EXHIBIT A

Mason Murphy v. Michael Schmitt, 2023 WL 5748752
(8th Cir. 2023)

Order Denying Petition for Rehearing En Banc from the U.S. Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1726

Mason Murphy

Appellant

v.

Michael Schmitt, Officer, in his individual capacity

Appellee

Jerry Pedigo, Corporal, in his individual capacity and in his official capacity and Camden County, Missouri

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Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:21-cv-04195-MDH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judges Kelly, Erickson and Grasz would grant the petition for rehearing en banc. Judge Gruender did not participate in the consideration or decision of this matter.

December 12, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

EXHIBIT B

Mason Murphy v. Michael Schmitt, 2023 WL 5748752
(8th Cir. 2023)

Opinion from the

U.S. Court of Appeals for the Eighth Circuit

United States Court of Appeals
For the Eighth Circuit

No. 22-1726

Mason Murphy

Plaintiff - Appellant

v.

Michael Schmitt, Officer, in his individual capacity

Defendant - Appellee

Jerry Pedigo, Corporal, in his individual capacity and in his official capacity;
Camden County, Missouri

Defendants

Appeal from United States District Court
for the Western District of Missouri - Jefferson City

Submitted: January 11, 2023
Filed: September 6, 2023
[Unpublished]

Before GRASZ, MELLOY, and KOBES, Circuit Judges.

PER CURIAM.

Officer Michael Schmitt stopped Mason Murphy while Murphy was walking on the wrong side of a rural road. Murphy refused to identify himself, and the two men argued for a few minutes before Schmitt arrested Murphy. Murphy sued Schmitt for First Amendment retaliation. The district court[1] granted Schmitt's motion to dismiss based on qualified immunity. We affirm.

I.

Schmitt was patrolling a rural road when he saw Murphy walking along the right side of the road with traffic. A Missouri statute requires pedestrians to "walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction." Mo. Rev. Stat. § 300.405. Schmitt stopped his car, approached Murphy, and asked Murphy to identify himself. Murphy refused to identify himself, and Schmitt put Murphy in handcuffs after nine minutes of argument. Murphy asked why Schmitt arrested him, and Schmitt refused to answer. On the drive to the sheriff's department, Murphy again asked Schmitt why he was being arrested. Schmitt responded that the arrest was for "failure to identify." Once at the station, Schmitt can be heard making a call to an unknown individual and saying he "saw the dip shit walking down the highway and [he] would not identify himself." Schmitt then asked the unknown individual: "What can I charge him with?" Officers eventually identified Murphy by a credit card he was carrying. Officers confirmed Murphy had no outstanding warrants and released him.[2] Murphy was in the jail cell for approximately two hours.

Murphy asserts he was arrested in retaliation for exercising his First Amendment right to argue with police. Murphy filed a suit alleging unlawful

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[1]The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri.

[2]Schmitt's equipment captured interactions between Murphy and Schmitt from the time of Schmitt's initial approach to the time of Murphy's eventual release.

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detention and First Amendment retaliation. The district court granted Schmitt's motion to dismiss based on qualified immunity. The parties agree Schmitt had probable cause to stop Murphy because Murphy was in violation of Missouri Revised Statute § 300.405. Murphy appeals the dismissal of the First Amendment retaliation claim.

II.

We review the grant of a motion to dismiss based on qualified immunity de novo. Carter v. Huterson, 831 F.3d 1104, 1107 (8th Cir. 2016). To survive a motion to dismiss, a plaintiff must "state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

A First Amendment retaliation claim has three elements: "(1) [the plaintiff] engaged in a protected activity, (2) the government official took adverse action against [the plaintiff] that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." Greenman v. Jessen, 787 F.3d 882, 891 (8th Cir. 2015) (citations omitted). In First Amendment retaliation cases, "probable cause should generally defeat a retaliatory arrest claim[.]" Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019). The Supreme Court arguably reserved one "narrow qualification" to the general rule: "the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." Id. (discussing but not applying such an exception). Evidence as to the exception allows "an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard. Because this inquiry is objective, the statements and motivations of the particular arresting officer are 'irrelevant' at this stage." Id. (citation omitted).

The parties agree Schmitt had probable cause to arrest Murphy because Murphy was in violation of Missouri Revised Statute § 300.405. Murphy argues the facts in this case fit into the possible Nieves exception because, like the hypothetical in Nieves, this is a situation where "officers have probable cause to make arrests, but typically exercise their discretion not to do so." Id. But here, Murphy has not pleaded facts sufficient to demonstrate a "facial plausibility" that police commonly see violations of § 300.405 on similar roads and fail to make arrests. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

The Supreme Court in Nieves gave an example of an individual who is arrested for jaywalking in an intersection where "jaywalking is endemic but rarely results in arrest" while the individual is "vocally complaining about police conduct[.]" Nieves 139 S. Ct. at 1727. Murphy relies heavily on the similarities between jaywalking and walking on the wrong side of the road to prove his point. While the crimes of jaywalking and walking on the wrong side of the road are similar, the totality of the circumstances between the example given in Nieves and the facts of this case differ. The hypothetical given by the Supreme Court specifies an arrest for jaywalking at an intersection where jaywalking is "endemic." Murphy's assertion that "[a] reasonable opportunity for further investigation or discovery will show that no one else in recent memory has been detained or arrested by any law enforcement officers . . . for walking on the wrong side of the road" does little to show officers typically witness violations of § 300.405 and exercise their discretion not to arrest. Murphy also asserts that "[w]alking on the wrong side of the road occurs all the time on the highways with wide shoulders" and the situation was one "where officers have probable cause to make arrests, but typically exercise their discretion not to." These are "threadbare recitals of a cause of action's elements, supported by mere conclusory statements" that "are not entitled to the assumption of truth." Iqbal, 556 U.S. at 663–4. To "determin[e] whether a complaint states a plausible claim[,]" we "draw on . . . experience and common sense." Id. As a matter of experience and common sense the present allegations do not show violations of § 300.405 are so common as

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to be "endemic" or are so frequently observed as to give rise to a "reasonable inference" that officers "typically exercise their discretion" not to arrest.

The above notwithstanding, Murphy argues the subjective intent of Officer Schmitt is so apparent as to require a finding of retaliation. We disagree. The Supreme Court has been clear that "[a] particular officer's state of mind is simply 'irrelevant,' and it provides 'no basis for invalidating an arrest.'" Nieves, 139 S. Ct. at 1725 (citations omitted). Such a position is necessary as "[p]rotected speech is often a legitimate consideration when deciding whether to make an arrest." Id. at 1724. "To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness." Id. at 1725.

III.

Accordingly, we affirm the judgment of the district court.

GRASZ, Circuit Judge, dissenting.

The First Amendment prohibits a police officer from retaliating against an individual for engaging in protected speech. Murphy alleged Officer Schmitt arrested him because he challenged whether Officer Schmitt could force him to provide his name. The majority concludes that Murphy failed to state a claim because Officer Schmitt had probable cause to arrest Murphy for walking on the wrong side of the road. I respectfully dissent. Because Murphy plausibly asserted that the Sunrise Beach Police Department does not regularly enforce this law, his First Amendment retaliation claim survives under the exception adopted by the Supreme Court in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

At the motion-to-dismiss stage, deciding whether a complaint asserts a plausible claim is "a context-specific task." *Ashcroft v. Iqbal*, 556 U.S. 662, 679

(2009). Here, Murphy asserted a claim under the First Amendment for retaliatory arrest. Normally, a retaliatory arrest claim fails as a matter of law if the police officer had probable cause to arrest the plaintiff. *Nieves*, 139 S. Ct. at 1727. But the Supreme Court has "conclude[d] that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* More specifically, "a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* In this context, "an unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'" *Id.* (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018)).[3]

As pled, Murphy was walking on the right side of the road, with traffic, when Officer Schmitt stopped his police car, exited, and demanded Murphy identify himself. Murphy declined to provide his name. Instead, he continually asked Officer Schmitt why he was detained. During the nearly ten minutes before Officer Schmitt arrested him, Murphy criticized and challenged Officer Schmitt. Officer Schmitt did not immediately provide a reason for the arrest.

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[3]The *Nieves* exception is not dicta. When announcing the rule, the Supreme Court used "conclude[d]," which denotes a holding. *Nieves*, 139 S. Ct. at 1727; *see also id.* at 1734 (Gorsuch, J., concurring in part and dissenting in part) ("I would hold, as the majority does, that the absence of probable cause . . . is not an absolute defense."); *id.* at 1741 (Sotomayor, J., dissenting) (referring to "today's holding" as including the exception). The Sixth and Tenth Circuits agree. *Hartman v. Thompson*, 931 F.3d 471, 484 n.6 (6th Cir. 2019); *Fenn v. City of Truth or Consequences*, 983 F.3d 1143, 1149 (10th Cir. 2020). *But see DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1296 (11th Cir. 2019). And when one examines the procedural history of *Nieves*, it is clear the "narrow qualification" was necessary to resolve the issue before the Court.

Later events indicate Officer Schmitt was scrambling to justify the arrest. While in the police car, Officer Schmitt told Murphy he was arrested for "[f]ailure to identify." He then changed his tune when he told someone via his police radio that Murphy was stumbling and walking on the wrong side of the road. Yet Murphy was not stumbling or acting impaired. When Officer Schmitt arrived at the jail with Murphy, he made a phone call in which he described Murphy as a "dip shit walking down the highway" who "would not identify himself" and "ran his mouth off." He then asked, "What can I charge him with?" Later, Officer Schmitt falsely claimed that Murphy was drunk. Officer Schmitt even admitted on multiple occasions that he did not "smell anything" on Murphy. Despite all this, Officer Schmitt insisted Murphy "sit here for being an asshole." Roughly two hours later, Murphy was released.

Under these factual allegations, I cannot join the majority's conclusion that Murphy failed to state a plausible claim. If the Sunrise Beach Police Department regularly enforces the Missouri statute prohibiting a person from walking on the wrong side of the road, one would suspect Officer Schmitt and the other officers he spoke with would have had little trouble identifying that law as the basis for the arrest. Instead, viewing the factual allegations in the complaint in a light most favorable to Murphy, Officer Schmitt arrested Murphy for challenging and criticizing him before later exploring various legal justifications for the arrest. Indeed, the allegations of post hoc decision-making indicate pretext, which supports application of the *Nieves* exception.

Consistent with these observations, and in light of *Nieves*, Murphy pled that "no one else in recent memory has been detained or arrested by any law enforcement officers in either Sunrise Beach or Camden County for walking on the wrong side of the road." This is critical because most, if not all, of the "objective evidence" about whether Sunrise Beach police officers commonly see people walking on the wrong side of the road, but typically exercise their discretion not to arrest, would not be in

Murphy's possession *before* discovery. *See Ahern Rentals, Inc. v. EquipmentShare.com, Inc.*, 59 F.4th 948, 954 (8th Cir. 2023) (holding "allegations pled on information and belief are not categorically insufficient to state a claim for relief where the proof supporting the allegation is within the sole possession and control of the defendant or where the belief is based on sufficient factual material that makes the inference of culpability plausible"). Put differently, Murphy never had an opportunity to discover and present "objective evidence" of First Amendment retaliation under *Nieves* because the district court prematurely dismissed Murphy's complaint. It largely negates the Supreme Court's opinion in *Nieves* to require a plaintiff to show "objective evidence" of the type of selective enforcement needed *before* discovery. Yet the court effectively does so by affirming dismissal here.

The inquiry, of course, does not end there. Even if a plaintiff asserts a plausible constitutional claim, the next qualified immunity prong is whether the right was clearly established at the time of the alleged violation. *See Reichle v. Howards*, 566 U.S. 658, 664 (2012). At the Rule 12(b)(6) stage, we ask whether the defendant has shown he is "entitled to qualified immunity on the face of the complaint." *Vandevender v. Sass*, 970 F.3d 972, 975 (8th Cir. 2020) (quoting *Kulkay v. Roy*, 847 F.3d 637, 642 (8th Cir. 2018)).

As the Supreme Court has explained, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *accord Thurairajah v. City of Fort Smith*, 925 F.3d 979, 985 (8th Cir. 2019). "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987). Building on these First Amendment principles, the Supreme Court held that an individual has the right to be free from a retaliatory arrest, even if supported by probable cause, when otherwise similarly situated individuals not engaged in the

same sort of protected speech had not been arrested. *Nieves*, 139 S. Ct. at 1727; *cf. Reichle*, 566 U.S. at 665–66. At the time Murphy was arrested in 2021, this constitutional right was clearly established. *Nieves*, 139 S. Ct. at 1727; *see also Novak v. City of Parma*, 932 F.3d 421, 430–31 (6th Cir. 2019) (explaining the right was not clearly established until *Nieves* was decided in 2019). Thus, Officer Schmitt has not shown that he is entitled to qualified immunity on the face of the complaint. *See LeMay v. Mays*, 18 F.4th 283, 289–90 (8th Cir. 2021). I respectfully dissent.

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EXHIBIT C

Mason Murphy v. Michael Schmitt, No. 2:21-cv-04195-MDH
(W.D. Mo.)

Order Granting Motion to Dismiss from the

U.S. District Court, Western District of Missouri

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MASON MURPHY,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 2:21-CV-04195-MDH**
	)	
MICHAEL SCHMITT, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Defendant Officer Michael Schmitt's motion to dismiss party. (Doc. 6). For the reasons set forth herein, the motion is **GRANTED**. Plaintiff's Complaint is dismissed as to Defendant Michael Schmitt.

BACKGROUND

Taking Plaintiff's allegations as true for purposes of a motion to dismiss, the Complaint (Doc. 1) states, in relevant part as follows:

Defendant Officer Michael Schmitt was at the time of the incident a police officer for Sunrise Beach a municipality in Camden County. Plaintiff sues Schmitt in his individual capacity only. Plaintiff was walking on northbound Route F in Camden County on May 15, 2021, at approximately 9:30 p.m. He was a few hundred yards south of Route F's intersection with Route 5. Plaintiff was walking in the shoulder on the right side of the road, with traffic. Sunrise Beach Officer Michael Schmitt was driving his patrol vehicle on northbound Route F approaching Plaintiff's location. Schmitt stopped his vehicle and exited his vehicle. The ensuing events for the next hour, until Schmitt leaves the Camden County Jail after an hour and three minutes have elapsed, are on audio and video tape.

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Schmitt approached Plaintiff on foot. RSMo. 300.405.2 requires pedestrians to walk against traffic when practicable, that is, on the left shoulder, not the right shoulder of the highway. Plaintiff alleges that at the time Officer Schmitt first approached Plaintiff, Schmitt had no reasonable suspicion that a crime had occurred, and that Plaintiff committed it. However, this allegation is not consistent with the other allegations in Plaintiff's Complaint. Plaintiff acknowledges that walking with traffic on a highway, as Plaintiff was doing, violates RSMo. 300.405.2. Plaintiff also alleges in his Complaint that a reasonable officer in Schmitt's position at that time would have known that he could have charged Plaintiff with walking on the wrong side of the road, and that Officer Schmitt has probable cause to arrest Plaintiff for violation of RSMo. 300.405.2.

Plaintiff further admits that Schmitt demanded that Plaintiff identify himself. Plaintiff declined to identify himself. Plaintiff and Schmitt argued for approximately 9 minutes during which time Plaintiff continued to refuse to identify himself. After the 9 minutes of argument Schmitt put Plaintiff in handcuffs and put him in Schmitt's patrol car. At minute 23, still during the drive, Schmitt stated on his police radio that Plaintiff had been stumbling and walking on the wrong side of the road.

Several times Schmitt stated that Plaintiff was drunk. At minute 45 Schmitt stated to Plaintiff, "I suspected you were under something. For your safety I wanted to check you out and know who you are." Plaintiff alleges that the actions of Schmitt in his interaction with Plaintiff, particularly Plaintiff's detention and arrest, in the totality of the circumstances, show that Schmitt's detention and arrest of Plaintiff was made in retaliation for Plaintiff exercising his rights under the First and Fifth Amendments to argue with the police. Plaintiff alleges that his arguing with the police was constitutionally protected by the First Amendment and the Fifth Amendment. Plaintiff

alleges that others have not been arrested for walking with traffic but admits Officer Schmitt had probable cause to do so. Plaintiff asserts that Plaintiff's walking on the wrong side of the road was insufficient to provoke the adverse consequence of arrest, particularly because other have not been arrested for the same conduct.

Plaintiff asserts claims for unlawful detention during the time before Officer Schmitt arrested him, under 42 U.S.C. § 1983 (Count I) and unlawful arrest by Officer Schmitt in retaliation for exercise of First Amendment Rights under § 1983 (Count II).

STANDARD

A complaint must contain factual allegations that, when accepted as true, are sufficient to state a claim of relief that is plausible on its face. *Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The Court "must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005) (internal citations omitted).

The complaint's factual allegations must be sufficient to "raise a right to relief about the speculative level," and the motion to dismiss must be granted if the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555, 570 (2007). Further, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

DISCUSSION

I. Officer Schmitt is entitled to qualified immunity

"In § 1983 actions, qualified immunity shields government officials from liability [in their individual capacities] unless their conduct violated a clearly established constitutional or statutory right of which a reasonable official would have known." *Bishop v. Glazier*, 723 F.3d 957, 961 (8th Cir. 2013) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity shields police officers from lawsuits based on official conduct if reasonable officers in the same position could have believed their conduct was 'lawful, in light of clearly established law and the information the … officers possessed' at the time." *Waters v. Madson*, 921 F.3d 725, 734-35 (8th Cir. 2019) (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Courts consider two factors in analyzing qualified immunity: (1) whether the alleged facts demonstrate that the public official's conduct violated a constitutional right; and (2) whether the constitutional right was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Id.* The second factor in the qualified immunity analysis requires the constitutional right to be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (internal citations omitted). The plaintiff "bears the burden of proving that the law was clearly established." *Hess v. Ables*, 714 F.3d 1048, 1051 (8th Cir. 2013).

a. Officer Schmitt had at least arguable reasonable suspicion to detain Plaintiff (Count I).

First, Plaintiff argues that Officer Schmitt's stop of Plaintiff was "not a *Terry* stop and therefore Schmitt had no right to ask Murphy for identification." (Doc. 1 at ¶ 177). Plaintiff's pleaded facts indicate that Officer Schmitt observed Plaintiff violating a Missouri state law (Doc. 1 at ¶¶ 20, 33, 41, 65) and thus had at least arguable reasonable suspicion to conduct a stop.

To conduct a temporary investigative detention, "officers need only reasonable suspicion based on the totality of the circumstances." *Waters v. Madsen*, 921 F.3d 725, 736 (8th Cir. 2019). Reasonable suspicion requires less than probable cause and needs "at least some minimal level of objective justification." *Id.* (quoting *De La Rosa v. White*, 852 F.3d 740, 744 (8th Cir. 2017). Courts look only at the information the officer possessed at the time of the stop to determine whether an officer had reasonable suspicion to conduct a temporary detention. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

Even if an officer lacks reasonable suspicion, they are nonetheless entitled to qualified immunity if they have "*arguable* reasonable suspicion — that is, if a reasonable officer in the same position could have believed she had reasonable suspicion." *Id.* (citing *De La Rosa*, 852 F.3d at 745-46) (emphasis in the original).

In this case, Plaintiff pleads facts that plainly demonstrate Officer Schmitt had at least reasonable suspicion to detain Plaintiff. Plaintiff concedes that Officer Schmitt observed Plaintiff violating Mo. Rev. St. § 300.405.2. Plaintiff also admits that a "reasonable officer in Schmitt's position at that time would have known that he could charge Plaintiff with walking on the wrong side of the road." (Doc. 1 at ¶ 67). Such admissions by Plaintiff establish that: (1) Officer Schmitt observed Plaintiff violating the law and thus had, at a minimum, reasonable suspicion to conduct an investigatory stop, and (2) even if Officer Schmitt did not have reasonable suspicion to stop

Plaintiff, he is still entitled to qualified immunity because reasonable officers in Officer Schmitt's position would have known Plaintiff could be charged with walking on the wrong side of the road.

b. Officer Schmitt is entitled to qualified immunity as to Plaintiff's retaliatory arrest claims (Count II).

To state a claim for retaliatory arrest, a Plaintiff must allege that "(1) he engaged in a protected activity, (2) [officers] took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in party by the exercise of the protected activity." *Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004). A retaliatory arrest claim requires showing of a fourth element: that the arrest is unsupported by probable cause or arguable probable cause. *Just v. City of St. Louis, Mo.*, 7 F.4th 761, 768 (8th Cir. 2021) (citing *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019)).

In order to overcome Officer Schmitt's claim that he is entitled to qualified immunity, Plaintiff needs a clearly established right to refuse to identify himself after he was lawfully detained for violating the law. No such clearly established right exists.

Whether a right is "clearly established" is a question of law for the court to decide. *Bishop v. Glazier*, 723 F.3d 957, 961 (8th Cir. 2013). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In other words, the unlawfulness of an officer's actions must be "apparent" in light of pre-existing law. *Bishop*, 723 F.3d at 961. As such, Plaintiff can establish a right is clearly established only if earlier cases give Officer Schmitt a fair warning that his alleged treatment of Plaintiff was unconstitutional. *Id.*

It is clearly established that a police officer may ask a suspect to identify himself. *See Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 186-87 (2004). "The Supreme Court has declined to decide whether a person may be punished for refusing to identify

himself in the context of a lawful investigatory stop that satisfies the Fourth Amendment." *Shephard v. Ripperger*, 57 Fed. App'x 270, 272 (8th Cir. 2003) (citing *Brown v. Texas*, 443 U.S. 47, 53 n.10 (1979)). "Because the legality of refusing to identify oneself to police is an open question, it is not clearly established for the purpose of denying qualified immunity." *Id.* (stating, "Because we conclude the law is not clearly established about whether refusing to identify oneself provides probable cause for arrest, the officers are entitled to qualified immunity in connection with their official acts.") (collecting cases).

As explained above, Plaintiff admits that he was detained after Officer Schmitt observed him violating the law. (Doc. 1 at ¶¶ 33, 34). Plaintiff's pleaded facts state that Plaintiff's detention was based both on reasonable suspicion and, as discussed below, probable cause. After observing Plaintiff violating the law, Officer Schmitt asked Plaintiff to identify himself, and Plaintiff repeatedly refused. (Doc. 1 at ¶¶ 30, 32). At the time of the events in the Complaint, it was not apparent that requesting Plaintiff's identification after observing him violating the law violated any of Plaintiff's clearly established rights. Therefore, as a matter of law, Officer Schmitt is entitled to qualified immunity for Plaintiff's Count I because Plaintiff did not plead that he had a clearly established right to refuse to identify himself during a lawful detention.

Moreover, Plaintiff's claim for retaliatory arrest is also defeated because his arrest was supported by probable cause, both for violating Mo. Rev. Stat. § 300.405.2 and Mo. Rev. Stat. § 300.080. Notably, "individuals do not have a recognized 'First Amendment right to be free from a retaliatory arrest that is supported by probable cause.'" *Waters*, 921 F.3d at 742. "[A] First Amendment retaliatory arrest claim is defeated by a showing of probable cause (or arguable probable cause)." *Just v. City of St. Louis, Mo.*, 7 F.4th 761, 768 (8th Cir. 2021) (citing *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019)). Only a narrow exception applies to this general rule: "when

a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727.

Plaintiff relies heavily on one example in dicta given by the *Nieves* Court: "an individual who has been vocally complaining about police conduct is arrested for jaywalking at [an intersection where jaywalking is endemic but rarely results in arrest]" can state a claim for retaliatory arrest even if there is probable cause to arrest them for jaywalking. *Id.* at 1727.

Even with this exception, the Court held that the plaintiff could not state a retaliatory arrest claim because the officers had probable cause to arrest him for disorderly conduct. *Id.* at 1727-28. The Court pointed out that the plaintiff spoke to the officers in a loud voice, was visibly drunk, and stood close to the officer, all of which gave the officers probable cause to arrest him. *Id.* at 1728.

Here, Plaintiff's speech was not merely criticism and challenge, like the speech at issue in *Hill*. Plaintiff admits that his refusal to identify himself was evasive. Multiple courts have determined that an individual does not have a clearly established right to be free from arrest for refusing to identify themselves. *See Shephard v. Ripperger*, 57 Fed. App'x 270, 272 (8th Cir. 2003) (citing *Brown v. Texas*, 443 U.S. 47, 53 n.10 (1979)) (stating, "Because we conclude the law is not clearly established about whether refusing to identify oneself provides probable cause for arrest, the officers are entitled to qualified immunity in connection with their official acts.") (collecting cases). As such, Officer Schmitt is entitled to qualified immunity.

Plaintiff relies on conclusory statements that "no one else in recent memory has been detained or arrested by any law enforcement officers in either Sunrise Beach or Camden County for walking on the wrong side of the road." (Doc. 1, ¶¶ 21, 68). Even accepting these statements

are true for purposes of this motion to dismiss, Plaintiff's arguments fail to recognize the totality of the circumstances surrounding his detention and arrest. Officer Schmitt has demonstrated that he is entitled to qualified immunity with respect to Plaintiff's claims.

CONCLUSION

Based on the foregoing, the Court concludes that Defendant Officer Michael Schmitt is entitled to qualified immunity with respect to Plaintiff's claims against him contained in Counts I and II of the Complaint. Therefore, Officer Schmitt's motion to dismiss party (Doc. 6) is **GRANTED**, and Michael Schmitt is dismissed as a party from the above-captioned case.

IT IS SO ORDERED.

Dated: February 28, 2022

/s/ Douglas Harpool
DOUGLAS HARPOOL
United States District Judge