. App'x 21, 24 (2d Cir. 2014) (punching an arrestee without provocation was excessive force and there is a distinction between "struggling against" the officer's blows and resisting arrest); *Ragland v. City of Mount Vernon*, No. 11 CV 1317 VB, 2013 WL 4038616, at *6 (S.D.N.Y. July 12, 2013) (evidence that officers, without warning, grabbed plaintiff's neck and jumped on his back while he was riding his bicycle precluded summary judgment on excessive force); *Calamia v. City of New York*, 879 F.2d 1025, 1035 (2d Cir. 1989) (concluding that a plaintiff's testimony about being immediately shoved to the floor upon answering an officer's door knock could defeat a motion for summary judgment as a matter of law); *Sash v. United States*, 674 F. Supp. 2d 531, 538 (S.D.N.Y. 2009) ("Tackling an arrestee on the street and forcibly shoving him into a metal gate when he offers no resistance certainly could be actionable conduct."). The standard of reasonableness standard must be applied to the moment that force was used. *Graham*, 490 U.S. at 396. The degree of force used, if any, and the moment of force used are not clear from the record.

Although there is evidence of Mr. Benny's interaction with the Defendants *after* a Defendant officer tries to bring Mr. Benny under arrest the first time, the video evidence and Mr. Benny's declaration of the events *prior to* and during his arrest cannot be reconciled at this time. Defendants' motion for summary judgment on Mr. Benny's excessive force claim must be, and is, denied. *See Mills v. Fenger,* 216 Fed. Appx. 7, 8-9 (2d Cir. 2006) (citing *Thomas,* 165 F.3d at 143) ("Because whether force is excessive turns on its reasonableness, we have held that '[s]ummary judgment on qualified immunity grounds is not appropriate when there are facts in dispute that are material to a determination of reasonableness.' "); *see also Coe v. Rogers,* No. cv 14-3216(JFB)(AKT), 2017 WL 1157182, at *14 (E.D.N.Y. Mar. 6, 2017), report and recommendation adopted, No. 14-3216 (JFB) (AKT), 2017 WL 1155002 (E.D.N.Y. Mar. 27, 2017) (finding that when there were two "competing versions of the events," of an officer's "body-slamming" of plaintiff, whether excessive force was used must be left for a jury to decided).

Despite all of the video evidence and parties' submissions, it remains unclear whether Mr. Benny had any time to comply with the arresting officer's order to turn around after he was told he was under arrest, what Mr. Benny did in response, and what degree of force the officer used. The facts around the moment of the officer's use of force are material and disputed. Thus, this Court finds that the jury must decide whether the officer's use of force was reasonable under the circumstances.

B. FAILURE TO INTERVENE (COUNT VI)

An underlying constitutional violation is a precondition of a failure-to-intervene claim. *See O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988). To establish liability on the part of a defendant under a failure-to-intervene theory, a plaintiff must show that the defendant (1) possessed actual knowledge that a fellow officer was using excessive force; (2) had a realistic opportunity to intervene and prevent the harm from occurring; and (3) nonetheless disregarded that risk by intentionally refusing or failing to take reasonable measures to end the use of excessive force. *Kornegay v. New York*, 677 F.Supp.2d 653, 658 (W.D.N.Y. 2010). Police officers are "under a duty to intervene and prevent fellow officers from subjecting a citizen to excessive force and may be held liable for his failure to do so if he observes the use of force and has sufficient time to act to prevent it." *See Figueroa v. Mazza*, 825 F.3d 89, 106 (2d Cir. 2016). If a fellow officer fails to intervene, "liability attaches on the theory that the officer . . . becomes a 'tacit collaborator' in the illegality." *Id.* (quoting *O'Neill*, 839 F.2d 11-12 (2d Cir. 1988)); *see also Terebesi v. Torreso*, 764 F.3d 217, 243 (2d Cir. 2014) ("An officer who fails to intercede in the use of excessive force . . . is liable for the preventable harm caused by the actions of other officers.").

"Whether the officer had a 'realistic opportunity' to intervene is normally a question for the jury, unless, 'considering all the evidence, a reasonable

jury could not possibly conclude otherwise.'" *Terebesi,* 764 F.3d at 244 (quoting *Anderson v. Branen,* 17 F.3d 552, 557 (2d Cir. 1994)).

Defendants provide no declarations of any officers detailing their knowledge or involvement, or lack thereof, of their opportunity to intervene in Mr. Benny's arrest, and therefore, the Court must consider Mr. Benny's sworn statements and the evidence of multiple unidentified officers present during the alleged use of excessive use of force. Although the Court recognizes "the mere fact that [an] [o]fficer was present for the entire incident does not, on its own, establish that he had either awareness of excessive force being used or an opportunity to prevent it," it is not clear whether excessive force was used and, if so, which officers were simply present or aware, or had an opportunity to intervene. *See Rodriguez v. City of New York,* No. 10 CIV. 9570 PKC KNF, 2012 WL 1658303, at *5 (S.D.N.Y. May 11, 2012). Based on the record before the Court and considering the evidence in the light most favorable to the nonmoving party, Mr. Benny, a question of material fact exists as to whether the force used was excessive and whether the other officers failed to intervene. If, as he claims, Mr. Benny had fully submitted to the officers' control and Defendants observed a fellow officer use unnecessary force but failed to intervene despite having time to do so, no reasonable officer under the circumstances would believe that his or her actions were lawful. Therefore, the Court cannot find that qualified immunity applies under the circumstances presented by the record before the

Court. The Defendants' motion for summary judgment on Mr. Benny's excessive force and failure to intervene is denied.

IV. FIRST AMENDMENT CLAIM (COUNT II)

The Court grants summary judgment for Defendants as to Mr. Benny's First Amendment claim. "To recover on a First Amendment claim under [Section 1983], a plaintiff must demonstrate that his conduct is deserving of First Amendment protection and that the defendants' conduct of harassment was motivated by or substantially caused by his exercise of free speech." *Rattner v. Netburn,* 930 F.2d 204, 208 (2d Cir. 1991) (quoting *Donahue v. Windsor Locks Board of Fire Commissioners,* 834 F.2d 54, 58 (2d Cir. 1987)); *see also Dorsett v. Cty. of Nassau,* 732 F.3d 157, 160 (2d Cir. 2013) ("To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury." (citation omitted)). The Court finds that no reasonable juror could find that Defendants deprived Mr. Benny of his First Amendment rights.

Mr. Benny asserts that there is a First Amendment right to videotape police officers in the performance of their official duties. This Court notes, however, that the right to videotape is "not without limitations" and "may be subject to reasonable time, place, and manner restrictions." *Glik v.*

Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) (citing *Smith v. City of Cumming,* 212 F.3d 1332, 1333 (11th Cir. 2000)); *see also Higginbotham v. City of New York,* 105 F. Supp. 3d 369, 379 (S.D.N.Y. 2015) ("All of the circuit courts that have [addressed the issue] . . . have concluded that the First Amendment protects the right to record police officers performing their duties in a public space, subject to reasonable time, place and manner restrictions." (citations omitted)). Time, place, and manner restrictions, in turn, are permissible if they "(1) are justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information." *Akinnagbe v. City of New York,* 128 F. Supp. 3d 539, 548 (E.D.N.Y. 2015) (quoting *Marcavage,* 689 F.3d 98 at 104.)). Furthermore, "the right [to record police officers in public] does not apply when the recording would impede police officers in the performance of their duties." *Higginbotham,* 105 F. Supp. 3d at 379-80; *see also Basinksi,* 192 F. Supp. 3d at 368 ("[C]ourts within this Circuit have recognized that 'in cases where the right to record police activity has been recognized by our sister circuits, it appears that the protected conduct has typically involved using a handheld device to photograph or videotape at a certain distance from, and without interfering with, the police activity at issue.'" (quoting *Rivera v. Foley,* No. 14-CV-196 (VLB), 2015 WL 1296258, at *10 (D. Conn. Mar. 23, 2015)).

When viewing these allegations in the light most favorable to Mr. Benny, Defendants' initial and repeated instructions to step back constitute a justified and narrow restriction on the place and manner in which Mr. Benny could exercise his asserted First Amendment right to film Defendants' arrest of Mr. Coad. Here, the government had a compelling interest in maintaining safety and order while a crowd continued to gather at the scene of police activities. *See Bruno,* No. 12-CV-285 (GTS) (RFT), 2016 WL 1057041, at *12 (finding probable cause to arrest where plaintiff disregarded officers' orders to stay behind the police tape); *Davan L.,* 689 N.E.2d 910-11 (affirming finding that juvenile's conduct, if committed by an adult, would constitute obstruction of governmental administration where juvenile had been directed to stay clear of "confined and defined" police activity area, but entered area and yelled that police were "coming"); *see also Salmon v. Blesser,* 802 F.3d 249, 253 (2d Cir. 2015) ("Police officers frequently order persons to leave public areas: crime scenes, accident sites, dangerous construction venues, anticipated flood or fire paths, parade routes, areas of public disorder, etc.").

The video Exhibits A through C show that none of the officers ever told any of the bystanders recording their activities that they could not record, but only directed that they step back. (*See generally* Exhibit A-C). Based on the undisputed evidence of what was captured in the videos, the Defendants' instructions to step back were justified and narrowly tailored to serve a compelling govern-

ment interest in maintaining order amidst a gathering crowd while conducting police activity. Indeed, the video evidence establishes that Mr. Benny continued to film the scene, until he defied the officers' final warning to "back up" and was placed under arrest. (*Id.*)

Alternatively, based on the authority discussed above, a reasonable officer could believe that it was lawful to arrest Mr. Benny for refusing to obey an order to retreat and cease disrupting the Defendants' performance of their official duties as a crowd of onlookers continued to yell and step towards the officers. Therefore, as an alternative holding, the individual Defendant officers are entitled to qualified immunity with respect to Mr. Benny's First Amendment claim.

Further, to the extent Mr. Benny's false arrest can be construed as retaliation claims under the First Amendment and Section 1983, the Court notes that the existence of probable cause will defeat a First Amendment retaliation claim. *See, e.g., Fabrikant v. French,* 691 F.3d 193, 215 (2d Cir. 2012) ("The existence of probable cause . . . will also defeat a First Amendment claim that is premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory motive."); *Mozzochi v. Borden,* 959 F.2d 1174, 1180 (2d Cir. 1992) ("An individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause, [even if it] is in reality an unsuccessful attempt to deter or silence criticism of the government."); *Norton v. Town of Islip,* 97 F. Supp. 3d 241, 257 (E.D.N.Y.

2015) ("Even if [plaintiff] had stated a plausible claim against [defendants], the Court would still dismiss [plaintiff] First Amendment retaliation claim because the appearance tickets against [plaintiff] were supported by probable cause."). The Court is unpersuaded that the police retaliated against Mr. Benny for exercising his First Amendment rights. The three videos this Court reviewed make it clear that multiple people, including Mr. Benny, were filming the events occurring around Mr. Benny. None of the other individuals filming were told to stop filming nor were they told that they were under arrest, as they appeared to stay farther away from the Defendants than Mr. Benny did. (Exhibit A, 00:46-1:06.) The Court, therefore, grants Defendants' motion for summary judgment as to Mr. Benny's First Amendment claims.

V. THE EQUAL PROTECTION CLAIM (COUNT II)

Lastly, the Court grants summary judgment for Defendants on Mr. Benny's equal protection claim. A plaintiff can maintain an Equal Protection Clause claim "so long as he establishes that he was treated differently than similarly situated persons and that the unequal treatment he received was motivated by personal animus." *Jackson v. Roslyn Bd. of Educ.,* 438 F.Supp.2d 49, 55 (E.D.N.Y. 2006) (*citing Harlen Assoc. v. Inc. Village of Mineola,* 273 F.3d 494, 500 (2d Cir. 2001)); *see also Brown v. City of Oneonta, N.Y.,* 221 F.3d 329, 337 (2d Cir. 2000) ("The Equal Protection Clause 'is essentially a

direction that all persons similarly situated should be treated alike.'" (citation omitted)). Mr. Benny has failed to raise a triable issue of material fact with respect to his Equal Protection claim.

Although the Court construes favorably Mr. Benny's sworn declaration for purposes of summary judgment, "the nonmoving party must produce more than a scintilla of admissible evidence that supports the pleadings." *Esmont v. City of New York*, 371 F.Supp.2d 202, 210 (E.D.N.Y.2005); *see also First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289–90, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 175 (2d Cir.2003). Here, the only evidence Mr. Benny provides for his claims of racially motivated discrimination by Defendants is his own declaration, which presents no specific facts from which a jury could find that the officers were motivated by personal animus. Mr. Benny claims that Defendants followed Mr. Benny and his friends, who are African-American, rather than other Caucasian pedestrians nearby. Moreover, Mr. Benny states that Caucasian individuals who were involved in a fight were permitted to leave the scene but provides no facts as to how they were similarly situated to Mr. Benny. There is no evidence that these Caucasian individuals repeatedly defied direct police orders to "back up" and leave the area; instead, Mr. Benny states that the Caucasian individuals did leave the area. (Pl. Decl. in Opp'n at ¶6.) Accordingly, the Court grants the motion for summary judgment with respect to Mr. Benny's equal protection claim.

CONCLUSION

For the foregoing reasons, Defendants' summary judgment is GRANTED in part and DENIED in part. The Court GRANTS the Defendants' summary judgment on Mr. Benny's false arrest, malicious prosecution, abuse of process, fabrication of evidence, Equal Protection, and First Amendment claims. The Court DENIES Defendants' summary judgment with respect to Mr. Benny's claims of excessive force and failure to intervene.

Further, the parties are directed to schedule a settlement conference with Magistrate Judge Steven Tiscione and/or complete the remaining discovery in this case.

SO ORDERED.

Dated: Brooklyn, New York
July 27, 2022

/s/ KIYO A. MATSUMOTO
KIYO A. MATSUMOTO
United States District Judge
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOCKET NO.: CV-20-1908

RICKY JOSHUA BENNY

Plaintiff,

–against–

THE CITY OF LONG BEACH, THE LONG BEACH POLICE DEPARTMENT, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10,

Defendants.

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff, RICKY JOSHUA BENNY by and through his attorneys, THE LAW OFFICES OF FREDERICK K. BREWINGTON, as and for his Complaint against the Defendants herein, states and alleges as follows:

PRELIMINARY STATEMENT

1. This is a civil action seeking monetary relief, a declaratory judgment, compensatory and punitive damages, disbursements, costs and fees for violations of the Plaintiff's rights, false arrest, wrongful imprisonment, abuse of process, assault, battery, unreasonable use of force, excessive force, failure to

intervene, denial of access to courts, fabrication of evidence, intentional infliction of emotional distress, negligence and gross negligence, brought pursuant to 42 U.S.C. §§ 1981, 1983, the 4th, 5th, 6th and 14th Amendments to the United States Constitution and New York State Law and depriving Plaintiff of rights secured by the Constitution and laws of the United States.

2. Plaintiff alleges that Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 assaulted, battered, falsely accused, falsely arrested, falsely imprisoned, fabricated evidence and maliciously prosecuted RICKY JOSHUA BENNY all in violation of his constitutional and civil rights.

3. The Plaintiff further alleges that the Defendants CITY OF LONG BEACH and CITY OF LONG BEACH POLICE DEPARTMENT had a duty to train, supervise and discipline police officers, including the Defendant OFFICERS, and were negligent in failing to properly hire, supervise and discipline the Defendant OFFICERS for their unlawful actions as described above.

4. Plaintiff alleges that Defendants CITY OF LONG BEACH and THE LONG BEACH POLICE DEPARTMENT, were negligent in training, hiring and supervising Defendant officers, thus leading to the unjustified excessive force, assault, false arrest, false imprisonment, malicious prosecution and other violations of RICKY JOSHUA BENNY. Plaintiff alleges that the arrest was made in an attempt to justify the fla-

grantly improper and unjustified conduct of Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10.

5. Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 without probable cause, justification or any reason except an intent to deprive Plaintiff of his rights, and their knowledge that their conduct has the tacit authorization of, THE CITY OF LONG BEACH and THE LONG BEACH POLICE DEPARTMENT, excessively beat, falsely arrested, falsely charged, falsely imprisoned, maliciously prosecuted, fabricated evidence and failed to intervene in wrongful actions taken against Plaintiff in an effort to justify their series of violative acts and cover up their wrongdoing. Said use of unjustified force and other actions set out herein exerted against and upon Plaintiff deprived him of his civil and constitutional rights.

6. Plaintiff alleges that, THE CITY OF LONG BEACH, THE LONG BEACH POLICE DEPARTMENT, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, are liable for the assault, battery, excessive force, false arrest, and false imprisonment, because the CITY OF LONG BEACH and THE LONG BEACH POLICE DEPARTMENT has supported abuses, condoned, and permitted a pattern of unlawful and excessive force, abuse of process, false arrest and malicious prosecution of arrested persons, and has failed to properly investigate such incidents and discipline

the officers involved. As a result police officers including these Defendants (collectively and individually) were deliberately indifferent to the need to train Officers of the CITY OF LONG BEACH and THE LONG BEACH POLICE DEPARTMENT. Police Officers, including these DEFENDANTS, have been and are encouraged to believe that they could violate the rights of persons, such as the Plaintiff, with impunity, and that THE CITY OF LONG BEACH and THE LONG BEACH POLICE DEPARTMENT has, and will, allow them to continue to act in violation of an individual's rights, constituting through their actions and failures a policy and/or pattern.

7. As a result of the Defendants' actions (or lack thereof), Plaintiff suffered physical pain and suffering, was caused to undergo medical treatment for serious physical injuries that he sustained at the hands of Defendants as a result of their use of excessive force and failure to provide medical attention to Plaintiff. Plaintiff incurred significant cost and expenses due to the Defendants' actions, including but not limited to: substantial legal fees in defending the false criminal charges, medical bills, loss of potential employment, serious physical injuries, and other cost/expenses.

JURISDICTION AND VENUE

8. This action is brought pursuant to 42 U.S.C. §§ 1981, 1983, and 1988 and the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution Jurisdiction is founded

upon 28 U.S.C. Sections 1331 and 1341 (3) & (4) and the aforementioned statutory and constitutional provisions. Plaintiff further invokes the pendent jurisdiction of this Court to hear and decide claims arising under state law.

9. Venue herein is proper under 28 U.S.C. § 1391(b); the cause of action arose in the Eastern District of New York, and upon information and belief, all of the parties reside in or are located in the Eastern District of New York.

10. That prior hereto Plaintiff in conjunction with his State claims filed a Notice of Claim in compliance with General Municipal Law Section 50 et. seq.

11. That more than 30 days have elapsed and Defendants have failed and refused to pay or adjust same.

PARTIES

12. Plaintiff RICKY JOSHUA BENNY (hereinafter "Plaintiff" or "Mr. Benny") is an African-American/ Hispanic-American man and was at all times relevant herein is an adult citizen of the United States.

13. Defendant, THE CITY OF LONG BEACH (hereinafter "CITY" or "LONG BEACH") is a municipal corporation, duly organized and existing under and by virtue of the laws of New York State. Upon information and belief, the CITY formed and has direct authority over several different departments including the LONG BEACH POLICE DEPARTMENT

(hereinafter "LBPD") . The aforementioned department and/or the employees, agents or representatives of said department is directly involved in violations that are the at issue in this Complaint.

14. Defendant, THE LONG BEACH POLICE DEPARTMENT (hereinafter "POLICE DEPARTMENT" or "LBPD") is an agency of the City of Long Beach.

15. That DEFENDANT POLICE OFFICER JOSEPH WIEMANN (a Caucasian man), POLICE OFFICER ROCCO WALSH (a Caucasian man) and OFFICERS JOHN DOES 1-10, (hereinafter referred to as "DEFENDANT OFFICERS"), were at all times herein mentioned police officers, employed by the CITY and POLICE DEPARTMENT under the direction of the POLICE DEPARTMENT, and DEFENDANT OFFICERS were acting in furtherance of the scope of their employment, acting under color of law, to wit under color of statutes, ordinances, regulations, policies, customs and usages of the State of New York and/or the POLICE DEPARTMENT, and is employed by the CITY OF LONG BEACH under the direction of the LONG BEACH POLICE DEPARTMENT. DEFENDANT POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 (currently unknown to the Plaintiff, but are believed to be known by Defendants and are as of yet unidentified members of the City of Long Beach and Long Beach Police Department), all of whom are being sued herein in their individual and official capacities.

16. Upon information and belief, that all times hereinafter mentioned, and at the time of the commencement of this action, the DEFENDANT POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 (currently unknown to the Plaintiff, but are believed to be known by Defendants and are as of yet unidentified members of the City of Long Beach and Long Beach Police Department), all of whom were, and are, citizens and residents of the State of New York and state actors.

17. That DEFENDANT OFFICERS were state actors on December 8, 2018 and continued to be so thereafter.

18. At all times relevant in this Complaint, and upon information and belief, DEFENDANT OFFICERS served as the complaining witnesses and assisting officers against Plaintiff in criminal proceedings and served as the source of information to the District Attorney's office, supplying allegations and claims against Mr. Benny which were false, fabricated and were knowingly in violation of Plaintiff's rights.

FACTUAL BACKGROUND

19. Plaintiff is an African-American/Hispanic-American male, currently 27 years of age. At all times relevant to this Complaint Plaintiff was a resident of Long Beach, New York.

20. On or about December 8, 2018, at or about 3:00a.m. to 3:30 a.m. in Long Beach, State of New York, after peacefully socializing with friends (persons of color), Plaintiff Benny was lawfully standing outside of the establishment known as Wales and Tales, located at 916 W. Beech Street, Long Beach, New York, awaiting a car service pick up.

21. At that time, members of the LBPD, including, but not limited to DEFENDANT POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 were already in the vicinity responding to a fight and/or disturbance at W. Beech Street and Virginia Avenue with which Plaintiff had no dealings or involvement. The persons engaged in the fight/disturbance were Caucasian persons. Plaintiff was emerging from the Wales and Tales in the attempt to await the car service along with Cedric Coad and Rashawn Weed, both of whom are African-American men.

22. The persons who were engaged in the actual fight, who were Caucasian persons, were confronted by police while they were actually engaged in the fight, and were then allowed to leave without charges, allegations or being taken into custody.

23. As Plaintiff and his friends emerged from the establishment, without cause or reason Long Beach Police Officers went immediately to Plaintiff and his friends, all of whom are clearly men of color, and approached Cedric Coad and began to antagonize him, using abusive and disrespectful language and then ultimately slammed him to the ground

and placed him under arrest in the middle of the street on Virginia Avenue at or near the West End Pizzeria. Although Mr. Coad was not engaged in any unlawful, violent or improper behavior he was targeted, while the Caucasian men engaged in a violent street fight were allowed to go free.

24. Plaintiff was on the opposite side of the intersection and while Cedric Coad was being placed under arrest by the officers, all of whom were white, and was not near on in any fashion in a place to interfere with the police actions. Despite the clear distance at which Plaintiff was located, Plaintiff was told by POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and other Long Beach Police Officers to "back up" onto the sidewalk. Plaintiff abided by said directives.

25. Plaintiff began to record the actions of the Police as they abused Mr. Coad and asked them for their names and badge numbers. The Police refused to provide Plaintiff their names or badge numbers, and instead began to shine their flashlights at Plaintiff's phone in an attempt to glare out the video recording that Plaintiff was conducting.

26. As Plaintiff was lawfully recording the abusive actions of Police and standing on the sidewalk POLICE OFFICER JOSEPH WIEMANN and POLICE OFFICER ROCCO WALSH approached Plaintiff from behind and picked Plaintiff up and body slammed him onto the concrete. No such action was taken against the white persons engaged in the fight. Not fully clear

as to what had happened and who had assaulted him, Plaintiff then immediately attempted to get back up from the ground.

27. POLICE OFFICER JOSEPH WIEMANN and POLICE OFFICER ROCCO WALSH once again grabbed Plaintiff and with great force and with an intent to cause serious and permanent injury body slammed him onto the concrete causing the Plaintiff to strike his face, head and upper torso against the concrete and rendering him semi or unconscious.

28. POLICE OFFICER JOSEPH WIEMANN and POLICE OFFICER ROCCO WALSH, without legal authority or legal cause of any kind, used unnecessary and unwarranted force and grabbed Mr. Benny, and in doing so grabbed Mr. Benny about his body, and forcibly lifted him and propelled Plaintiff downward with the full force of his body onto the right side of his face and shoulders onto the concrete pavement beneath him.

29. Then POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 joined in and abused Mr. Benny, and wrongfully and abusively handcuffed him. Although Mr. Benny complied with the officers' request(s) the officers continued to abuse Mr. Benny causing him great pain, injury, humiliation and embarrassment. The treatment of Mr. Benny was different and much worse than any treatment which Defendant Officers used or attempted to use against the White persons who had been engaged

in the street fight that were allowed to leave free of any charges or being arrested.

30. Plaintiff was forcefully and brutally slammed and thrown to the ground, manhandled, kneed, cut, scarred, damaged and bruised as he was beaten by the aforementioned DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 to the point that he suffered physical permanent injury to the following, which includes but is not limited to, his face, mouth, jaw, teeth, nose, jaw, shoulders, and back. Plaintiffs race, color and ethnicity clearly was a factor in the differential treatment which he suffered.

31. Based on surveillance video tape, which captured accounts at the scene of the incident at the time, Plaintiff was approached by the above-stated DEFENDANT OFFICERS as stated above and was victimized by POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10.

32. POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 wrote and gave false statements and testimony; provided false police reports, fabricated evidence, intimidated Plaintiff, falsely arrested Plaintiff, falsely accused Plaintiff of crimes which he did not commit, falsely prosecuted Plaintiff, subjected Plaintiff to a malicious prosecution, abuse of criminal process, abused authority and process, wrote and submitted false investigative reports,

and/or provided false information in furtherance of a contrived and misguided official investigation into the incident.

33. DEFENDANT POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 then, without cause or justifiable basis, charged Plaintiff with several crimes including Resisting Arrest, Obstruction of Governmental Administration and Refusing to Move On.

34. Mr. Benny was falsely charged and POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 continued to falsely, abusively and maliciously prosecute Mr. Benny for nearly a year until all charges were dismissed on June 27, 2019.

35. At all times, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 were aware that Plaintiff committed no crimes and that their charges were false. Mr. Benny suffered severe and serious injuries as a direct result of the use of unreasonable and excessive force by DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10.

36. At all times, Defendant police officers were aware that Mr. Benny committed no crimes and that their charges were false and manufactured to coverup the brutal and senseless actions of POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10. Thereafter, Mr. Benny, was brought to the Long Beach police

Precinct where he received untimely and inadequate medical attention. After Mr. Benny arrived at the precinct he repeatedly asked to make a phone call to his family, asked for help for the bleeding he was experiencing, in addition to pleading for appropriate medical attention. Mr. Benny was denied everything he requested until approximately seven (7) to nine (9) hours afterwards when he finally received minimal medical attention from two paramedics, just minutes before he was released from custody with a desk appearance, to appear in court.

37. Mr. Benny was denied every reasonable request made and was denied his right to counsel, right to medical treatment and deprived of his liberty and property. He waited for approximately seven (7) to nine (9) hours to receive any form of medical attention, when he finally received medical attention from two paramedics who looked at him minutes before he was released from custody with a desk appearance, to appear in court on January 17, 2019 .

38. Mr. Benny sustained multiple injuries including, but not limited to his mouth, teeth, face lacerations, nose, jaw, shoulders, back, cuts about his body, mental anguish, bleeding, being subjected to the Criminal Justice system, being jailed, suffering a concussion, injury to the Sphenoid Bone including but not limited to a pterygoid plate fracture, TMJ injury, extreme trauma to his head, being knocked unconscious, post concussion syndrome, lacerations and cuts, injury to the right side of his

face, chipped tooth, injury to his wrists, injury to his shoulders-including but not limited to a complex tear of the posterior labrum both horizontal and obliquely, injury to the adjacent labral capsular junction, a displaced labral flap with the tear extending to th superior labrum where there is a small nondisplaced labral flap, an additional tear along the anterior inferior chondral labral junction and a small region of chondral delamination of the posterior glenoid adjacent to the labral tear of approximately 3mm, no less than two surgeries to address and repair damages caused to Plaintiff's facial/skull injury and shoulder injury, injury to his back and being manhandled during his unlawful abuse, scarring, loss of blood, physical pain, embarrassment, mental pain and suffering, incarceration, damage to his name and reputation, court fees, legal fees and costs, medical costs/fees, property damage and other monetary damages including but not limited to loss of employment and income due to POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 's violation of his various rights.

39. DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 lodged false and malicious charges against Plaintiff, and wrongfully and improperly arrested Plaintiff without probable cause in an attempt to justify and cover up their own wrongful and violative actions. Each of the DEFENDANT OFFICERS have engaged in the preparation of false and misleading reports and documents intended to fur-

ther the prosecution of Plaintiff, and to cause Mr. Benny further injury and distress following his abusive and violent treatment.

40. The Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 wrote and filed a false police report, after falsely arresting Mr. Benny and falsely accused Mr. Benny of crimes which he did not commit, falsely prosecuted Mr. Benny, wrote false allegations against him, failed to conduct and engage in sufficient and proper investigations and submitted false investigative reports. Defendants falsely alleged that Mr. Benny resisted arrest, falsely alleged that Mr. Benny Obstructed Governmental Administration and was falsely charged with Disorderly Conduct, when defendant was in fact lawfully standing on the side walk recording the abusive and lawless actions of Defendant Police Officer. They also falsely alleged that Mr. Benny "intentionally caused public annoyance and alarm by refusing a lawful order given by uniformed Long Beach Police Officers to disperse the area while he was congregating with several others resulting in an even larger crowd to assemble in the area" Defendants also falsely charged Mr. Benny with "intentionally attempt[ing] to prevent uniformed Long Beach police officers from effecting his lawful arrest for disorderly conduct for refusing a lawful order given by police to disperse the area by pushing uniformed Police Officer Joseph Wiemann on his chest with his hands after being told by the officer that he was being placed under arrest."

Further, Defendants falsely alleged that "did intentionally attempt to prevent a uniformed Long Beach Police Officer from effectuating his lawful; arrest for disorderly conduct for refusing a lawful order given by police to disperse the area by pushing uniformed Police Officer Joseph Wiemann on his chest with his hands and attempting to prevent officers from placing him into handcuffs by tensing up his arms and pulling them tightly towards his chest."

41. Each of the three charging documents were dated December 8, 2018, and were sworn documents which contained the statement ***"Any false statement made herein is punishable as a Class A misdemeanor, pursuant to Section 210.45 of the Penal Law."*** (Emphasis added) Each of the three charging documents was signed under oath by Joseph Wiemann. Each of the three charging documents were false and fabricated claims made against Plaintiff

42. Rather than admit their wrongful actions and avoid perjury and making false statements, Defendant Officers colluded and conspired to violating Penal Law § 195.05 (Misdemeanor Obstructing Governmental Administration 2nd); § 205.30 (Resisting Arrest); and § 240.20 (Disorderly Conduct.) The commencement of the criminal proceeding was an abuse of the use of legal process and intended to mask the clear violations suffered by Mr. Benny at the hands of the Defendant Officers.

43. Although Plaintiff was made to suffer serious injuries on December 8, 2018, which required intensive and specialized medical treatment. Mr. Benny pleaded not guilty to all charges and maintained his innocence to the charges until they were dismissed.

44. At no time during the attack on Plaintiff by DEFENDANT OFFICERS did Plaintiff resist or provide any form of force or resistance against any of the DEFENDANT POLICE OFFICERS that were attacking him.

45. POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10, with no provocation, handcuffed and brutally beat Plaintiff with their hands, feet, knees and fists as well as subjecting him to the abuse of hurling him down to the ground no fewer than twice, slamming him against the ground, causing severe physical and emotional injuries to Plaintiff's person.

46. On said date, although the Plaintiff had committed no crime or broken any law for which he was charged, exhibited no assaultive behavior, said DEFENDANT OFFICERS engaged in the aforementioned prohibited conduct all in violation of the Plaintiff's constitutionally protected rights.

47. POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 conspired and concocted the trumped up allegations of wrongdoing on the part of Plaintiff, wherein they accused Plaintiff of Obstruction of

Governmental Administration, Resisting Arrest and Disorderly Conduct.

48. POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 detained and arrested the Plaintiff, although no probable cause existed for said arrest. Despite the obvious violations occurring against Mr. Benny on the street and thereafter, none of the DEFENDANT OFFICERS intervened to prevent the wrongful beating, abuse and mistreatment of Plaintiff including the beating and filing of false criminal charges against him.

49. Plaintiff was arraigned in the Long Beach City Court on the false criminal charges on December 10, 2018 and pleaded not guilty to all charges.

50. Plaintiff, by his attorneys served Discovery Demands on the office of the District Attorney and The People's Response to Mr. Benny's Discovery Demand was provided on February 11, 2019.

51. On March 11, 2019 Mr. Benny, by his attorneys filed and served a Notice of Omnibus Motion and supporting documents seeking, among other relief, the dismissal of all the charges lodged against Plaintiff.

52. On or about April 22, 2019, the office of the Nassau County District Attorney filed Opposition to Mr. Benny's Omnibus Motion. That document provide nothing which further established probable cause to arrest and charge Mr. Benny.

53. On May 6, 2019, Mr. Benny by his attorneys filed a Reply Affirmation in further support of the Omnibus Motion.

54. On June 27, 2019 the Hon. William Miller, City of Long Beach Court Judge, issued a decision dismissing all three accusatory instruments and found that each of the charges were, "legally insufficient" and dismissed every one. Thus, the charges concluded in favorable dismissal and disposition in Plaintiff's favor.

55. Notice of Entry of this decision, containing seven pages was provided to the People and the Court and acknowledged by the Court on July 5, 2019. No further motions or appeals followed.

56. Plaintiff was subject to false charges and malicious prosecution for six and a half months. At no time did any of the defendants cease their pursuit of the false charges which had been lodged against Plaintiff.

57. Plaintiff, RICKY JOSHUA BENNY continues to suffer emotionally and physically, often coping with sleeplessness and night terrors, which affects his ability to function as he did before the incident.

58. Plaintiff, RICKY JOSHUA BENNY was subjected to intrusive surgical procedures, anesthesia, and months of recovery and rehabilitation following his injuries and surgeries and continues to suffer from physical disfigurement, scarring, abnormalities in movement, pain, suffering and aching as a result of Defendants', individually and collectively, actions and failures to act.

AS AND FOR THE FIRST COUNT

42 U.S.C. § 1981

59. The Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 58 of this Complaint with the same force and effect as though fully set forth herein.

60. Plaintiff was racially discriminated against by POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 by the use of selective enforcement and differential and targeted treatment while abusing Plaintiff and other persons of color and taking no action against White persons who were clearly engaged in violent criminal acts.

61. Plaintiff was detained, arrested, assaulted and maliciously prosecuted by Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 and his race and color were factors as the officers saw Plaintiff as a nonwhite and targeted him his friends of color, while taking no action against white persons who were engaged in criminal activity and were ignored as to police action.

62. Plaintiff was denied privileges and immunities because of his race/color. The decision by POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 to single him out and speak to him and his friends with disrespect, disdain and in an abusive fashion.

63. The above referenced conduct was part of deliberate and concerted actions aimed at Plaintiff in acts of bias, abuse, and discrimination, based on race, by CITY, LBPD, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 which violates 42 U.S.C. § 1981 as amended by the Civil Rights Restoration Act of 1991 (Publ. Law No. 102-406).

64. But for his race, Plaintiff would not have been treated as he was. While taking the violent and unauthorized actions taken toward and against Plaintiff, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10 continued the aforesaid discriminatory treatment of Plaintiff on an ongoing basis, and all Defendants above alleged conduct was part of a systemic pattern and practice of discrimination (against Plaintiff as an African-American/Hispanic-American male.) This wrongful action by these officers was adopted, supported, encouraged, and authorized by Defendants CITY and the LBPD.

65. As a direct consequence of the actions of POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH AND POLICE OFFICERS 1-10, acting in furtherance of their duties as agents of CITY and LBPD, Plaintiff suffered injuries, including but not limited to pain, suffering, fear, economic loss, stigmatization, embarrassment, harassment, loss of liberty and the infringement of his rights guaranteed to his under the U.S. Constitution.

66. As a direct consequence of the actions of the Collective Defendants, Plaintiff suffered financial loss, loss of standing in the community, loss of time, loss of freedom, loss of quality of life, damage to name and reputation, special damage, attorney's fees, incidental fees/costs, loss of property and other financial impairments.

67. As a direct and proximate result of the aforesaid acts of the DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, Plaintiff suffered great physical harm, property damage, mental anguish and violations of rights from then until now and he will continue to so suffer in the future, having been greatly humiliated and mentally injured, as a result of the foregoing acts of the DEFENDANTS.

68. Plaintiff was forced to incur great expense due to the filing of this Complaint for attorney's fees, investigation expenses, and other expenses in clearing his name against the unfounded and unwarranted allegations by the DEFENDANTS, which have been a serious burden on Plaintiff.

69. That by reason of the foregoing, Plaintiff has been placed in fear of his life, suffers significant emotional damages, distress, pain, suffering, loss of self-esteem, self-doubt and has been exposed to disgrace, public humiliation and embarrassment, was deprived of access to his family, was deprived of his constitutional rights and has been damaged in the sum in excess of Five Million ($5,000,000.00) Dollars.

AS AND FOR THE SECOND COUNT

42 U.S.C. § 1983

First, Fourth, Fifth and Fourteenth Amendment Violations- Including but not limited to UNLAWFUL TREATMENT DUE TO RACE/ETHNICity/COLOR

70. The Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 69 of this Complaint with the same force and effect as though fully set forth herein.

71. The DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, under the color of state law, subjected Plaintiff to the foregoing acts and omissions without due process of law in a violation of 42 U.S.C. § 1983 thereby depriving Plaintiff of his rights, privileges and immunities secured by the First, Fourth, Fifth and Fourteenth Amendment of the United States Constitution.

72. The abusive, malicious and unreasonable actions committed by CITY and LBPD employees DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 were done in furtherance of their intent to deny Plaintiff's equal protection under the law - based on his race, color and ethnicity, heritage and speech which was expressive and based on their treatment of people with color by the police in Long

Beach and as it was happening before him to his friend a person of color who had not committed any crime and was singled out due to the color of his skin, all of which is - a matter of public concern in violation of his First, Fourth, Fifth and Fourteenth Amendment rights. This was evident in and through that actions of DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 as they chose to take police action against Plaintiff and his friends who were clearly persons of color and not take action agaisntt White persons who were actively engaged in violent criminal behavior that the Defendants witnesses

73. The DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 failure to stop these wrongful actions constitutes a breach of their duty, as public servants acting under the color of law, to do so under the First Amendment.

74. Each named Defendant knew that their respective actions were in violation of the Plaintiff's right to equal protection, free speech, to freely record as he wished, which they knew or should have known were unreasonable, unlawful, and a breach of the Plaintiff's rights under a well organized and clearly established law.

75. DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 acting within the scope of their official authority as state actors, contrary to

the various Constitutional and statutory rights secured to the Plaintiff, and acting with malicious intent, misrepresented facts in order to justify the maltreatment and violation of the First Amendment right to free speech against the Plaintiff.

76. The CITY and LBPD's position of taking no action and refusal to discipline the DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 for their misconduct against Plaintiff is neglectful of their duty to prevent the further violation of Plaintiff's rights under 42 U.S.C. § 1983, with such violation occurring as a result of said officers being improperly cleared of any wrongdoing, despite substantial evidence to the contrary.

77. None of the Defendants took action to prevent the wrongful actions or intervened to stop the acts taken against the Plaintiff, including but not limited to beating Plaintiff, causing false criminal proceedings to continue against the Plaintiff, abuse of process and retaliation for trying to exercise his right to freely record public officers while on duty. All of these acts and failures were in violation of Plaintiff's rights to equal protection.

78. Each of the Defendants condoned the wrongful, grossly negligent, reckless, callous, discriminatory, careless and intentional acts taken as set out herein and each had an affirmative responsibility to prevent, expose and reverse said wrongful, grossly negligent, reckless, callous, careless and intentional acts but instead furthered and con-

doned said wrongful acts. Said actions were aimed at silencing Plaintiff, to keep him, as an African-American/Hispanic-American male, silent.

79. Plaintiff's Fourth Amendment Rights were violated when DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 forcefully seized Plaintiff and wrongfully and illegally used force against him and did so with no legal authority and without probable cause.

80. Each named Defendant knew that their respective actions were in violation of the Plaintiff's right to protection from said use of force and unauthorized and unreasonable searches and seizures. Each named Defendant knew that their actions were unreasonable, unlawful, and a breach of the Plaintiff's rights under a well organized and clearly established law.

81. Plaintiff's Constitutional Rights were violated when DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 decided to interrupt Plaintiff as he recorded Defendants and then used excessive force and physically abused Plaintiff by brutally beating, tackling and hitting Plaintiff aggressively in the and seriously and permanently injuring him.

82. DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 caused Plaintiff to be seized, arrested, and held in a dangerous, compromising position for an unreasonable time without, proba-

ble cause and caused him to be deprived of his liberty, without due process and was further exposed to disgrace, public humiliation and embarrassment.

83. Plaintiff's Fourteenth Amendment Rights to due process and equal protections rights were violated, as he as a African-American/Hispanic-American male who did nothing to be subjected to maltreatment that White persons were not be subjected to.

84. Plaintiff is a brown skinned African-American/Hispanic-American male and is part of a protected class. DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 in committing such acts violated Plaintiff's right to substantive due process and equal protection rights, which were marked by he clear and obvious double standard and differential treatment to which Plaintiff was subjected including but not limited to abusive and disrespectful language, seizure, being slammed to the ground, being falsely charged and maliciously prosecuted, all of which was done to Plaintiff on account of his race, color and ethnicity.

85. The CITY and LBPD, DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 through their actions, violated the due process rights guaranteed to Plaintiff under the Fourteenth Amendment of the United States Constitution.

86. Plaintiff exercised his right to freely record officers while on duty outside his home when he felt unsafe and threatened. He also continued to exercise his right to speak, record and deny the signing of any documents while being harassed, cursed at, abused, and subjected to racial slurs and unlawfully searched, seized, arrested and confined by DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10.

87. As a direct consequence of the actions of DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 acting in furtherance of their duties as agents of the CITY and LBPD, Plaintiff suffered injuries, including but not limited to, temporary loss of pay, stigmatization, embarrassment, harassment, loss of liberty and the infringement of his rights guaranteed to him under the U.S. Constitution.

88. As a direct consequence of the of the actions of the Collective Defendants, Plaintiff suffered temporary loss of employment, loss of standing in the community, loss of time, criminal record, loss of freedom, loss of quality of life, detention, arrest, denial of medical care and loss of regular income, damage to name and reputation, special damages, attorney's fees, incidental fees/costs, loss of benefits and other financial impairments.

89. Plaintiff was forced to incur great expense due to the filing of this Complaint for attorney's

fees, investigation expenses, and other expenses in clearing his name against the unfounded and unwarranted allegations by the DEFENDANTS, which have been a serious burden on Plaintiff.

90. That by reason of the foregoing, Plaintiff has been placed in fear of his life, suffers significant emotional damages, distress, pain, suffering, loss of self-esteem, self-doubt and has been exposed to disgrace, public humiliation and embarrassment, was deprived of access to his family, was deprived of his constitutional rights and has been damaged in the sum in excess of Five Million ($5,000,000.00) Dollars.

AS AND FOR A THIRD COUNT

42 U.S.C. § 1983

FALSE ARREST, MALICIOUS PROSECUTION, FABRICATION OF EVIDENCE, UNREASONABLE AND EXCESSIVE USE OF FORCE

91. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 90 of this Complaint with the same force and effect as though fully set forth herein.

92. On or about December 8, 2018, Plaintiff was placed in fear of his life, falsely seized, falsely detained and falsely arrested by DEFENDANTS and subjected to excessive and unreasonable use of force and unlawful search and seizure.

93. On or about December 8, 2018 and after, Plaintiff was placed in fear of his life, falsely arrested, falsely seized, detained, and held for an unreasonable period of time against his will without justification, explanation or rationale for such detention.

94. On or about December 8, 2018, while being detained, Plaintiff was subject to excessive and unreasonable use of force, which was demeaning in nature.

95. On or about December 8, 2018, while being detained, DEFENDANT OFFICERS beat Plaintiff about his body and head, subjected him to loss of consciousness, loss of blood, fear, permanent scarring, loss of function, loss of freedom, loss of use of body parts and other serious injuries, which they knew would be a likely outcome of their action and were indeed the outcomes and injuries that DEFENDANT OFFICERS caused.

96. On or about December 8, 2018, while being detained, DEFENDANT OFFICERS kicked, punched, and otherwise subjected Plaintiff to excessive and unreasonable use of force which caused, but not limited to, injuries to his mouth, teeth, face lacerations, nose, jaw, shoulders, back, and cuts, mental anguish, bleeding, being subjected to the Criminal Justice system, being jailed, loss of liberty and being forced to attend court, injury to the Sphenoid Bone including but not limited to a pterygoid plate fracture, TMJ injury, extreme trauma to his head, loss of consciousness, concussion, post concussion

syndrome, permanent scarring, loss of blood, physical pain, headaches, neurological deficits, prolonged pain, medical treatment, surgery, rehabilitation, embarrassment, mental pain and suffering, incarceration, damage to name and reputation, court fees, legal fees and costs, medical costs/fees, and other monetary damages. As a result of the DEFENDANT OFFICERS' actions Plaintiff suffered and continues to suffer.

97. Upon information and belief such seizure, arrest and detention was ordered and was carried out by DEFENDANT CITY, DEFENDANT POLICE DEPARTMENT and DEFENDANT OFFICERS.

98. DEFENDANT OFFICERS from DEFENDANT POLICE DEPARTMENT, were present on December 8, 2018 in or around the vicinity Virginia Avenue at or near the West End Pizzeria, City of Long Beach, State of New York and participated in the unlawful detention, arrest, and beating of Plaintiff.

99. DEFENDANT OFFICERS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 from the CITY and LBPD failed to take any action to prevent this unlawful behavior by the DEFENDANT OFFICERS.

100. Upon information and belief, such seizure, arrest, detention, and assault was ordered, condoned and authorized by the COUNTY DEFENDANTS and DEFENDANT OFFICERS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, with a callous, deliberate

indifference to Plaintiff's known constitutional rights.

101. Upon information and belief, each DEFENDANT OFFICER including but not limited to POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH, OFFICERS JOHN DOES 1-10 took an active role in creating and manufacturing the allegations made against Plaintiff. In essence, Defendants fabricated facts, fabricated allegations and fabricated behavior and attributed them to Plaintiff knowing said information was not true and was created and fabricated by Defendants Officers.

102. As part of the false arrest, detention, and accusations, DEFENDANT OFFICERS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 caused Plaintiff to be seized, arrested, forced to get medical treatment and held in a dangerous, compromising position for an unreasonable time without, probable cause and caused him to be deprived of his liberty, without due process and was further exposed to disgrace, public humiliation and embarrassment.

103. The DEFENDANT OFFICERS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 individually and collectively knew at the time of Plaintiff's arrest, and at all times since then, that they were not in possession of any evidence consistent with and sufficient to establish his guilt and were based solely, or in part, on DEFENDANTS' discriminatory and violative actions due to his race and color.

104. Each of the DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, acting under color of law, acted separately and in concert and without authorization of law. Each of the DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, separately and in concert with each other, acted willfully, knowingly and purposefully with the specific intent to deprive Plaintiff of his right to freedom from excessive force, illegal seizure of his person, freedom from illegal detention, and imprisonment. All of these rights are secured to Plaintiff by the provisions of the due process clause of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, the Fourth Amendment, as well as the Equal Protection clause of the Fourteenth Amendment and by 42 U.S.C. § 1983. In addition, Plaintiff was denied access to an attorney at the time of his wrongful and abusive punishment and was subjected to summary punishment without providing any of the rights to which he was entitled including right to counsel.

105. None of the Defendants took action to prevent the wrongful actions taken against the Plaintiff causing false criminal proceedings to continue against the Plaintiff, abuse of process and retaliation for trying to exercise his right to speak on a matter of public speech and right.

106. Each of the Defendants condoned the wrongful, grossly negligent, reckless, callous, careless and intentional acts taken as set out herein and

each had an affirmative responsibility to prevent, expose and reverse said wrongful, grossly negligent, reckless, callous, careless and intentional acts but instead furthered and condoned said wrongful acts.

107. CITY and LBPD and POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 through their actions, violated the due process rights guaranteed to Mr. Benny under the Fourteenth Amendment of the United States Constitution.

108. In fabricated allegations, falsely arresting, falsely imprisoning, abusing, detaining, coercing, threatening, intimidating and falsely charging Plaintiff, and denying Plaintiff his right to be free from unreasonable search and seizure from the DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, and each of them, knew or should have known they were violating laws of the State of New York and those statutory and constitutional rights set forth herein causing harm to Plaintiff.

109. As a direct and proximate result of the aforesaid acts of the DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, Plaintiff suffered great physical harm, property damage, mental anguish and violations of rights from then until now and he will continue to so suffer in the future, having been greatly humiliated and mentally

injured, as a result of the foregoing acts of the DEFENDANTS.

110. Plaintiff was forced to incur great expense due to the filing of this Complaint for attorney's fees, investigation expenses, and other expenses in clearing his name against the unfounded and unwarranted allegations by the DEFENDANTS, which have been a serious burden on Plaintiff.

111. That by reason of the foregoing, Plaintiff has been placed in fear of his life, suffers significant emotional damages, distress, pain, suffering, loss of self-esteem, self-doubt and has been exposed to disgrace, public humiliation and embarrassment, was deprived of access to his family, was deprived of his constitutional rights and has been damaged in the sum in excess of Five Million ($5,000,000.00) Dollars.

AS AND FOR A FOURTH COUNT

42 U.S.C. §1983 – ABUSE OF PROCESS

112. The Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 through 111 of this Complaint with the same force and effect as though fully set forth herein.

113. The Collective Defendants, including POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH, and OFFICERS JOHN DOES 1-10 intentionally, recklessly and maliciously filed and/or caused to be filed, a false, inaccurate, and/or misleading crimi-

nal complaints against Plaintiff RICKY JOSHUA BENNY Said criminal complaint was made by the aforementioned Defendants without research and investigation (of any kind) into the veracity and/or truthfulness of said complaint.

114. The false criminal complaints lodged by Defendants against RICKY JOSHUA BENNY was done with knowledge that the facts contained therein were false, misleading and/or otherwise inaccurate.

115. Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 did not file said criminal complaint as a result of actual knowledge that a crime was committed, determined through investigation and/or a simple rudimentary search, which was available to Defendants.

116. Instead, Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 filed said false criminal complaint against Plaintiff RICKY JOSHUA BENNY with an ulterior purpose/motive to subject Plaintiff as punishment without lawful court order and to block Plaintiff from access to the Court and seeking justice against them for their wrongful acts, collect payment and various forms of restitutions from Plaintiff to which Defendants were not entitled.

117. Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 subjected Plaintiff to the criminal justice system without just cause or reason. DEFENDANTS abused the criminal justice sys-

tem in arresting, charging, prosecuting and conducting a public court appearences in attempt to satisfy their personal attempt to satisfy their personal goals and their own warped sense of power.

118. POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 motive for subjecting Plaintiff RICKY JOSHUA BENNY to false criminal process included but was not limited to a cover-up of their wrong doings, and to level their charges against Plaintiff in an effort to ensure that Plaintiff would be convicted and would not be able to pursue his rights in court for his false arrest and unwarranted beating. Defendants also intended to cripple Plaintiff financially by forcing him into submitting to court and legal fees, payments, and court imposed fees/fines—not because they knew or believed that Plaintiff committed any criminal acts.

119. The Defendants' POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 clear intentions was to use the criminal justice system to cause harm to Plaintiffs without proper motive, excuse or justification of any kind.

120. Defendants' POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 use of criminal process for the aforementioned improper purpose amounted to an abuse of said process, which was initiated and used to the detriment of Plaintiffs solely for a purpose

that was/is outside the legitimate ends of the legal process.

121. Defendants CITY, LBPD POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, with knowledge of the inaccuracy and/or falsity of said criminal complaints made by Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, and without any investigation and/or rudimentary query, intentionally, recklessly and maliciously caused to be filed, said false, inaccurate, and/or misleading criminal complaint against Plaintiff RICKY JOSHUA BENNY

122. The subsequent false arrest and malicious prosecution of Plaintiff RICKY JOSHUA BENNY was done by Defendants CITY, LBPD, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 with knowledge that the facts contained therein were false, misleading and/or otherwise inaccurate.

123. Defendants POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 did not initiate the arrest and prosecution of Plaintiff as a result actual knowledge that a crime was committed.

124. Instead, Defendant Officers POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 searched, seized, harassed, annoyed, falsely arrested, falsely imprisoned, and maliciously prosecuted Plaintiff with an ulterior purpose/motive to collect payments, and

fees. Defendants were motivated by the intent to subject Plaintiff to the criminal system in order to force, coerce and justify punishment, payments and fees from Plaintiff and to shield themselves from liability from the wrongful actions committed against Plaintiff.

125. Defendants' CITY, LBPD, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, clear intention was to falsely arrest, and falsely prosecute Plaintiff RICKY JOSHUA BENNY and cause harm to Plaintiff without proper motive, excuse, or justification of any kind.

126. Defendants CITY, LBPD, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, use of criminal process for the aforementioned improper purpose amounted to an abuse of said process, which was initiated and used to the detriment of Plaintiff solely for a purpose that was/is outside the legitimate ends of the criminal process (i.e. to prevent criminal and professional liability to Defendants and to avoid monetary penalties and exposure and to obtain personal monetary returns).

127. As a direct consequence of the actions of POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10, acting in furtherance of their duties as agents of CITY and LBPD, RICKY JOSHUA BENNY suffered injuries, including but not limited to, temporary loss of pay, stigmatization, embarrassment, harassment, loss

of liberty and the infringement of his rights guaranteed to his under the U.S. Constitution.

128. As a direct consequence of the of the actions of the Collective DEFENDANTS, RICKY JOSHUA BENNY suffered temporary loss of employment, loss of standing in the community, loss of time, criminal record, loss of freedom, loss of quality of life, arrest record, loss of regular income, damage to name and reputation, special damage, attorney's fees, incidental fees/costs, loss of property and other financial impairments.

129. That by reason of the foregoing, Plaintiff suffered and continues to suffer irreparable injury and monetary damages in excess of FIVE MILLION ($5,000,000.00) DOLLARS, as well as punitive damages, costs and attorney's fees, and any other relief this Court may find just and proper.

AS AND FOR A FIFTH COUNT

42 U.S.C. § 1983 – MUNICIPAL LIABILITY

130. Plaintiff repeats and re-alleges each and every allegation contained in paragraph 1 through 129 of this Complaint with the same force and effect as though fully set forth herein.

131. Prior to December 8, 2018 and since, the CITY and LBPD have permitted and tolerated a pattern and practice of unjustified, unreasonable and illegal uses of force, abuse of authority, beatings, and uses of weapons by police officers of the LBPD Although such beatings, abuse of authority, illegal

use of force, and use of weapons were improper, the officers involved were not seriously prosecuted, disciplined, or subjected to restraint, and such incidents were in fact covered up with official claims that the beatings, use of force, and uses of weapons were justified and proper. As a result, CITY police Officers within their jurisdiction were caused and encouraged to believe that civilian persons could be beaten or abused under circumstances not requiring the use of excessive force, and that such abuse and beatings would in fact be permitted by the DEFENDANT CITY.

132. Prior to December 8, 2018 and since, the CITY has permitted and tolerated a pattern and practice of unjustified, unreasonable and illegal uses of force, abuse of authority, beatings, and uses of weapons by police officers of the LBPD and other local police departments within the jurisdiction of the LBPD. This is especially true in certain portions of the City, especially in the community commonly known as North Park and against person who reside or are believed to reside in that community or are believed to reside in that community. The vast majority of persons residing in North Park are Black African-Americans or Hispanic persons. Although such beatings, abuse of authority, illegal use of force, and use of weapons were improper, the officers involved were not seriously prosecuted, disciplined, or subjected to restraint, and such incidents were in fact covered up with official claims that the beatings, use of force, and uses of weapons were justified and proper. As a

result, LBPD police officers within their jurisdiction were caused and encouraged to believe that civilian persons could be beaten or abused under circumstances not requiring the use of excessive force, and that such abuse and beatings would in fact be permitted by the CITY .

133. In addition to permitting a pattern and practice of improper beatings and abuses in the CITY and LBPD have failed to maintain a proper system of investigation of all incidents of unjustified beatings, abuses of authority, false arrests, and excessive use of force by police officers.

134. The CITY has failed to respond to the continuing and urgent need to prevent, restrain, and discipline police officers who wrongfully, beat, abuse authority, use excessive force, and abuse civilians, and the CITY has failed to find that civilian complaints made against police officers are founded or valid in anyway, therefore the CITY is liable under 42 U.S.C. § 1983 because the CITY has had actual and/or constructive knowledge of the patterns of abuse and excessive force against citizens by its police officers, employees, and/or agents in violation of the United State Constitution, and because of the CITY and LBPD's un-meaningful policy and custom for reviewing complaints of misconduct, the Defendant Officers relied upon that flawed policy to continue their patterns of their abusive authority, physical abuse, excessive force, and false arrests, all in violation of the Plaintiff's rights.

135. The CITY and LBPD have maintained a system of review of unjustified seizures, beatings, shootings, and excessive use of force by police officers that has failed to identify the improper abuses of authority, brutality by police officers and failed to subject officers who abused, beat and/or brutalized citizens to discipline, closer supervision, or restraint, to the extent that it has become the custom of the CITY to tolerate the improper abuses of authority beatings, illegal arrests and other wrongful actions by police officers.

136. Further, the CITY and LBPD, who maintain either supervisory and/or decision-making positions, permitted a practice of improper investigation, supervision, discipline and retention of Defendant Officers. The CITY and LBPD also refused and failed to prosecute the Defendant Officers thereby improperly and in violation of the Plaintiffs' rights neglected, failed, and/or delayed in administering an investigation of the circumstances surrounding the instant matter and neglected, failed, and/or delayed in presenting the matter to the District Attorney of the County of Nassau for presentation to the Grand Jury for action against police officers.

137. Upon information and belief, specific systemic flaws in the CITY brutality review process include, but are not limited to, the following:

a. Preparing reports regarding investigations of beatings and abuse incidents as routine point-by-point justifications of police offi-

cer actions, regardless of whether such actions are justified;

b. Police officers investigating beatings systemically fail to credit testimony by non-police officer witnesses, and uncritically rely on reports by police officers involved in the incident;

c. Police officers investigating beatings fail to include in their reports relevant factual information which would tend to contradict the statements of the police officers involved;

d. Supervisory police officers at times issue public statements exonerating police officers for excessive use of force, improper beatings, and use of unnecessary and excessive force before the investigation of the incident by the police department has been completed;

e. Reports in brutality cases are not reviewed for accuracy by supervisory officers. Conclusions are frequently permitted to be drawn on the basis of clearly incorrect or contradictory information.

138. The foregoing acts, omissions, systemic flaws, policies and customs of the Defendants CITY and LBPD caused the Defendant Officers to believe that brutality and other improper actions would not be aggressively, honestly and properly investigated, with the foreseeable result that officers are

most likely to use excessive force in situations where such force is neither necessary nor reasonable.

139. As a consequence of Defendants' wrongful actions, intentional, negligent, and reckless behavior, and violations of state and federal laws, Plaintiff was deprived of his freedom, was made to suffer physical injuries, great pain and suffering, and was subjected to great fear and terror, personal humiliation, degradation, and continued to suffer physical pain and mental and emotional distress as a result of the aforesaid unlawful conduct of the Defendants.

140. Plaintiff was forced to incur great expense due to the filing of this complaint for attorney's fees, investigation expenses, and other expenses in clearing his name against the unfounded and unwarranted allegations by the DEFENDANTS, which have been a serious burden on Plaintiff.

141. That by reason of the foregoing, Plaintiff suffered and continues to suffer irreparable injury and monetary damages in excess of FIVE MILLION ($5,000,000.00) DOLLARS, as well as punitive damages, costs and attorneys fees, and any other relief this Court may find just and proper.

AND AS FOR A SIXTH COUNT

42 U.S.C. § 1983 – FAILURE TO INTERVENE

142. The Plaintiff repeats, reiterates and realleges each and every allegation contained in para-

graphs 1 through 141 of this Complaint with the same force and effect as though fully set forth herein.

143. POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 from CITY and LBPD knew or should have known that the detainment, false arrest, wrongful imprisonment and excessive beating of RICKY JOSHUA BENNY violated the Plaintiff's rights, guaranteed to him under the Fourth, Fifth, and Fourteenth Amendments and 42 U.S.C. §1983.

144. Each of the said DEFENDANTS had the authority, ability and concurrent duty under 42 U.S.C.§ 1983 to prevent the false arrest, wrongful detainment and excessive beating of the Plaintiff, yet neglected to prevent said violations from occurring, and further failed to intervene to protect or aid the Plaintiff when such violations did in fact occur.

145. DEFENDANT OFFICERS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 from the DEFENDANT CITY and LBPD failed to stop these wrongful actions, which constitutes a breach of their duty to do so under 42 U.S.C. § 1983.

146. DEFENDANT OFFICERS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 from the DEFENDANT CITY and LBPD knew or should have known that the fabricated accusations against, and physical beating of RICKY JOSHUA BENNY were violative of his Fourth,

Fifth and Fourteenth Amendment rights to due process, and were tantamount to unequal protection under the law, in violation of the Plaintiff's fundamental rights under the Constitution.

147. Said DEFENDANTS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 had and continued to have the power to prevent the continued due process violations against RICKY JOSHUA BENNY yet they failed to prevent or dismiss the pending fabricated charges against the Plaintiff, or to protect the Plaintiff from the unwarranted and potential penalties of said charges.

148. DEFENDANT CITY and LBPD's exoneration of and refusal to discipline the DEFENDANT OFFICERS for their misconduct against RICKY JOSHUA BENNY is neglectful of their duty to prevent the further violation of RICKY JOSHUA BENNY's right to compensation under 42 U.S.C. §1983 and the State Law claims, with such violation occurring as a result of said officers being improperly allowed to engage in their wrongful acts and essentially being cleared of any wrongdoing, despite substantial physical evidence to the contrary.

149. As a direct and proximate result of the aforesaid acts of the DEFENDANTS, Plaintiff suffered great physical harm, mental anguish, property damage, and violations of rights from then until now and he will continue to so suffer in the future, having been greatly humiliated and mentally

injured, as a result of the foregoing acts of the DEFENDANTS.

150. Plaintiff was forced to incur great expense due to the filing of this complaint for attorney's fees, investigation expenses, and other expenses in clearing his name against the unfounded and unwarranted allegations by the DEFENDANTS, which have been a serious burden on Plaintiff.

151. That by reason of the foregoing, Plaintiff has been in fear of his life, suffers serious emotional damages, distress, pain, suffering, loss of self-esteem, self-doubt and has been exposed to disgrace, public humiliation and embarrassment, was deprived of access to his family, was deprived of his constitutional rights, and has been damaged in the sum in excess of Five Million ($5,000,000.00) Dollars.

AND AS FOR AN SEVENTH COUNT

FALSE ARREST (PENDENT STATE CLAIM)

152. Plaintiff, repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 151 of this Complaint, with the same force and effect as though fully set forth herein.

153. On or about the 8th day of December 2018 in the DEFENDANT CITY, LBPD, DEFENDANT OFFICERS POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 intentionally, falsely, unlawfully and wrongfully, with force and without Plaintiff's consent and against

his will, assaulted, battered, falsely arrested and falsely imprisoned Plaintiff by detaining Plaintiff and imprisoning him, and depriving him of his liberty for an unreasonable time.

154. By reason of the above and in particular said false arrest, Plaintiff's reputation has been greatly injured and he has been brought into public scandal and disgrace. Plaintiff has been greatly hindered and prevented from following and transacting his affairs, and business and has suffered great emotional trauma and harm, all to his damage.

155. That by reason of the foregoing, Plaintiff has been placed in fear of his life, suffers extreme emotional damages, distress, pain, suffering, loss of self-esteem, self-doubt and exposed him to disgrace, public humiliation, was deprived of access to his family and was deprived of his constitutional rights and has been damaged in the sum in excess of Five Million ($5,000,000.00) Dollars.

AND AS FOR A EIGHTH COUNT

ABUSE OF PROCESS
(PENDENT STATE CLAIM)

156. Plaintiff, repeats reiterates and realleges each and every allegation contained in paragraphs 1 through 155 of this Complaint, with the same force and effect as though fully set forth herein.

157. DEFENDANTS' CITY, LBPD, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH

and OFFICERS JOHN DOES 1-10 used their legal power and authority to commence and continue false criminal charges against Plaintiff in an attempt to gain benefit from doing so. DEFENDANTS sought and used the criminal process to cover up and seek protection from loss of employment, discipline and possible criminal prosecution by alleging that Plaintiff had engaged in criminal activity when they each knew and were well aware that he had not. Said acts were a violation of Federal Law and State Law in that Plaintiff's Fourth and Fourteenth Amendment Rights were violated as well as common law.

158. DEFENDANTS' CITY, LBPD, POLICE OFFICER JOSEPH WIEMANN, POLICE OFFICER ROCCO WALSH and OFFICERS JOHN DOES 1-10 accusations and allegations against Plaintiff were false, malicious, negligent, reckless, intentional and wrongful and were intended to cause Plaintiff injury and to harass Plaintiff and were clearly the improper exercise of the police power, the resources of government, as well as an abuse of process.

159. That the false arrest, false imprisonment, assault, battery, excessive and unreasonable use of force, illegal transportation, and violation of Plaintiff's civil rights were brought about and caused by the actions of DEFENDANTS and that the same were a clear and intentional abuse of process causing Plaintiff severe damage.

160. As a result of the foregoing, Plaintiff has suffered injury to his good name and reputation

and has suffered great mental and bodily distress during his false imprisonment and afterwards, all to his damage.

161. That as a result of said beatings, slamming, kneeing, kicking, punches and other actions against Mr. Benny, the Plaintiff RICKY JOSHUA BENNY sustained damages and injuries, including but not limited to, personal injuries to his body, violation of civil rights, loss of income, permanent damage to reputation and standing in the community, loss of comfort, support and companionship, extreme mental and emotional harm and stress, impairment of earning power and other injuries not yet fully ascertained.

162. That by reason of the foregoing, Plaintiff has been placed in fear of his life, emotional damages, distress, pain, suffering, loss of self-esteem, self-doubt and exposed him to disgrace, public humiliation and embarrassment was prevented from attending his work and business for a long time, was deprived of access to his family and was deprived of his constitutional rights and has been damaged in the sum in excess of Five Million ($5,000,000.00) Dollars.

WHEREFORE, the Plaintiff demands judgment against the DEFENDANTS:

a) On the First Cause of Action in the sum in excess of Five Million ($5,000,000.00) Dollars;

b) On the Second Cause of Action in the sum in excess of Five Million ($5,000,000.00) Dollars;

c) On the Third Cause of Action in the sum in excess of Five Million ($5,000,000.00) Dollars;

d) On the Fourth Cause of Action in the sum in excess of Five Million ($5,000,000.00) Dollars;

e) On the Fifth Cause of Action in the sum in excess of Five Million ($5,000,000.00) Dollars;

f) On the Sixth Cause of Action in the sum in excess of Five Million ($5,000,000.00) Dollars;

g) On the Seventh Cause of Action in the sum in excess of Five Million ($5,000,000.00) Dollars;

h) On the Eighth Cause of Action in the sum in excess of Five Million ($5,000,000.00) Dollars;

i) Punitive damages in the sum in excess of Ten Million ($10,000,000.00) Dollars;

j) Declaratory Judgment that defendants willfully violated Plaintiffs' rights secured by federal and state law as alleged herein;

k) Injunctive relief, requiring defendants to correct all past violations of federal and state law as alleged herein; to enjoin

DEFENDANTS from continuing to violate federal and state law as alleged herein; and to order such other injunctive relief as may be appropriate to prevent any future violations of said federal and state laws;

l) Award such other and further relief as this Court may deem appropriate, including costs and attorney's fees, pursuant to 42 U.S.C. § 1988.

A JURY TRIAL IS HEREBY DEMANDED.

Dated: Hempstead, New York
April 24, 2020

LAW OFFICES OF
FREDERICK K. BREWINGTON

By: /s/ FREDERICK K. BREWINGTON
Attorneys for Plaintiff
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U.S.C.A. Const. Amend. IV–
Search and Seizure; Warrants

Amendment IV.
Searches and Seizures; Warrants

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights
[Statutory Text & Notes of
Decisions subdivisions I to IX]

Effective: October 19, 1996

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.