APPENDIX

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED SEPTEMBER 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3920

TATE DAVID PROWS,

Plaintiff-Appellant,

v.

CITY OF OXFORD, OH, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: NORRIS, SUHRHEINRICH, and READLER, Circuit Judges.

Tate David Prows, proceeding pro se, appeals the district court's dismissal of his civil action for lack of standing. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the following reasons, we affirm.

Appendix A

In November 2022, Prows, an Oxford, Ohio resident, sued the city of Oxford and nine city officials regarding an ordinance that restricted gatherings during the COVID-19 pandemic. The ordinance was in effect from August 2020 to June 2021. *See* Ohio Exec. Order No. 2021-08D. The ordinance prohibited gatherings with more than ten people but did "not apply to . . . gatherings for the purpose of the expression of First Amendment protected speech." Prows alleged that the ordinance deterred him from gathering with his family during the 2020 holiday season and was facially unconstitutional. Officers never cited or even investigated Prows for violating the ordinance, but he feared enforcement based on videos of officers enforcing the ordinance against students at Miami University by issuing $500 fines. Prows brought multiple 42 U.S.C. § 1983 claims, a 42 U.S.C. § 1985(3) claim, and two state-law claims, requesting damages and other relief.

The defendants moved for judgment on the pleadings, contending that Prows lacked standing to sue and that his complaint failed to state a claim. A magistrate judge recommended finding that Prows had standing but that his complaint failed to state a claim. Prows filed timely objections. Instead of addressing whether Prows's complaint stated a claim for relief, the district court dismissed the complaint, after concluding that Prows lacked standing to sue. Specifically, the district court determined that Prows alleged a general grievance about the ordinance, could not show fear of future enforcement, and could not show sufficient "chill" or emotional injuries. On appeal, Prows argues that the district court erred in holding that he lacked standing because he showed that

the city ordinance violated the First Amendment, he had a fear of future enforcement, the ordinance chilled his First Amendment rights, and he suffered emotional harm.

We review de novo the dismissal of a complaint for lack of standing. *See Buchholz v. Meyer Njus Tanick*, 946 F.3d 855, 860 (6th Cir. 2020). To establish the jurisdictional requirement of standing under Article III of the Constitution, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). "The 'injury in fact' test requires more than an injury to a cognizable interest." *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). "It requires that the party seeking review be himself among the injured." *Id.* "Standing is determined at the time the complaint is filed." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012). "If a party does not have standing to bring an action, then the court has no authority to hear the matter and must dismiss the case." *Binno v. Am. Bar Ass'n*, 826 F.3d 338, 344 (6th Cir. 2016).

At the outset, we note that Prows plainly lacks standing to bring claims for injunctive and declaratory relief because the ordinance was no longer in effect when he sued. *See Murthy v. Missouri*, 144 S. Ct. 1972, 1986, 219 L. Ed. 2d 604 (2024) (recognizing that "plaintiffs [who] request forward-looking relief . . . must face a real and immediate threat of repeated injury" (citations and

quotations omitted)); *cf., e.g., Davis v. Colerain Twp., Ohio*, 51 F.4th 164, 174-76 (6th Cir. 2022) (finding no live case or controversy where ordinance was repealed). Thus, we focus on the question of whether Prows has standing to assert his damages claims, on behalf of himself and others.

First, Prows does not have standing to challenge the constitutionality of the ordinance on behalf of all Oxford residents. A "'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Hollingsworth v. Perry*, 570 U.S. 693, 706, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013). That is, "[a] litigant . . . 'claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy." *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). To the extent that Prows attempts to challenge the constitutionality of the ordinance on behalf of all Oxford residents, he lacks standing to do so. *See id.*; *see also Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 393 n.5, 144 S. Ct. 1540, 219 L. Ed. 2d 121 (2024) (discussing the narrow parameters of third-party standing).

Second, Prows's allegations that the defendants' actions caused him to suffer emotional injuries are insufficient to confer standing. "[E]xtreme emotional distress" can be sufficient to establish "a cognizable injury in fact." *Gerber v. Herskovitz*, 14 F.4th 500, 505 (6th Cir. 2021). But "a general allegation of emotional harm like anxiety or distress falls 'short of cognizable injury.'" *Garland v. Orlans, PC*, 999 F.3d 432, 440 (6th Cir.

2021) (quoting *Buchholz*, 946 F.3d at 864). Here, Prows merely alleged that, because he could not gather with his family during the 2020 holiday season, he suffered "severe emotional trauma and anxiety which manifested itself in numerous physical symptomologies." He does not elaborate on this conclusory allegation or otherwise suggest that he suffered emotional injury so "extreme" as to confer standing. *Gerber*, 14 F.4th at 505; *see also All. for Hippocratic Med.*, 602 U.S. at 380-82 (discussing the requirement that an injury in fact be "concrete").

Finally, Prows's allegations that the defendants chilled his First Amendment rights are insufficient to prove an injury in fact and thus confer standing. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972). Allegations based on a plaintiff's "own subjective apprehension" counseling him not to engage in conduct because he assumed it would result in punishment are insufficient to confer standing. *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008). Something "'more' [is] required to substantiate an otherwise-subjective allegation of chill." *Id.* at 609.

Here, Prows's "own subjective apprehension" caused him not to gather with his family during the 2020 holiday season. *Id.* He must allege "more than the apprehension based on a written policy," and he did not. *McGlone v. Bell*, 681 F.3d 718, 731 (6th Cir. 2012). Prows did not allege that officers threatened to enforce the ordinance against him

or anyone in his family or that they enforced or threatened to enforce it against any family gatherings at all. He did not otherwise provide evidence supporting his fear that "armed police officers [would] show up to his door" and fine him if he gathered with his family. Evidence that officers enforced this ordinance occasionally to break up large gatherings like a college party is insufficient. *Morrison*, 521 F.3d at 609; *cf. Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012) (finding standing where plaintiff alleged that he was warned that his conduct violated the challenged rule and he intended to engage in the same conduct in the future); *McGlone*, 681 F.3d at 731 (finding standing where the plaintiff alleged that he was not allowed to speak on campus and was threatened with arrest). Rather, "whether [Prows] would have been so punished, we can only speculate." *Morrison*, 521 F.3d at 610.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED SEPTEMBER 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3920

TATE DAVID PROWS,

Plaintiff-Appellant,

v.

CITY OF OXFORD, OH, *et al.*,

Defendants-Appellees.

Before: NORRIS, SUHRHEINRICH, and READLER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

Appendix B

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, FILED AUGUST 24, 2023

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action No. 1:22-cv-693

TATE DAVID PROWS,

Plaintiff,

v.

CITY OF OXFORD, *et al.*,

Defendant.

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

☐ the plaintiff (*name*) _____ recover from the defendant (*name*) _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____%, plus post judgment interest at the rate of _____% per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (*name*) _____ recover costs from the plaintiff (*name*) _____

Appendix C

☒ other: Prows's Amended Complaint (Doc. 7) is dismissed without prejudice for lack of standing. The Court denies all other motions as moot.

This action was (*check one*):

☐tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____without a jury and the above decision was reached.

☐decided by Judge _____on a motion for

Date: 8/24/23

CLERK OF COURT

/s/
Signature of Clerk or
Deputy Clerk

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION, FILED AUGUST 24, 2023

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:22-cv-693

TATE DAVID PROWS,

Plaintiff,

v.

CITY OF OXFORD, *et al.*,

Defendants.

DOUGLAS R. COLE, UNITED STATES DISTRICT JUDGE. Magistrate Judge Litkovitz.

OPINION AND ORDER

In the early days of the COVID-19 pandemic, the City of Oxford, Ohio restricted private gatherings to control the virus's spread. Tate Prows, who lives in the City, believes this policy violated his rights and the rights of others like him. Proceeding pro se, Prows sued the City of Oxford and its agents under federal and state law. Defendants moved for judgment on the pleadings, and the Magistrate Judge issued an Order and Report and Recommendation

(R&R) (Doc. 49) advising the Court to grant the motion and dismiss Prows's Complaint (Doc. 1), and also ruling on another related motion. Prows objected. (Doc. 50). The R&R and Prows's Objections are now before the Court.

As discussed below, the Court finds that Prows lacks standing. Accordingly, the Court **DISMISSES** Prows's Amended Complaint (Doc. 7) **WITHOUT PREJUDICE**. The Court **DENIES** all other motions **AS MOOT**.

BACKGROUND

Starting in 2020, the COVID-19 pandemic descended upon the United States and severely disrupted daily life. Responding to concerns about the virus's spread, the Oxford City Council convened in August 2020 to implement restrictions on large gatherings within city limits. (Doc. 7, #131). During that meeting, the Oxford City Council adopted Ordinance 3579, which limited certain gatherings of 10 or more persons:

> Section 1. All individuals within the City of Oxford are prohibited from hosting, maintaining or participating in mass gatherings in accordance with the following:
>
> > a. "Mass gatherings" for purposes of this Ordinance, means any social gathering, event or convening that brings together greater than ten (10) non-household persons at the same time, to include both indoor and

> outdoor gatherings.
>
> b. "Non-household" for purposes of this Ordinance, means any individuals who do not reside within the same housing unit or dwelling.

(Doc. 1-2, #31). The Ordinance, though, included many exceptions. For example, it exempted from its prohibition members of the media, religious gatherings, and gatherings for First Amendment expressive purposes.

> Section 2. The mandatory prohibition on mass gatherings through this Ordinance does not apply in the following situations:
>
> h. This Ordinance does not apply to and/or excludes members of the media.
>
> i. This Ordinance does not apply to and/or excludes religious gatherings, gatherings for the purpose of the expression of First Amendment protected speech, weddings and funerals.

(*Id.* at #31-32).

By its own terms, the Ordinance would remain in effect only "during the pendency of State of Ohio Executive Order 2020-01D." (*Id.* at #33). After the City

enacted the Ordinance, local police began enforcing the restrictions with $500 fines. (Doc. 7, #145). Officers issued citations to twenty-three people. (*Id.*). But on June 18, 2021, Ohio Governor Mike DeWine rescinded Executive Order 2020-01D, which also ended Ordinance 3579. *See* Ohio Exec. Order No. 2021-08D.

Plaintiff Tate Prows lives in Oxford, Ohio. (Doc. 7, #128). He alleges that while Ordinance 3579 was in effect, it deterred him from gathering with family during the 2020 Holiday Season. (*Id.* at #137). Prows never alleges officers cited him for violating the Ordinance, or even that they threatened to do so. But he does note that he saw videos on YouTube in which the City was enforcing the Ordinance against college students at Miami University, which is in the City. (*Id.* at #134-35). And he says that these enforcement efforts caused him concern that the City would likewise enforce it against him. (*Id.* at #135). In any event, he believes that the mere existence of the Ordinance violated his rights and the rights of his neighbors.

On November 28, 2022, some seventeen months after the Ordinance lost effect, Prows sued the City and its agents. (Doc. 1). In his Amended Complaint, the operative complaint here, Prows names the City of Oxford, along with the following city officials in their individual and official capacities: Mayor Michael Smith, Vice-Mayor William Snavely, Police Chief John Jones, City Manager Doug Elliot, and City Councilors David Prytherch, Edna Southard, Jason Bracken, Glenn Ellerbe, and Chantel Raghu. (Doc. 7, #124). His Amended Complaint

presses six claims. The first three arise under § 1983 and allege violations of the First Amendment (Count 1), the Fourteenth Amendment (Count 2), and the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Amendments (Count 3). Next, he asserts a claim under 42 U.S.C. § 1985(3). Finally, he (apparently) presents two state-law claims: a claim for Civil Conspiracy (Count 5)[1] and a claim for Negligent Infliction of Emotional Distress (Count 6). (*Id.* at #135-51).

Defendants answered (Doc. 13) and then moved for judgment on the pleadings. (Doc. 20). In the motion, Defendants argued Prows lacked standing to pursue his claims and had failed to plausibly allege any claim. (*See id.*). Prows responded multiple ways. First, Prows moved to strike Defendants' Answer. (Doc. 19). Second, Prows moved to convert Defendants' Rule 12(c) Motion into a Motion for Summary Judgment. (Doc. 27). Third, Prows moved twice for leave to amend his Complaint. (Docs. 34, 38). Finally, Prows responded on the merits. (Doc. 33).

The Court referred the matter to the Magistrate Judge (*see* Doc. 46), and the Magistrate Judge issued an Order and Report and Recommendation (R&R, Doc. 49). There, the Magistrate Judge first found that Prows had standing to pursue this action. (*Id.* at #485). She next analyzed Prows's various claims before (1) denying Prows's Motion to Convert Rule 12(c) Motion into a Motion for Summary Judgment and (2) recommending that the Court grant Defendants' Motion for Judgment on the

1. Prows never clarifies whether his Civil Conspiracy claim proceeds under federal or state law. But for purposes of this Opinion, it does not matter.

Pleadings in full. (*Id.* at #506). The Magistrate Judge also notified the parties that they had fourteen days to lodge specific objections. (*Id.* at #507). Prows objected, but only as to the recommendation concerning Defendants' Motion for Judgment on the Pleadings. (Doc. 50). He did not discuss the Magistrate Judge's order denying his Motion to Convert. (*Id.*).

At Prows's request, the Court heard argument on Prows's objections to the R&R. During argument, the Court inquired as to Prows's alleged injury. Prows explained that he viewed his injury-in-fact as the "chilling" effect the Ordinance had on his First Amendment rights. Elsewhere in his papers, though, he raises the possibility that his injury was the emotional harm he suffered in not gathering with his family while the Ordinance was in effect or, in other words, the emotional injury that he says resulted from the chilling.

The matter is now ripe.

LAW AND ANALYSIS

Before the Magistrate Judge, Defendants attacked Prows's standing and also mounted several challenges to the merits of his claims. The R&R largely agreed with the Defendants on the merits but rejected their concerns about standing. Prows now objects to the R&R, arguing that he has presented meritorious claims. The Court, however, concludes it cannot reach those issues. That is because this Court has an independent obligation to assess its own jurisdiction. And based on its review of the facts

here, the Court concludes that Prows lacks standing. As that lack of standing precludes the Court's consideration of the merits and requires dismissal, this Opinion does not address the Magistrate Judge's reasoning on the merits.

"Standing stems from the Constitution's mandate that federal courts may decide only 'Cases' or 'Controversies.'" *Vonderhaar v. Vill. of Evendale*, 906 F.3d 397, 400-01 (6th Cir. 2018) (citing U.S. Const. art. III, § 2, cl. 1). Consistent with that language, standing is designed to ensure that courts decide live disputes, rather than "issue advisory opinions or address statutes 'in the abstract.'" *L.W. by & through Williams v. Skrmetti*, 73 F.4th 408, 415 (6th Cir. 2023) (quoting *California v. Texas*, 141 S. Ct. 2104, 2115, 210 L. Ed. 2d 230 (2021)).

Because standing is a prerequisite to subject-matter jurisdiction, a court may (indeed, has an obligation to) evaluate the issue at any time, even sua sponte. *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 607 (6th Cir. 2007). Standing requires a plaintiff to make three showings: "(1) an injury that is (2) 'fairly traceable to the defendant's allegedly unlawful conduct' and that is (3) 'likely to be redressed by the requested relief.'" *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

To meet the first prong, a plaintiff must show a concrete and particularized, actual past injury or imminent future injury. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). "By particularized,

we mean that the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n. 1. By contrast, "a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Hollingsworth v. Perry*, 570 U.S. 693, 706, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013); *see, e.g., Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078 (1923) ("The party who invokes the [judicial] power must be able to show ... that he has sustained or is immediately in danger of sustaining some direct injury ... and not merely that he suffers in some indefinite way in common with people generally.").

Prows does not allege a traditional injury. He does not say, for example, that Oxford fined or arrested him for violating the Ordinance, or even that City agents or officials threatened enforcement against him personally. Likewise, Prows does not claim to fear an imminent future injury. The Ordinance has lost effect, and Prows does not suggest that Oxford plans to reinstate it.

Rather, Prows asserts standing based on what he chose not to do while the Ordinance was in effect. He alleges the Ordinance "chilled" his First Amendment "right ... to assemble" with his family for the 2020 Holiday season. (Doc. 7, #130, 135-36). And at the hearing, Prows also focused on this "chilling" effect the Ordinance allegedly had on him. In support of his claim that the City "chilled" his activities, he first notes that City officials (1) threatened to enforce the Ordinance against Oxford residents generally, and (2) did in fact enforce it against some other residents. (*Id.* at #134-35). Prows says

that, fearing the same treatment, he complied with the Ordinance. (*Id.* at #135). And, from complying, Prows says he suffered "severe emotional trauma and anxiety which manifested itself in numerous physical symptomologies." (*Id.*). So, the question the Court must answer is whether either the "chilling" or the resulting "emotional trauma and anxiety" suffice as the injury needed to support standing. The Court concludes that neither does.

Let's start with chilling. The basic argument is that enforcement against others led Prows to fear imminent enforcement against him, making him change his behavior. In the pre-enforcement context, that argument often works. But that is because, in the pre-enforcement context, a plaintiff can rely on a threatened *future* injury for standing purposes, so long as that injury is sufficiently probable and sufficiently imminent. *Block v. Canepa*, 74 F.4th 400, 408-09 (6th Cir. 2023) ("When a plaintiff brings a pre-enforcement challenge, '[a]n allegation of future injury may suffice' to show an injury in fact 'if the threatened injury is "certainly impending," or there is a "substantial risk" that the harm will occur.'") (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014)). Enforcement against others is one way that potential enforcement against the plaintiff can become sufficiently probable and imminent. But, as that shows, when a plaintiff claims chilling in that context, it is the *enforcement* itself (sufficiently imminent and probable) that is the injury.

But that theory does not work for Prows here. Well settled law holds that standing is measured at the time

a plaintiff files his or her action. *See, e.g., Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012). At the time Prows sued, even if City officials had enforced the Ordinance against others in the past, Prows could not have feared imminent future enforcement against him because the Ordinance had already lost effect. Further highlighting the disconnect, in the pre-enforcement context, the relief plaintiffs typically seek is a prohibition on future enforcement. Again, that is something not at issue here. In short, "chilling" as it is used in the pre-enforcement standing framework—where it is inextricably linked to the injury arising from potential enforcement—simply does not translate neatly to a post-Ordinance world.

But can past chilling *itself* (divorced from current fears of potential enforcement) suffice when a plaintiff seeks damages for that chilling? One could read *Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602 (6th Cir. 2008), as suggesting that the answer may be yes. There, a school board had adopted "a written policy prohibiting students from making stigmatizing or insulting comments regarding another student's sexual orientation." *Id.* at 605. Morrison was "a Christian who believe[d] that homosexuality is a sin," but, "[w]ary of potential punishment," he chose to "remain[] silent with respect to his personal beliefs." *Id.* While the policy was still in effect, he sued. But, after he filed his lawsuit, the Board changed the policy. That left the court to decide "whether Morrison's claim for nominal damages, premised upon a 'chill' on his speech [while the policy was in effect] presents a justiciable controversy." *Id.*

The Sixth Circuit said no, but that was because it found Morrison suffered only a "subjective chill," which did not suffice to support standing. *Id.* at 610. Morrison's chill was subjective because he simply assumed that the policy would be applied to him, without being able to point to any conduct on the defendants' part, beyond adopting the policy, that would support that assumption. *Id.* But the Sixth Circuit left open the possibility that an objectively reasonable chill—changing behavior based on an objectively reasonable fear of enforcement—may suffice to support a claim for nominal damages. Here, Prows could argue that seeing the Ordinance enforced against others made it objectively reasonable for Prows to believe it likewise would be enforced against him, so that his change in behavior—not inviting family over to celebrate the holidays—was not merely a subjective chill.

However, for two reasons, the Court concludes that *Morrison* does not help Prows. First, there, in answering "what 'more' might be required to substantiate an otherwise-subjective allegation of chill, such that a litigant would demonstrate a proper injury-in-fact," the examples the Sixth Circuit provided all involved chill arising from threats of enforcement *against the plaintiffs themselves*. *Id.* at 609. Here, of course, the City took no actions against Prows himself so, if that is required to make chilling "objective," Prows suffered only subjective chilling.

But even if enforcement against others could give rise to "objective" chilling, *Morrison* is distinguishable on a perhaps more important ground. There, the plaintiff filed *while the policy was still in effect*. *Id.* at 606-607. True,

by the time *Morrison* arrived at the Sixth Circuit the underlying facts had changed and the policy was no longer in effect. But that does not change the *standing* analysis because, as noted, standing is measured at the time a suit is filed. Post-filing changes affect only mootness. So, understood that way, *Morrison* is just a typical pre-enforcement action predicated on a threatened future injury. In that context, *Morrison* is just one of many cases that says that, for such pre-enforcement actions, the future harm must be sufficiently imminent and probable for standing to arise. That is all well and good, but it tells us little about cases in which the policy changes *before* suit is filed, which is what matters here.

Another case that discusses the issue also picks up on both these strands. In *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 549 (4th Cir. 2010), the Fourth Circuit said that "an actual chilling of protected speech is a discrete infringement of First Amendment rights that gives rise to a claim under § 1983 for at least nominal damages." But "actual chilling" as the Fourth Circuit used it there seems to mean chilling that arose from actual application of the policy in some fashion *to the plaintiff himself*. For the *Hrabowski* court went on to observe that "plaintiffs may not assert claims for damages against a speech policy that was never actually applied to them." *Id.* And in *Hrabowski*, as in *Morrison*, plaintiff initially brought suit while the policy was still in effect. *Id.* at 545.

When a plaintiff opts not to sue until the challenged law or policy is a dead letter, though, courts should be leery of relying on claims of "chilling" to support standing. Such

claims are easy to make and difficult to disprove. More importantly, recognizing dubious claims of past chilling, absent any prospect of future enforcement, threatens to drag courts into resolving often thorny questions of constitutional law in a setting where the result matters little. As the Sixth Circuit put it in *Morrison*, where the policy ended after the suit started, "[t]his is a case about nothing." 521 F.3d at 607. That is all the more true when, as here, a plaintiff waits some seventeen months after an ordinance lapses to challenge it. In short, the Court concludes that where the challenged law or policy is not in effect at the time suit commences, plaintiffs relying on past chilling as their injury must, at the very least, substantiate such claims with allegations of official conduct directed at the plaintiffs themselves. Absent such allegations, none of which Prows has made here, any claimed "chilling," on its own, is not a concrete and particularized injury that will support standing.

That leaves Prows's claim that he suffered an emotional injury from past compliance with the now-defunct Ordinance. True, if a plaintiff has suffered a compensable injury based on past enforcement of an unconstitutional statute, a defendant cannot moot an action by repealing the statute. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802, 209 L. Ed. 2d 94 (2021). And a corollary necessarily follows—a plaintiff who has a viable claim for money damages based on a prior enforcement action always has standing.

But, at the risk of over-repetition, Oxford never enforced the Ordinance against Prows. Instead, Prows

says enforcement against others caused him to change his conduct, giving rise to "emotional trauma" that led to "physical symptomologies." (Doc. 7, #135). To Prows's credit, the Sixth Circuit has recognized that, at least in some cases, "extreme emotional distress can suffice as an injury-in-fact to confer Article III standing." *Van Vleck v. Leikin, Ingber, Winters, P.C.*, No. 22-1859, 2023 U.S. App. LEXIS 10455, 2023 WL 3123696, at *6 (6th Cir. Apr. 27, 2023). For example, the circuit has allowed religious congregants to sue protestors who targeted their church services, finding standing based on the parishioners' extreme emotional injuries. *Gerber v. Herskovitz*, 14 F.4th 500, 506 (6th Cir. 2021). Indeed, our common law heritage has, for centuries, recognized some purely emotional injuries as sufficient to support suit. *See I de S et ux v. W de S*, Y.B. 22 Edw. III, f. 99, pl. 60 (1348) (allowing a tavern owner's wife to recover against a disgruntled patron for her fear of almost being hit by their hatchet). The long-recognized intentional tort of assault, after all, is defined as conduct that is intended to cause a "reasonable apprehension of imminent harmful or offensive contact." *Assault*, BLACK'S LAW DICTIONARY (11th ed. 2019). And that apprehension itself has long been understood as an injury that can provide a basis for damages. *See, e.g., Allen v Hannaford*, 138 Wash. 423, 244 P. 700 (Wash. 1926) (affirming verdict in assault case of $750 for fear created when defendant threatened plaintiff with a gun).

Note, however, that in such cases, the alleged emotional injury arises from conduct specifically directed at the plaintiff. In *Gerber*, the protestors targeted the congregant-plaintiffs. In *I de S*, the patron swung a

hatchet at the tavern owner's wife.[2] And in *Allen* the threatened party was the plaintiff himself.[3]

Here, by contrast, Prows's emotional trauma did not arise from the City or any City agent taking an action directed at him personally. So, even though "emotional trauma" can serve as a concrete injury for standing purposes in some circumstances, the emotional injury that Prows claims here is not "particularized" to him. Rather, it is the same "injury" that every City citizen suffered—the "injury" of complying with an allegedly unconstitutional law, thereby forgoing large gatherings. *See Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752, 757 (6th Cir. 2019) ("An injury is particularized if it affects the plaintiff in a personal and individual way." (cleaned up)). Or, as one

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2. Granted, the antiquated law at that time meant that the tavern owner's wife could not sue in her own name but, rather, only under her husband's. John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789, 790 n.4 (2007). For practical purposes, though, the patron directed a particularized harm at the real plaintiff-in-interest.

3. True, there are some minor exceptions to the directed-at-the-plaintiff rule. For example, in cases involving claims of negligent or intentional infliction of emotional distress, the underlying harmful act may be directed at one person, resulting in emotional harm to another (for example, harming a child in front of the child's mother). In those cases, the harm arising from conduct directed at the first person (the child) provides standing to the other (the mother). But such claims have very limited scope—the harm must be directed at someone closely related to the plaintiff (usually a family member). While Prows asserts a claim for negligent infliction of emotional distress, he alleges no physically harmful conduct directed at anyone in a close relationship to him. (Compl., Doc. 1, #23-24)

Sixth Circuit judge put it, "[e]ven when the government's alleged violation of a law produces mental distress in the party who seeks to challenge it, that sort of 'psychological' trauma alone is not an injury sufficient to confer standing under Art. III." *See Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 873 (6th Cir. 2020) (quotation omitted) (Murphy, J., concurring).

Of course, had the City fined Prows, that would suffice. *See Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 426 (6th Cir. 2019) (Rogers, J., concurring) ("[A] money damages suit is generally an Article III case or controversy."). Or, had Prows told law enforcement he planned to gather with his family, only to be advised he could not, any resulting severe emotional damages might work. But that is because, on those facts, his emotional trauma might have had a sufficient link to conduct directed at Prows himself to meet the "particularized" threshold. Here, based on Prows's Amended Complaint, the City's only "conduct" consisted of (1) passing the ordinance and (2) enforcing it against others, causing Prows to change his behavior. For the reasons above, Prows suffered at most a "generalized grievance," which courts routinely reject as a basis for standing. *See Hollingsworth*, 570 U.S. at 706.

In sum, to assert Article III standing in a damages action based on alleged past chilling or a resulting past emotional injury, Prows must show that, at the very least, he suffered that injury from conduct the City or its agents in some way directed at him. He has not done so.[4]

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4. Or perhaps this is all better understood through the lens of redressability, the third prong of the standing analysis. The

chilling effect injury, or resulting emotional injury, that Prows alleges here plausibly gives rise to, at most, a claim for nominal damages. But such damages support standing only when they arise from a "completed violation." *See Uzuegbunam*, 141 S. Ct. at 802. Merely passing an ordinance (or enacting a regulatory policy, as in *Uzuegbunam*) cannot in and of itself "complete" a violation, as otherwise the category "uncompleted violation" would be a null set. Therefore, passing the Ordinance, even if unconstitutional, cannot be a "completed violation" as *Uzuegbunam* uses the term. Further, in deciding what made the violation there "complete," the Supreme Court focused on the steps the regulator took to enforce the policy against the plaintiff himself. *Id.* ("For purposes of this appeal, it is undisputed that Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him."). Here, by contrast, the only steps City officials took beyond passing the Ordinance were directed at others. So, if conduct directed against the plaintiff himself is all that counts, Prows's claimed injury, along with the resulting nominal damages, also falls short on redressability grounds.

Unfortunately, in *Uzuegbunam*, the Court left open the question perhaps most directly relevant here. There, another plaintiff, Bradford, claimed that the enforcement against Uzuegbunam caused him to discontinue engaging in similar First-Amendment-protected activity. The Court then declined to reach the issue of whether he had suffered a redressable injury as a result, remanding to the district court to assess standing in the first instance. *See id.* at 802 n. *. That said, there the alleged conduct of the two arguably was more similar than here. But, given the Supreme Court's remand of the Bradford issue, this Court declines to rely on a lack of redressability to deny standing here.

Appendix D

CONCLUSION

For the above reasons, the Court **DISMISSES** Prows's Amended Complaint (Doc. 7) **WITHOUT PREJUDICE** for lack of standing. The Court **DENIES** all other motions **AS MOOT**. The Court **ORDERS** the Clerk to enter judgment and **TERMINATE** this matter from the Court's docket.

SO ORDERED.

August 24, 2023
DATE

/s/ Douglas R. Cole
DOUGLAS R. COLE
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER AND REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION, FILED JUNE 7, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:22-cv-693

TATE PROWS,

Plaintiff,

v.

CITY OF OXFORD, *et al.*,

Defendants.

Cole, J.
Litkovitz, M.J.

ORDER AND REPORT AND RECOMMENDATION

On November 28, 2022, plaintiff initiated this civil rights action against the City of Oxford, Ohio (the "City"), its chief of police John Jones ("Chief Jones"), its mayor Michael Smith ("Mayor Smith"), its vice-mayor William Snavely ("Vice-Mayor Snavely"), its manager Doug Elliott ("Manager Elliott"), and all five of its councilors: Chantel

Raghu ("Councilor Raghu"), Jason Bracken ("Councilor Bracken"), Glenn Ellerbe ("Councilor Ellerbe"), David Prytherch ("Councilor Prytherch"), and Edna Southard ("Councilor Southard") (collectively, "defendants"). This matter is before the Court on defendants' motion for judgment on the pleadings (Doc. 20), plaintiff's objection (Doc. 33), and defendants' reply (Doc. 48). Plaintiff also filed a motion to convert defendant's motion into a motion for summary judgment, which is fully briefed. (*See* Docs. 27, 29, and 32).

I. Background[1]

The crux of this lawsuit is the City's Ordinance No. 3579: "An Ordinance Prohibiting Mass Gatherings of More Than Ten (10) Non-Household Members Within the City of Oxford, Ohio, to Limit the Spread of Covid-19, and Declaring an Emergency." (*See* Doc. 1-2 at PAGEID 29-33) (the "mass-gatherings ordinance").[2] Plaintiff alleges that

1. "When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto . . . so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). *See Brent v. Wayne Cnty. Dep't of Hum. Servs.*, 901 F.3d 656, 695 (6th Cir. 2018) (Rule 12(c)).

2. This document is not attached to plaintiff's amended complaint. (Doc. 7). It is included, however, as exhibit "A" to plaintiff's original complaint, which included exhibits designated "A" through "C." (*See* Doc. 1-2). Plaintiff's amended complaint picks up with exhibits designated "D" and "E." (*See* Doc. 7-1). Based on this and plaintiff's references to the mass-gatherings ordinance throughout his amended complaint, the Court understands plaintiff to have intended that exhibits designated "A" through "E" all be attached to his amended complaint.

Appendix E

City councillors debated what would become the mass-gatherings ordinance in August 2020. (Doc. 7, PAGEID 131 at ¶ 1). City council unanimously passed the mass-gatherings ordinance on August 18, 2020. (*Id.*, PAGEID 134 at ¶ 13; Doc. 1-2 at PAGEID 33).

Precipitated by, *inter alia*, the Covid-19 pandemic and state of emergency declared by Ohio Governor Mike DeWine (*see* Doc. 1-2 at PAGEID 29-31), the mass-gatherings ordinance stated in part as follows:

> **Section 1.** All individuals within the City of Oxford are prohibited from hosting, maintaining or participating in mass gatherings in accordance with the following:
>
> > a. "Mass gatherings" for purposes of this Ordinance, means any social gathering, event or convening that brings together greater than ten (10) non-household persons at the same time, to include both indoor and outdoor gatherings.
> >
> > b. "Non-household" for purposes of this Ordinance, means any individuals who do not reside within the same housing unit or dwelling.
>
> **Section 2.** The mandatory prohibition on mass gatherings through this Ordinance does not apply in the following situations:

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a. Normal operations at bus stops or hubs, medical facilities, libraries, shopping malls and centers, or other spaces where more than ten (10) persons may be in transit.

b. Typical office environments.

c. Schools and University classes or officially sanctioned functions.

d. Factories, warehouses and distribution centers.

e. Retail, grocery stores, restaurants and bars where large numbers of people are present, but it is unusual for them to be within arm's length of one another.

f. Athletic and sporting events, including recreational and club sports.

g. Notwithstanding this Ordinance, buildings and venues that traditionally host mass gatherings, whether indoors or outdoors, may continue to be used for sanctioned community events.

h. This Ordinance does not apply to and/or excludes members of the media.

i. This Ordinance does not apply to and/or excludes religious gatherings, gatherings

> for the purpose of the expression of First Amendment protected speech, weddings and funerals.

(*Id.* at PAGEID 31-32). Violators of the ordinance were subject to civil penalties of $500.00 for the first violation and $1,000 for each violation thereafter. (*Id.* at PAGEID 32). The mass-gatherings ordinance was effective only, by its terms, "during the pendency of State of Ohio Executive Order 2020-01D[,]" which ended on June 18, 2021.[3] (*Id.* at PAGEID 33).

Plaintiff's complaint includes allegations of specific conduct by certain defendants. Chief Jones, Manager Elliott, and Councilor Prytherch expressed some hesitation about/disapproval of the mass-gatherings ordinance during August 4 and 18, 2020 City council

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3. Governor DeWine rescinded Executive Order 2020-01D via Executive Order 2021-08D. *See* Executive Order 2021-08D (Rescinding Executive Order 2020-01D and Ending the Declared State of Emergency), Mike DeWine, Governor of Ohio (June 18, 2021), https://governor.ohio.gov/media/executive-orders/Executive-Order-2021-08D [https://perma.cc/Y9BD-5XWZ]. Under Fed. R. Evid. 201(b)(2), the Court "may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, such as a government website. *See Broom v. Shoop*, 963 F.3d 500, 509 (6th Cir. 2020) (citing *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017), favorably for the proposition that it is appropriate to take judicial notice of a government website); *Demis v. Sniezek*, 558 F.3d 508, 513 & n.2 (6th Cir. 2009) (taking judicial notice of information on the Bureau of Prisons website).

meetings. (*See* Doc. 7, PAGEID 132 at ¶¶ 3-8; PAGEID 134 at ¶ 13; PAGEID 136 at ¶ 21; and PAGEID 149 at ¶ 67). Chief Jones enforced the mass-gatherings ordinance. (*See* Doc. 7, PAGEID 132, ¶ 6). Vice-Mayor Snavely stated that the mass-gatherings ordinance should have contained steeper fines during an interview with CNN after the mass-gatherings ordinance passed. (*Id.*, PAGEID 134 at ¶ 15; PAGEID 147-48 at ¶ 60). Councilor Bracken advocated for steeper fines prior to the mass-gatherings ordinance's passage. (*Id.*, PAGEID 133 at ¶ 10; PAGEID 149 at ¶ 66). Councilor Southard also advocated for associated punishments that "carried some weight" prior to the mass-gatherings ordinance's passage. (*Id.*, PAGEID 131 at ¶ 2). Councilor Raghu inquired whether an exemption for extended families could be included prior to the mass-gatherings ordinance's passage. (*Id.*, PAGEID 143 at ¶ 42). Plaintiff's amended complaint does not reference any specific conduct by Mayor Smith or Councilor Ellerbe.

Against the five City Councillors collectively, plaintiff alleges that they "h[e]ld the false belief that their ordinances carry the same weight as laws" (*id.*, PAGEID 133 at ¶ 9) and voted to pass the mass-gatherings ordinance despite concerns raised by Chief Jones (*id.*; *id.*, PAGEID 149 at ¶ 68). Plaintiff also generally alleges that the conduct of all defendants was wanton or reckless. (*Id.*, PAGEID 125-26 and 130; PAGEID 150 at ¶ 72).

Plaintiff does *not* allege that the mass-gatherings ordinance was enforced (or threatened to be enforced) against him. Plaintiff alleges that he "was chilled and

deterred from exercising his First Amendment right." (*Id.*, PAGEID 135 at ¶ 16). Plaintiff further alleges that he was unable to gather with his larger family during the "Holiday Season of 2020, due to fear of having armed police officers show up to his door, without a warrant" to enforce the mass-gatherings ordinance. (*Id.*). Plaintiff alleges that this resulted in "severe emotional trauma and anxiety which manifest itself in numerous physical symptomologies." (*Id.*).

Counts I through III of plaintiff's amended complaint allege violations of plaintiff's First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Fourteenth Amendment rights. Count IV alleges conspiracy under 42 U.S.C. § 1985(3). Count V alleges a general civil conspiracy claim. Plaintiff withdrew his negligent infliction of emotional distress claim. (Doc. 33 at PAGEID 375). Plaintiff seeks relief including his "right to reasonable attorney's fees" pursuant to the "common law Writ of Qui Tam" (*id.*, PAGEID 146 at ¶ 55); the impaneling of a federal grand jury (*id.*, PAGEID 151-52 at ¶¶ 79-80); compensatory damages; attorney fees pursuant to 42 U.S.C. § 1988; and punitive damages from the individual defendants.[4]

II. Standard of Review

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true,

4. Plaintiff withdrew his request for injunctive relief and acknowledges that he cannot seek punitive damages from the City. (Doc. 33 at PAGEID 375).

and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) (quoting *S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973)). However, the Court "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* at 581-82 (quoting *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999)). Put differently, defendants are entitled to judgment under Rule 12(c) if "no material issue of fact exists and [they are] entitled to judgment as a matter of law." *Id.* at 582 (quoting *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991)).

To withstand a Rule 12(c) motion for judgment on the pleadings, like a Rule 12(b)(6) motion, "a complaint must contain direct or inferential allegations respecting all the material elements under some viable legal theory." *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007) (citation omitted). "The factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A "legal conclusion couched as a factual allegation" need not be accepted as true; and "a formulaic recitation of the elements of a cause of action" is insufficient. *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

A complaint filed by a pro se plaintiff must be "liberally construed" and "held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). By the same token, however, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" to withstand a Rule 12(c) motion. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

III. Analysis

A. Standing

It is plaintiff's burden to establish Article III standing—i.e., that there is a case or controversy appropriate for judicial disposition under the Constitution. *See* U.S. CONST. art. III, § 2; *Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 581 (6th Cir. 2016) ("Plaintiffs bear the burden of establishing standing."). To do so, plaintiff must show:

> "(1) [he] has suffered an 'injury-in-fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Id. (quoting *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 606-07 (6th Cir. 2007)) (alteration in

original). The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lance v. Coffman*, 549 U.S. 437, 439, 127 S. Ct. 1194, 167 L. Ed. 2d 29 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

In addition to Article III standing, the Court considers prudential standing. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007). This inquiry is aimed at precluding access to federal courts over "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens" or in situations where the plaintiff "rest[s] his claim to relief on the legal rights or interests of third parties." *Id.* at 349 (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). For prudential standing, plaintiff must show that (1) he seeks to redress his own injuries and not those of third parties, (2) his claim is "more than a generalized grievance[,]" and (3) his complaint "fall[s] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 206 (6th Cir. 2011) (quoting *City of Cleveland v. Ohio*, 508 F.3d 827, 835 (6th Cir. 2007), and *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)) (internal quotation omitted).

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Plaintiff's amended complaint alleges a generalized grievance with the City common to all City residents. (*See, e.g.*, Doc. 7, PAGEID 135 at ¶ 16 ("[Plaintiff], along with every other U.S. citizen residing within the territorial jurisdiction of the City . . . , was chilled and deterred from exercising his First Amendment right."); PAGEID 150 at ¶ 72 ("Defendants breached their duty to all citizens under their protection by wantonly and recklessly violating the citizens' inalienable rights. . . .")). This is insufficient to establish injury in fact for standing purposes. *See Lance*, 549 U.S. at 439. *See also Marcum v. Jones*, No. 1:06-cv-108, 2006 U.S. Dist. LEXIS 12004, 2006 WL 543714, at *1 (S.D. Ohio Mar. 3, 2006) ("A litigant may bring his own claims to federal court without counsel, but not the claims of others.") (citing 28 U.S.C. § 1654); *Dodson v. Wilkinson*, 304 F. App'x 434, 438 (6th Cir. 2008) (Prisoner "lack[ed] standing to assert the constitutional rights of other prisoners.") (quoting *Newsom v. Norris*, 888 F.2d 371, 381 (6th Cir. 1989)).

As to plaintiff personally, he alleges that he refrained from gathering with his family "during the Holiday Season of 2020[] due to fear of having armed police officers show up to his door, without a warrant" to assess a fine pursuant to the mass-gathering ordinance. (Doc. 7, PAGEID 135 at ¶ 16). Relatedly, plaintiff alleges that the City had enforced the mass-gatherings ordinances and assessed fines for first-time infractions. (*Id.*, PAGEID 134 at ¶ 14; Doc. 1-2 at PAGEID 35-57 (City Civil Offense Citations)). As a result, plaintiff alleges that he suffered "severe emotional trauma and anxiety which manifested itself in numerous physical symptomologies." (*Id.*, PAGEID 135 at ¶ 16)

The Court finds that this allegation is sufficient for purposes of the standing inquiry.[5] The injury in fact component of the standing analysis is satisfied "when the threat of enforcement of that law is 'sufficiently imminent.'" *Miller v. City of Wickliffe, Ohio*, 852 F.3d 497, 506 (6th Cir. 2017) (quoting *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 451 (6th Cir. 2014)). "Sufficiently imminent," in turn, is determined by reference to whether "(1) the plaintiff alleges 'an intention to engage in a course of conduct' implicating the Constitution and (2) the threat of enforcement of the challenged law against the plaintiff is 'credible.'" *Id.* (quoting *Platt*, 769 F.3d at 451-52 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979))). Plaintiff alleges that, while the mass-gatherings ordinance was in effect, he intended to gather with his extended family, which includes more than 10 people, meeting the first requirement. As to the second requirement, a threat is credible "if a person must censor herself to avoid violating the law in question." *Id.* (citing *Platt*, 769 F.3d at 452). Such censorship arises where the law at issue "amount[s] to an outright prohibition on certain types of speech in which a Plaintiff had demonstrated an intent to engage." *Thiede v. Burcroff*, No. 16-13650, 2018 U.S. Dist. LEXIS

5. The standing analysis should not preempt the merits analysis. *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 864 n.3 (6th Cir. 2020) ("We are mindful of the Supreme Court's admonition that we must keep the merits of [the plaintiff 's] claim separate from the standing question.") (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)).

7945, 2018 WL 465968, at *14 (E.D. Mich. Jan. 18, 2018). *See also Platt*, 769 F.3d at 452 (injury in fact established where the plaintiff alleged a "desire[] to engage in political speech . . . that violate[d] the [law at issue]"). Based on the foregoing, the alleged injury resulting from plaintiff's reasonable belief that he could not gather with his family during the 2020 holiday season is sufficient to confer standing. *Cf. Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)).

B. Immunity

1. *Absolute immunity*

Defendants argue that the individual defendants are entitled to absolute immunity for their legislative activity. It appears to the Court, however, that only Councilors Prytherch, Southard, Bracken, Ellerbe, Rahu; Vice-Maylor Snavely; and Mayor Smith voted to pass the mass-gatherings ordinance. (*See* Doc. 7-1 at PAGEID 179 (August 18, 2020 City council meeting minutes)). Chief Jones and Manager Elliott are therefore not candidates for such immunity.

Plaintiff distinguishes the cases defendants cite from the situation at bar, where he alleges that the legislative activity was "outside the scope of [defendants'] legislative authority. . . ." (Doc. 33 at PAGEID 372; *id.* at PAGEID

358-60 (discussing the scope of the City's legislative power under Ohio's Constitution)). In reply, defendants argue that the mass-gatherings ordinance was within the City's legislative powers under Ohio's Constitution as interpreted by the Ohio Supreme Court.

"Local legislators sued in their individual capacities may invoke absolute legislative immunity to insulate themselves from liability for certain actions." *Vaduva v. City of Xenia*, 780 F. App'x 331, 335 (6th Cir. 2019) (citing *Smith*, 641 F.3d at 218). This immunity exists to promote public service without fear of civil liability, given that local government positions often feature little "prestige [or] pecuniary rewards. . . ." *Smith*, 641 F.3d at 219. "[P]assing an ordinance is a 'purely legislative act.'" *Vaduva*, 780 F. App'x at 335 (quoting *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 437 (6th Cir. 2005)) (remaining citations omitted).

The Sixth Circuit in *Vaduva* considered and rejected an argument that appears analogous to the one plaintiff makes here:

> Plaintiff argues that City Council Defendants are not entitled to legislative immunity because passing an *unconstitutional* ordinance is not within the sphere of legitimate legislative activity, and that the district court erred by "focus[ing] on the nature of the act [rather than] the unconstitutionality of the ordinance." (Reply Brief for Appellant at 12.) Yet, to the contrary, "whether an act is legislative turns on

> the nature of the act, rather than on the motive or intent of the official performing it." *Canary v. Osborn*, 211 F.3d 324, 329 (6th Cir. 2000) (quotation omitted); *see also Collins v. Vill. of New Vienna*, 75 F. App'x 486, 488 (6th Cir. 2003) (per curiam). Thus, the constitutionality of [the ordinance at issue] is not relevant to this legislative immunity analysis. *See, e.g., Smith*, 641 F.3d at 218 ("Even if the Board did not have the power to abolish the alternative school under Tennessee law, the Board members may still enjoy legislative immunity as individuals in federal court for their legislative actions, sound or unsound."); [*Shoultes v Laidlaw*, 886 F.2d 114, 117-18 (6th Cir. 1989)] ("While the ordinance subsequently was held invalid, it was passed by a properly constituted legislative body, which was empowered to pass zoning regulations. Accordingly, we hold that the Mayor and Council members are shielded from suit by absolute legislative immunity.").

Id. at 335-36 (footnote omitted). *See also Kent v. Ohio House of Representatives Democratic Caucus*, 33 F.4th 359, 367 (6th Cir. 2022) ("The Caucus's decision to oust Kent remained discretionary [as opposed to ministerial] . . . , even if it allegedly violated state law" and was shielded by legislative immunity). Legislative immunity depends on the nature of the challenged act and not its legality of the motives of the actors, and the action of these defendants—voting to pass the mass-gatherings ordinance—was clearly legislative in nature. *See Vaduva*,

780 F. App'x at 335-36. Plaintiff's claims, including his conspiracy claims, should therefore be dismissed against Councilors Prytherch, Southard, Bracken, Ellerbe, Rahu; Vice-Maylor Snavely; and Mayor Smith on the basis of absolute immunity. *See also id.* at 336 n.5 ("[L]egislative immunity analysis applies equally to Plaintiff's § 1983 and § 1985(3) claims.").

2. *Qualified immunity*

Given the above, the Court considers whether the remaining individual defendants, Chief Jones and Manager Elliott, are protected by qualified immunity. "Qualified immunity protects government officials performing discretionary functions unless their conduct violates a clearly established statutory or constitutional right of which a reasonable person in the official's position would have known." *Brown v. Lewis*, 779 F.3d 401, 411 (6th Cir. 2015) (quoting *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (2006)). Thus, when a defendant raises qualified immunity, the plaintiff must show that (1) "a constitutional violation has occurred" and (2) "the violation involved a clearly established constitutional right of which a reasonable person would have known." *Id.* (citing *Sample v. Bailey*, 409 F.3d 689, 695-96 (6th Cir. 2005)). The Court may consider these elements in any order. *See Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). "[T]o impose individual liability upon a [state official] for engaging in unconstitutional misconduct, it is a plaintiff's burden to specifically link the [official]'s involvement to the constitutional infirmity. . . ." *Burley v. Gagacki*, 834 F.3d 606, 615 (6th Cir. 2016). *See also Gilmore v. Corr. Corp. of Am.*, 92 F. App'x 188, 190 (6th

Cir. 2004) ("Merely listing names in the caption of the complaint and alleging constitutional violations in the body of the complaint is not enough to sustain recovery under § 1983.").

Qualified immunity, a fact-sensitive analysis, is generally inappropriate at the pleading stage. *Siefert v. Hamilton Cnty.*, 951 F.3d 753, 761 (6th Cir. 2020). But this is not an absolute rule. *Id.* "If, taking all the facts as true and reading all inferences in the plaintiff's favor, the plaintiff has not plausibly showed a violation of his clearly established rights, then the officer-defendant is entitled to immunity from suit" at the pleading stage. *Id.* at 762.

As discussed above, plaintiff does not allege that Chief Jones or Manager Elliott voted to pass the mass-gatherings ordinance. In fact, plaintiff alleges that these two defendants expressed hesitation about the mass-gatherings ordinance. *See supra* p. 3. Plaintiff also does not allege that Chief Jones or Manager Elliot enforced the mass-gatherings ordinance against him personally. (*See* Doc. 7, PAGEID 132, ¶ 6 (Chief Jones "and his officers enforced [the mass-gatherings ordinance]"). Chief Jones and Manager Elliott therefore cannot be held individually liable for any unconstitutional conduct and are entitled to qualified immunity. *Burley*, 834 F.3d at 615 (6th Cir. 2016); *Gilmore*, 92 F. App'x at 190.

3. *State law immunity*

Defendants also argue that they enjoy immunity pursuant to Ohio law. Given the foregoing analysis, the

Court considers immunity under state law only as it relates to the City, Chief Jones, and Manager Elliott.

a. *The City*

To determine whether a political subdivision enjoys immunity under Ohio's Political Subdivision Tort Liability Act (PSTLA), Ohio Rev. Code § 2744 *et seq.*, Ohio courts employ a three-tiered analysis. *Hortman v. Miamisburg*, 110 Ohio St. 3d 194, 2006- Ohio 4251, 852 N.E.2d 716, 718 (Ohio 2006). Courts are to first examine whether the political subdivision falls within the general immunization from liability under Ohio Revised Code § 2744.02(A). *Id.* Courts are to next analyze whether an exception to immunity set out in Ohio Revised Code § 2744.02(B)(1)-(5) applies. *Id.* Finally, courts are to determine whether a defense under Ohio Revised Code § 2744.03 applies to reinstate immunity. *Id.*

Plaintiff admits that the City is a political subdivision (*see* Doc. 7 at PAGIED 128) and therefore generally immune for purposes of the first tier. Under Ohio Rev. Code § 2744.02(A)(1):

> [T]he functions of political subdivisions are hereby classified as governmental functions and proprietary functions. . . . [A] political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of

> the political subdivision in connection with a governmental or proprietary function.

Id.

Under the second tier, the first exception concerns the negligent operation of a motor vehicle and does not apply. *See id.* at § 2744.02(B)(1). The second exception concerns proprietary functions[6] and does not apply. *See id.* at § 2744.02(B)(2). The third exception concerns the negligent maintenance of public roads and does not apply. *See id.* at § 2744.02(B)(3). The fourth exception concerns negligence related to physical defects on or in public properties and does not apply. *See id.* at § 2744.02(B)(4). The fifth exception concerns instances in which an Ohio statute otherwise expressly imposes liability on a political subdivision and does not apply. *See id.* at § 2744.02(B)(5).

Because the City does not lose its immunity pursuant to any of these exceptions, the third tier is not applicable. The City should be determined immune from plaintiff's state law claims under the PSTLA. *See Stillwagon v. City of Delaware*, 175 F. Supp. 3d 874, 907-08 (S.D. Ohio 2016) ("Ohio courts have held that political subdivisions are immune from intentional torts such as . . . civil conspiracy. . . .") (citations omitted).

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6. The definition of proprietary functions (Ohio Rev. Code § 2744.01(G)(1)(a)) excludes functions set forth in Ohio Revised Code § 2744.01(C)(2), including "[t]he power . . . to protect persons" and "[t]he enforcement . . . of any law. . . ." (*id.* at § 2744.01(C)(2)(b) and (i)).

b. *Chief Jones and Manager Elliott*

Plaintiff's state law claims against Chief Jones and Manager Elliott also fail as a matter of law under the PSTLA. Ohio Revised Code § 2744.03(A)(6) states that immunity applies to political subdivision employees except in three circumstances:

> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
>
> (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

Id. at §§ 2744.03(A)(6)(a)-(c).

The Court sees nothing in the amended complaint that would invoke § 2744.03(A)(6)(c). Regarding

§ 2744.03(A)(6)(a), plaintiff does not plausibly allege conduct by Chief Jones or Manager Elliott outside the scope of their employment. Under Ohio law, the scope of employment—for purposes of intentional torts—"turns on . . . whether the [employee] acted, or believed himself to have acted, at least in part, in his employer's interests." *Auer v. Paliath*, 140 Ohio St. 3d 276, 2014- Ohio 3632, 17 N.E.3d 561, 566 (Ohio 2014) (quoting *Ohio Gov't Risk Mgmt. Plan v. Harrison*, 115 Ohio St. 3d 241, 2007 Ohio 4948, 874 N.E.2d 1155, 1159 (Ohio 1997)) (alteration in original). *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1144 (6th Cir. 1996) ("The scope of employment issue [under Ohio law] does not focus on the alleged wrongful nature of the employee's actions; rather, the issue is the actions complained of and whether those actions are 'so divergent that [their] very character severs the relationship of employer and employee.'") (quoting *Osborne v. Lyles*, 63 Ohio St. 3d 326, 587 N.E.2d 825, 829 (Ohio 1992)) (alteration in original). While generally a question of fact, the scope of employment may be determined as a matter of law where "reasonable minds can come to but one conclusion. . . ." *Riotte v. Cleveland*, 195 Ohio App. 3d 387, 2011- Ohio 4507, 960 N.E.2d 496, 501 (Ohio Ct. App. 2011) (quoting *Osborne*, 587 N.E.2d at 829).

The only specific actions by Chief Jones and Manager Elliott alleged in the amended complaint are their deliberations regarding and critique of the mass-gatherings ordinance and Chief Jones' enforcement of the mass-gatherings ordinance against others—which are not actions "so divergent that [their] very character severs the relationship of employer and employee." *Osborne*, 587

N.E.2d at 829 (quoting *Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 19 Ohio App. 3d 246, 19 Ohio B. 398, 484 N.E.2d 280, 287 (Ohio Ct. App. 1985)). Plaintiff's amended complaint does not make this case; at most, plaintiff argues that their actions were wrongful or illegal—if he implicates these particular defendants at all. (*See, e.g.*, Doc. 7, PAGEID 126 ("The numerous violations of the Ohio Constitution, . . . by the City . . . and its policymakers, are evidence of the abuse and misuse of [defendants'] privilege."); PAGEID 133 at ¶ 9 ("[The City councilors] did not heed the warnings of [Chief] Jones, regarding the brazenly unconstitutional nature of [the mass-gatherings ordinance].")); PAGEID 131 ("[The City councilors] think their ordinances are laws. . . ."); PAGEID 133 at ¶ 9 (The City councilors "hold the false belief that their ordinances carry the same weight as laws.")). But wrongfulness or illegality does not take an employee's action out of the scope of employment. *See RMI Titanium Co.*, 78 F.3d at 1144. While the determination of the scope of employment is generally an issue of fact, the Court finds "reasonable minds can come to but one conclusion" in this case that Chief Jones and Manager Elliott acted within the scopes of their employment. *Id.* at 831.

With respect to § 2744.03(A)(6)(b), plaintiff refers to defendants' behavior being "reckless[] and callous[]. . . ." (*See, e.g.*, Doc. 7 at PAGEID 130). Under Ohio law:

> Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. [*Hawkins v.*

> *Ivy*, 50 Ohio St. 2d 114, 363 N.E.2d 367, 369 (Ohio 1977)]; *see also Black's Law Dictionary* 1613-1614 (8th Ed. 2004) (explaining that one acting in a wanton manner is aware of the risk of the conduct but is not trying to avoid it and is indifferent to whether harm results).
>
> Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. [*Thompson v. McNeill*, 53 Ohio St. 3d 102, 559 N.E.2d 705, 708 (Ohio 1990)], adopting 2 Restatement of the Law 2d, Torts, Section 500, at 587 (1965); *see also Black's Law Dictionary* 1298-1299 (8th Ed. 2004) (explaining that reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the risk, but the actor does not desire harm).

Anderson v. Massillon, 134 Ohio St. 3d 380, 2012- Ohio 5711, 983 N.E.2d 266, 273 (Ohio 2012).

The City council meeting minutes attached and referred to in plaintiff's amended complaint (and therefore considered as part of this motion) undercut any reasonable inference that Chief Jones or Manager Elliott failed to exercise any care or consciously disregarded a substantial and unjustifiable risk of harm. To the contrary, plaintiff

alleges that these individuals expressed concerns with the mass-gatherings ordinance. Plaintiff's argument also ignores the fact that the mass-gatherings ordinance itself, which Chief Jones allegedly enforced (though not against plaintiff) demonstrates explicit regard for its legality—carving out exceptions for "religious gatherings" and "gatherings for the purpose of the expression of First Amendment protected speech. . . ." (Doc. 1-2 at PAGEID 32).

Plaintiff's amended complaint does not plausibly allege that Chief Jones or Manager Elliott acted either outside the scope of their employment or recklessly or wantonly. Plaintiff's state law claims should therefore be dismissed against Chief Jones and Manager Elliott pursuant to the PSTLA.

C. Federal conspiracy claims

Leaving aside the defendants insulated by absolute immunity, the Court considers plaintiff's federal conspiracy claims against the remaining defendants.

1. *42 U.S.C. § 1985(3)*

Section 1985 provides a cause of action for conspiracy to deprive an individual the equal protection of the law. *See* 42 U.S.C. § 1985(3). To state a § 1985(3) claim, plaintiff must show:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class

> of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Bhd. of Carpenters and Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 828-29, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983). A § 1985(3) claim must also allege racial or class-based invidiously discriminatory animus driving the conspiracy. *Id.* at 834 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)). *See also McGee v. Schoolcraft Cmty. Coll.*, 167 F. App'x 429, 435 (6th Cir. 2006) ("The Sixth Circuit has ruled that § 1985(3) only applies to discrimination based on race or membership in a class which is one of 'those so-called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics.") (quoting *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 224 (6th Cir. 1991)).

Defendants argue that plaintiff's § 1985(3) conspiracy claim must fail because plaintiff does not allege racial or class-based invidiously discriminatory animus. Plaintiff urges his own reading of the Supreme Court's decision in *Griffin*, which is that the discriminatory-animus requirement was intended to qualify only the private § 1985(3) conspiracies first recognized in *Griffin* (as opposed to the conspiracy among state actors alleged

here). The plain language of *Griffin*, however, simply does not warrant such qualification: "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971).

In addition, though plaintiff downplays the significance of decisional law (*see* Doc. 33 at PAGEID 369), he offers no other binding authority to support his position. Federal courts "may not disregard Supreme Court precedent unless and until it has been overruled by the Court itself." *Taylor v. Buchanan*, 4 F.4th 406, 408 (6th Cir. 2021) (citing *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813 (6th Cir. 2020)). Likewise, because this Court is a district court that sits in the Sixth Circuit, it "is not at liberty to disregard clearly established Sixth Circuit precedent." *Hawks v. Life Ins. Co. of N. Am.*, No. 3:15-cv-124, 2015 U.S. Dist. LEXIS 171135, 2015 WL 9451067, at *3 (W.D. Ky. Dec. 23, 2015) (quoting *United States v. Adams*, No. 6:09-cr-16, 2009 U.S. Dist. LEXIS 115106, 2009 WL 4799466, at *2 (E.D. Ky. Dec. 10, 2009)). As the amended complaint fails to allege racial or class-based invidious discrimination, plaintiff's conspiracy claim under § 1985(3) should be dismissed.

2. *Civil conspiracy*

Defendants argue that that plaintiff does not articulate whether his civil conspiracy claim is founded in state law, federal law, or both. Given the Court's conclusion

regarding the PSTLA, the Court considers the conspiracy claim under federal law:

> "A civil conspiracy is an agreement between two or more persons to injure another by unlawful action." *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985). To prove conspiracy, plaintiffs must show (1) "that there was a single plan," (2) "that the alleged coconspirator shared in the general conspiratorial objective," and (3) "that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Id.* at 944 (citations omitted).

Rieves v. Town of Smyrna Tenn., No. 23-5106, 67 F.4th 856.

Defendants argue that this claim is barred under the intracorporate conspiracy doctrine. Plaintiff argues in response that the Sixth Circuit has not ruled that the intracorporate conspiracy doctrine applies in a § 1983 action; and, in any event, it does not apply because the defendants' actions were not within the scope of their employment. Defendants argue that plaintiff's allegation that defendants acted under color of state law effectively admits that their actions were within the scope of their employment.

The Sixth Circuit has held that "the intracorporate conspiracy doctrine applies in § 1983 suits to bar conspiracy claims where two or more employees of the same entity are alleged to have been acting within the

scope of their employment when they allegedly conspired together to deprive the plaintiff of his rights." *Jackson v. City of Cleveland*, 925 F.3d 793, 818 (6th Cir. 2019). The Sixth Circuit has explained that the scope-of-employment exception to the intracorporate conspiracy doctrine "recognizes a distinction between collaborative acts done in pursuit of an employer's business and private acts done by persons who happen to work at the same place." *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 840 (6th Cir. 1994). *Compare id.* at 841 ("Even if the employees lacked the necessary qualifications to prescribe proper medical treatment, that . . . does not establish that they acted outside the course of their employment. It is clear that their comments were connected to the legitimate business of [the defendant] and the work of its staff.") *with DiLuzio v. Vill. of Yorkville, Ohio*, 796 F.3d 604, 615 (6th Cir. 2015) ("[I]mproper abuse of . . . authority for personal gain or malicious intent was outside of the scope of . . . employment."). *Cf. Henson v. Nat'l Aeronautics & Space Admin.*, 14 F.3d 1143, 1148 (6th Cir. 1994) (considering the scope of employment in the context of the Federal Tort Claims Act) ("The mere fact that his actions may have been unlawful . . . is not enough, by itself, to find the actions outside his authority.").

In the section of his opposition dedicated to the intracorporate conspiracy doctrine, plaintiff implies that defendants' actions were outside the scope of employment but does not identify particular actions. (Doc. 33 at PAGEID 374 ("The intracorporate conspiracy doctrine 'provides that members of the same entity cannot conspire with one another as long as their alleged acts were **within**

the scope of their employment." *Burgess v. Fischer*, 375 F.3d 462 483 (6th Cir. 2013)") (emphasis plaintiff's)). For the reasons discussed in part III.B.3.b above, plaintiff does not plausibly allege that Chief Jones or Manager Elliott acted outside the scope of their employment. Dismissal of plaintiff's federal civil conspiracy claim is therefore appropriate based on the intracorporate conspiracy doctrine against the remaining defendants.

D. *Monell*

Although the Court concludes that each of the individual defendants enjoys either qualified or absolute immunity from plaintiff's constitutional claims, the Court nevertheless considers whether the City is liable under § 1983. *Scott v. Clay Cnty., Tenn.*, 205 F.3d 867, 879 (6th Cir. 2000) ("[I]f the legal requirements of *municipal* . . . civil rights liability are satisfied, qualified immunity will *not* automatically excuse a municipality . . . from constitutional liability, even where the municipal . . . actors were personally absolved by qualified immunity, *if* those agents *in fact* had invaded the plaintiff's constitutional rights.") (footnote and citation omitted); *Barber v. City of Salem, Ohio*, 953 F.2d 232, 238 (6th Cir. 1992) ("[I]t is possible that city officials may be entitled to qualified immunity for certain actions while the municipality may nevertheless be held liable for the same actions.") (footnote omitted); *Caron v. City of Oakwood*, No. C-3-91-409, 1993 U.S. Dist. LEXIS 21310, 1993 WL 1377512, at *19 (S.D. Ohio Dec. 30, 1993) ("[I]t is not unreasonable to read [*Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980)], as denying municipalities

the ability to take advantage of any immunity, absolute or qualified, accorded individual officers in § 1983 actions."); and *Wagner v. Genesee Cnty. Bd. of Comm'rs*, 607 F. Supp. 1158, 1167, 1170 (E.D. Mich. 1985) (a municipality remains liable under *Monell* even if individual defendants are found absolutely immune).

For liability to attach to a municipal entity under § 1983, "a plaintiff must show: (1) a deprivation of a constitutional right; and (2) that the municipal entity is responsible for that deprivation." *Baynes*, 799 F.3d at 620 (quoting *Doe v. Claiborne Cnty., Tenn. By & Through Claiborne Cnty. Bd. of Educ.*, 103 F.3d 495, 505-06 (6th Cir. 1996)). *See also Burgess*, 735 F.3d at 478 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)) ("A plaintiff raising a municipal liability claim under § 1983 must demonstrate that the alleged federal violation occurred because of a municipal policy or custom."). A plaintiff shows an illegal policy or custom one of four ways: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Id.*

As to the first element of municipal liability, defendants argue that plaintiff has failed to identify a policy or custom of the City that inflicted constitutional injury. Plaintiff argues in response that the mass-gatherings ordinance was an illegal legislative enactment. In reply, defendants characterize plaintiff's *Monell* claim as one based on

inadequate training/supervision that is too vague and conclusory to state a *Monell* claim against the City.

The Court finds plaintiff's complaint clearly alleges "the existence of an illegal official policy or legislative enactment": the mass-gatherings ordinance. *Id.* (*See* Doc. 7, PAGEID 134 at ¶ 14 ("[The mass-gatherings ordinance] is unconstitutional on its face. [The mass-gatherings ordinance] violates the First Amendment.")). Plaintiff also alleges that "the city policymaker's lack of constitutional training" led to the alleged constitutional violations. (Doc. 7, PAGEID 141 at ¶ 35). Failure to train claims, however, require a showing of deliberate indifference. *See Amerson v. Waterford Twp.*, 562 F. App'x 484, 490 (6th Cir. 2014) (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). And deliberate indifference "typically requires proof that the municipality was aware of prior unconstitutional actions by its employees and failed to take corrective measures." *Amerson*, 562 F. App'x at 490 (citing *Miller v. Calhoun Cnty.*, 408 F.3d 803, 815 (6th Cir. 2005)). Plaintiff alleges no such history of prior unconstitutional action. Plaintiff does not otherwise allege that deficient training would have addressed "recurring situations presenting an obvious potential for such a violation. . . ." *Plinton v. Cnty. of Summit*, 540 F.3d 459, 464 (6th Cir. 2008) (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997)).

In any event, however, municipal liability also requires plaintiff to demonstrate the underlying deprivation of a constitutional right. *Baynes*, 799 F.3d at 622 ("Without an

underlying unconstitutional act, Baynes' claim against the County under § 1983 must also fail."). Defendants argue that plaintiff has failed to plausibly allege any violation of his First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, or Fourteenth Amendment rights. Plaintiff does not rebut defendants' argument that his Fourth, Fifth, Sixth, Eighth, and Ninth Amendment claims are unsupported by any factual allegations, but he maintains that defendants violated his First and Fourteenth Amendment rights "either by voting . . . approval or enforcement" of the mass-gatherings ordinance. (Doc. 33 at PAGEID 371). In reply, defendant reiterates that plaintiff has not plausibly alleged that violations of these constitutional rights occurred.

Even a liberal construction of plaintiff's amended complaint does not reveal factual bases to support any violation of *plaintiff's* Fourth, Fifth, Sixth, Seventh, Eighth, or Ninth Amendment rights at all. Plaintiff's amended complaint instead alleges that "23 citizens" suffered these constitutional violations. (*See* Doc. 7, PAGEID 145-46 at ¶¶ 49-54). Without any allegations supporting the deprivation of *plaintiff's* rights under these constitutional amendments, any associated *Monell* claim cannot survive. *See Marcum*, 2006 U.S. Dist. LEXIS 12004, 2006 WL 543714, at *1; *Dodson*, 304 F. App'x at 438.

As to the Fourteenth Amendment, plaintiff's amended complaint fails to allege a plausible Equal Protection violation. The Equal Protection clause "bars governmental discrimination that either (1) burdens a fundamental right, (2) targets a suspect class, or (3) intentionally treats one differently from others similarly situated without any

rational basis for the difference. *Green Genie, Inc. v. City of Detroit, Mich.*, 63 F.4th 521, 527 (6th Cir. 2023) (citing *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005)). "[A] valid equal-protection claim requires showing 'that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Reform Am. v. City of Detroit, Mich.*, 37 F.4th 1138, 1152 (6th Cir. 2022) (quoting *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011)) (internal quotation marks omitted).

Plaintiff alleges that he belongs to a class of those with larger families. (*See* Doc. 7 at PAGEID 142-44). Defendants focus on the fact that "large families" are not a suspect or quasi-suspect class, such as race or gender, which would trigger heightened scrutiny of the mass-gatherings ordinance. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 441, 448 (6th Cir. 2012) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978)) (race); *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (gender); and *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006) (strict scrutiny applies to governmental discrimination that targets a suspect class). Critically, however, plaintiff does not allege that individuals having smaller families were treated differently under the mass-gathering ordinance; rather, members of both groups were prohibited from "hosting, maintaining or participating in mass gatherings" that brought together "greater than ten (10) non-household

Plaintiff does not appear to allege that the mass-gatherings ordinance was a content-based restriction on conduct.[9] "[C]ontent-neutral time, place, and manner restrictions will be upheld so long as they are 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Pleasant View Baptist Church v. Saddler*, 506 F. Supp. 3d 510, 522 (E.D. Ky. 2020) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)).

Starting with the governmental interest at issue, the City's interest in passing the mass-gatherings ordinance was unquestionably significant. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206, 141 S. Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest."). Plaintiff's amended complaint does not address whether the mass-gatherings ordinance left open alternative channels of communication, and decisions in other jurisdictions have concluded that gathering restrictions like those at issue here left open such channels. *See, e.g.*, *Amato v. Elicker*, 534 F. Supp. 3d 196, 211 (D. Conn. 2021) (granting motion to dismiss) ("Plaintiffs could engage in communication online, by telephone, or in person in groups no larger than those allowed under Executive Order 7N."); *Martin v. Warren*, 482 F. Supp. 3d 51, 54, 76 (W.D.N.Y. 2020)

9. There is no indication that City imposed the mass-gatherings ordinance "because of disagreement with the message [the gatherings prohibited thereby] convey[ed]." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (citation omitted).

(denying preliminary injunction) (alternative channels of communication were available where the challenged order restricted gatherings of more than four persons outdoors and more than nine persons indoors between certain hours); and *Geller v. de Blasio*, 613 F. Supp. 3d 742, 749 (S.D.N.Y. 2020) (denying preliminary injunction) ("The plaintiff is free to express her discontent online, through media, and by protesting in public on her own. For now, these are acceptable alternatives to public group protests.").

Plaintiff does, however, allege that the mass-gatherings ordinance was not narrowly tailored. (*See* Doc. 7, PAGEID 140 at ¶ 33; PAGEID 142 at ¶ 42). But by its very terms, the mass-gatherings ordinance "does not apply to and/or excludes religious gatherings, gatherings for the purpose of the expression of First Amendment protected speech, weddings and funerals[,]" among various other carve-outs. (Doc. 1-2 at PAGEID 32). In addition, in the preliminary-injunction posture, the court in *Saddler* considered an executive order similar to the mass-gatherings ordinance and concluded that the facts that (1) groups of under eight could still socially gather indoors, (2) groups could still gather in socially-distanced outdoor public venues, (3) online meeting remained an option, (4) non-social gatherings were not restricted, and (5) the order was temporary all demonstrated that the challenged order was narrowly tailored. 506 F. Supp. 3d at 522-23. By contrast, the same court found that "a blanket prohibition on gathering in large groups to express constitutionally protected speech" was not narrowly tailored and granted a motion for preliminary inunction. *Ramsek*, 468 F. Supp. 3d at 907, 919-21.

The mass-gatherings ordinance contained the same features as the executive order considered in *Saddler*. Given the foregoing, the Court determines as a matter of law that the mass-gatherings ordinance was narrowly tailored. *See O'Toole v. O'Connor*, No. 2:15-cv-1446, 2016 U.S. Dist. LEXIS 109923, 2016 WL 4394135, at *3 (S.D. Ohio Aug. 18, 2016) ("A state's compelling interest or a regulation's tailoring could be the subject of factual discovery, but in the context presented here, the Court finds ample support in the law to decide whether Ohio has a compelling interest and whether it has narrowly tailored the rules to forward that interest."). As such, plaintiff has not plausibly alleged a violation of his First Amendment rights, and his *Monell* claim should be dismissed.

Because the Court concludes that all of plaintiff's state and federal claims should be dismissed, the Court does not address defendants' objections to various elements of plaintiff's requested relief or whether the official-capacity claims should be dismissed as redundant.

E. Rule 12(d)

In a separate motion (Doc. 27), plaintiff argues that the Court must treat defendants' motion for judgment on the pleadings as one for summary judgment pursuant to Fed. R. Civ. P. 12(d), which states:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under

Appendix E

> Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Id. Plaintiff argues that the following arguments/defenses of defendants constitute matters outside the pleadings as contemplated by Rule 12(d):

> 1) 42 USC 1985(3) is inapplicable due to no allegations of discriminatory animus.
>
> 2) Civil Conspiracy cause of action is barred by the intracorporate conspiracy doctrine.
>
> 3) Plaintiff cannot recover for Negligent Infliction of Emotional Distress because he was not a bystander to an accident.
>
> 4) Injunctive relief claims are moot as the ordinance at issue is no longer in effect.
>
> 5) The claim for punitive damages should be dismissed because such damages cannot be recovered against the City, and there are no factual allegations establishing malice or callous indifference by the individual defendants.
>
> 6) Plaintiff cannot recover attorney fees under the state law violations.

(Doc. 27 at PAGEID 331). Plaintiff withdrew his negligent infliction of emotional distress and injunctive relief claims—mooting numbers three and four. (*See* Doc. 33 at PAGEID 375).

Appendix E

Plaintiff takes issue with defendants' arguments concerning the elements of a § 1985(3) claim, the applicability of the intracorporate conspiracy doctrine to plaintiff's civil conspiracy claim, and the availability of punitive damages, and attorney fees. As demonstrated in the foregoing Report and Recommendation, however, these issues can all be determined by application of the law to plaintiff's complaint and attachments thereto and without reference to other materials. As such, the Court need not convert the motion into a motion for summary judgment under Rule 56.

IT IS THEREFORE ORDERED THAT:

1. Plaintiff's motion to convert defendants' Rule 12(c) motion into a motion for summary judgment (Doc. 27) is **DENIED.**

IT IS THEREFORE RECOMMENDED THAT:

2. Defendants' motion (Doc. 20) be **GRANTED.**

Date: 6/7/2023

/s/ Karen L. Litkovitz
Karen L. Litkovitz
United States Magistrate Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3920

TATE DAVID PROWS,

Plaintiff-Appellant,

v.

CITY OF OXFORD, OH, *et al.*,

Defendants-Appellees.

ORDER

BEFORE: NORRIS, SUHRHEINRICH, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed: October 11, 2024

Mr. Tate David Prows
225 W. Chestnut Street
Oxford, OH 45056

Re: Case No. 23-3920, *Tate Prows v. City of Oxford, OH, et al*
Originating Case No.: 1:22-cv-00693

Dear Mr. Prows,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077