EXHIBIT A

***Novak* v. *City of Parma*, 33 F.4th 296 (6th Cir. 2022)**

Opinion of the United States Court of Appeals
for the Sixth Circuit

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 22a0090p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTHONY NOVAK,

Plaintiff-Appellant,

v.

CITY OF PARMA, OHIO; KEVIN RILEY and THOMAS CONNOR, individually and in their official capacities as employees of the City of Parma, Ohio,

Defendants-Appellees.

No. 21-3290

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:17-cv-02148—Dan A. Polster, District Judge.

Argued: April 8, 2022

Decided and Filed: April 29, 2022

Before: SUTTON, Chief Judge; THAPAR and READLER, Circuit Judges.

COUNSEL

ARGUED: Donald Screen, THE CHANDRA LAW FIRM LLC, Cleveland, Ohio, for Appellant. D. John Travis, GALLAGHER SHARP, LLP, Cleveland, Ohio, for Appellees. **ON BRIEF:** Donald Screen, Subodh Chandra, THE CHANDRA LAW FIRM LLC, Cleveland, Ohio, for Appellant. D. John Travis, Richard C.O. Rezie, Zoran Balac, GALLAGHER SHARP, LLP, Cleveland, Ohio, for Appellees. David J. Carey, AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, Columbus, Ohio, Freda J. Levenson, AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, Cleveland, Ohio, Ronald London, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, Washington, D.C., Larry H. James, CRABBE, BROWN & JAMES, LLP, Columbus, Ohio, Alejandro V. Cortes, R. Todd Hunt, WALTER | HAVERFIELD LLP, Cleveland, Ohio, Philip K. Hartmann, FROST BROWN TODD LLC, Columbus, Ohio for Amici Curiae.

OPINION

THAPAR, Circuit Judge. Anthony Novak thought it would be funny to create a Facebook page that looked like the Parma Police Department's. The Department was not amused. In fact, officers arrested Novak and prosecutors charged him with a state crime. Novak was acquitted at trial, and he now argues his constitutional rights were violated in the ordeal. But because the officers reasonably believed they were acting within the law, Novak can't recover.

I.

According to Anthony Novak, he created "The City of Parma Police Department" Facebook account—a knockoff of the Department's real page—to exercise his "fundamental American right" of "[m]ocking our government officials." R. 6, Pg. ID 1238. And mock them he did. In less than a day, he published half-a-dozen posts "advertising" the Department's efforts, including free abortions in a police van and a "Pedophile Reform event" featuring a "No means no" learning station. The page spread around Facebook. Some readers praised its comedy. Others criticized the page or called out that it was fake. (He deleted their comments.) And still others (nearly a dozen, in total) felt it necessary to call the police station. A few asked if the page was real. The rest expressed confusion or alerted the police to the fake page.

Once the Department heard about the page, it sprang into action. First, officers verified that the official page hadn't been hacked. Then, they posted a notice on the Department's actual page, confirming that it was the official account and warning that the fake page was "being investigated." R. 123-9, Pg. ID 24596. Novak then copied that post onto his knockoff page—allegedly "[t]o deepen his satire." R. 6, Pg. ID 1259.

Then-Lieutenant Kevin Riley tasked Detective Thomas Connor with figuring out who ran the knockoff page. Connor sent a letter to Facebook, asking the company to preserve all records related to the account and take down the page. Riley issued a press release and appeared on the

nightly news, announcing an investigation and warning the public about the fake page. Novak—worried he'd get in trouble for the page—took it down.

Yet the officers continued their investigation. Connor eventually got a search warrant for Facebook, and he discovered that Novak was the page's author. Unsure what sort of case they had, Riley and Connor sought advice from Parma's Law Director, Timothy Dobeck. Dobeck concluded they had probable cause and could seek two more warrants: an arrest warrant from Magistrate Judge Edward Fink and a search warrant from Judge Deanna O'Donnell. The grounds? An Ohio law that makes it illegal to use a computer to disrupt or impair police functions. Ohio Rev. Code § 2909.04(B). Both judges found there was probable cause and issued the warrants.

With warrants in hand, the officers arrested Novak, searched his apartment, and seized his phone and laptop. He spent four days in jail before he made bond. Then prosecutors presented the case to a grand jury, which indicted him for disrupting police functions. But a jury later acquitted him. And after his acquittal, Novak brought dozens of claims against Riley, Connor, and the City of Parma. In a prior appeal, we granted qualified immunity to the officers on some claims. *Novak v. City of Parma*, 932 F.3d 421 (6th Cir. 2019). Now, Novak appeals the district court's grant of summary judgment to the defendants on the remaining claims.

II.

We review the district court's grant of summary judgment de novo. *Yates v. City of Cleveland*, 941 F.2d 444, 446 (6th Cir. 1991). Since Novak brings numerous interrelated claims, we review them in four groups. We begin with his claims against the officers under 42 U.S.C. § 1983. Second, we tackle his municipal-liability claims against the City of Parma. Third, we consider Novak's state-law claims. And last, two miscellaneous claims.

A. Section 1983 Officer-Liability Claims

Novak brings several section 1983 claims against Lieutenant Riley and Detective Connor. He alleges First Amendment retaliation, Fourth Amendment violations, and First Amendment prior restraint. We address each in turn.

1. Retaliation

Novak's first set of claims alleges that the police officers retaliated against him in violation of the First Amendment. For their part, the officers contend they are entitled to qualified immunity.

Qualified immunity protects state officers against section 1983 claims unless (1) "they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time" of the offense. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (cleaned up). And the burden lies with the plaintiff to show each prong. *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam); *Cunningham v. Shelby County*, 994 F.3d 761, 764–65 (6th Cir. 2021).

To meet his burden, Novak argues that Riley and Connor violated his clearly established right to be free from retaliatory arrest. He suggests the arrest was retaliatory because the officers based it on his Facebook page—which he argues is parody protected under the First Amendment. But there's no recognized right to be free from a retaliatory arrest that is supported by probable cause. *See Reichle v. Howards*, 566 U.S. 658, 663 (2012). So to prevail on his claim, Novak must show it was clearly established that the officers lacked probable cause to arrest him. Because he hasn't done so, the officers are entitled to qualified immunity.

Start with the basics. For probable cause to exist, "the facts and circumstances known to the officer" must be sufficient to lead a "prudent man" to believe an offense has been committed. *Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir. 2007) (citation omitted). So here, we look to whether a reasonable officer would believe each element of Ohio's disruption statute was met. Specifically, that Novak (1) used the computer or Internet (2) to "disrupt" or "interrupt" police operations and (3) did so knowingly. *See* Ohio Rev. Code § 2909.04(B).

No one contests that Novak used a computer and the Internet to create his knockoff page. And the officers believed that Novak's page had "disrupted" their operations. They knew the call center had received multiple calls about the page, and the statute imposes no lower bound on how much disruption is required. So the officers could reasonably believe that the calls constituted a disruption. As to the knowledge element, the officers were permitted to rely on

inferences. *See United States v. Tagg*, 886 F.3d 579, 587 (6th Cir. 2018). Here, the officers inferred that Novak knew he was disrupting operations from his decisions to repost the Department's warning post on his own page and to delete comments that explained the page was fake.

But there's a catch: "[P]rotected speech cannot serve as the basis" for probable cause. *Leonard v. Robinson*, 477 F.3d 347, 358 (6th Cir. 2007) (citing *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997)). While protected speech can be evidence that a speaker committed a separate crime, the First Amendment bars its use as the sole basis for probable cause. *See Reichle*, 566 U.S. at 668; *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1722, 1724 (2019); *Novak*, 932 F.3d at 431–32.

Take an example: Protest letters about the draft can support probable cause that the protester didn't intend to register, in violation of draft laws. *Wayte v. United States*, 470 U.S. 598, 612–13 (1985). There, the protected speech—the protest letters—is only *evidence* that the protester is engaging in unprotected conduct that itself constitutes a crime (refusing to register for the draft). The protest letters are not themselves the criminal conduct.

Novak argues that the officers' probable-cause determination is based solely on protected speech. Appellant's Br. 45; *see Novak*, 932 F.3d at 431 ("The sole basis for probable cause to arrest Novak was his speech."). Whether Novak's satirical posts were protected parody is a question of fact. *Novak*, 932 F.3d at 428. But Novak didn't just post fake event advertisements mocking the police department. He also modeled his page after the Department's, using the same profile picture. He deleted comments that let on his page wasn't the official one. And when the Department tried to clarify that Novak's page was imitating its own, he copied the official page's clarification post word for word.[1]

[1]We recognize that our prior opinion in this case suggested that Novak's speech was the only source of probable cause for the officers. *See Novak*, 932 F.3d at 431. But we now review the question at summary judgment, where our review is no longer limited to Novak's complaint. And though Novak's Facebook activity and its consequences form the sole basis for probable cause (since he didn't do anything else, like hack into the Department's page), it's possible that not all of his Facebook activity was protected speech. While it's reasonable for Novak to argue that deleting comments and copying the Department's clarification post were speech—specifically, efforts to "deepen his satire," R. 6, Pg. ID 1259—it was similarly reasonable for the officers to view those activities as unprotected conduct.

Whether these actions—deleting comments that made clear the page was fake and reposting the Department's warning message—are protected speech is a difficult question. After all, impersonating the police is not protected speech. *See United States v. Alvarez*, 567 U.S. 709, 721 (2012); *see also id.* at 735 (Breyer, J., concurring); *id.* at 748 (Alito, J., dissenting); *United States v. Chappell*, 691 F.3d 388, 393–94 (4th Cir. 2012). And for good reason—one can easily imagine the mayhem that a scam IRS or State Department website could cause.[2]

But while probable cause here may be difficult, qualified immunity is not. That's because qualified immunity protects officers who "reasonably pick[] one side or the other" in a debate where judges could "reasonably disagree." *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 443 (6th Cir. 2016). That's just what the officers did—they reasonably found probable cause in an unsettled case judges can debate. Indeed, Novak has not identified a case that clearly establishes deleting comments or copying the official warning is protected speech. So even with *Leonard*'s protected-speech rule on the books, the officers could reasonably believe that some of Novak's Facebook activity was not parody, not protected, and fair grounds for probable cause.

What's more, the officers had good reason to believe they had probable cause. Both the City's Law Director and the judges who issued the warrants agreed with them. Reassurance from no fewer than three other officials further supports finding that the officers "reasonably," even if "mistakenly," concluded that probable cause existed. *Wesby*, 138 S. Ct. at 591 (cleaned up). That's enough to shield Riley and Connor from liability.

Thus, the officers are entitled to qualified immunity on Novak's retaliation claims.

2. Fourth Amendment

The same analysis guides our consideration of Novak's Fourth Amendment claims.

Search, Seizure, and Arrest. Novak argues that the officers lacked probable cause for his arrest, the search of his apartment, and the seizure of his phone and laptop. Yet our precedent

[2]Indeed, even if a savvy scammer interspersed his fake website with parody, the criminal law would prevail. Someone purporting to represent the State Department could end up on the hook for impersonating a government agency, if the fake site was a misleading copycat of the real one. And a hacker who replaced the IRS homepage with the tagline "No taxes due this year" could still be convicted based on his conduct—hacking into a government website.

offers a "complete defense" against these claims when officers relied on a magistrate judge's warrant. *Sykes v. Anderson*, 625 F.3d 294, 305 (6th Cir. 2010) (arrest); *see Tlapanco v. Elges*, 969 F.3d 638, 649 (6th Cir. 2020) (search and seizure). And here, the officers obtained warrants from Magistrate Judge Fink and Judge O'Donnell before committing these alleged violations.

But this defense has two exceptions. The first covers cases when an officer provides false information to obtain a warrant. *Sykes*, 625 F.3d at 305. To establish this defense, Novak must show that (1) the officers knowingly or recklessly made false statements or significant omissions; and (2) those "statements or omissions were material, or necessary, to the finding of probable cause." *Id.* (cleaned up).

Novak says that in seeking an arrest warrant from Magistrate Judge Fink, Connor offered false information (that people called thinking the page was real) and left out important context (that Novak's only act was speech, and that the page was a parody or joke). He argues that this negates the officers' warrant defense.[3]

Yet Novak doesn't show that Connor actually provided any false information or misrepresented the nature of the calls. He complains that Connor was inconsistent: Connor told Magistrate Judge Fink that "[p]eople believed [Novak's page] was real," yet later admitted in his deposition that none of the callers in fact thought that. R. 107-1, Pg. ID 19128–32. So according to Novak, Connor misled the magistrate judge. But the call transcripts reveal that some of the callers thought the page might be real. Perhaps Connor's statement could be considered an exaggeration, but not an outright falsehood.

As to Connor's omissions about the nature of Novak's page, it's true that Connor called the page a "fake" Facebook account rather than a "joke" or "parody" account. And he likewise did not specify that the "posts" he complained of in his warrant affidavits were speech.

But neither of these claimed falsities was material to Magistrate Judge Fink's probable-cause determination. Indeed, Magistrate Judge Fink remembered that people called because they were confused, not because they thought the page was real. And he noted that it was the *fact* the

[3]Because Judge O'Donnell relied on Magistrate Judge Fink's prior probable-cause determination to issue the search warrant, Novak argues the same false statements and omissions tainted this second warrant as well.

calls occurred at all—rather than their content—that grounded his disruption analysis. Further, Connor's portrayals of Novak's Facebook page as "fake" rather than "parody" and "posts" rather than "speech" were just that—portrayals. It wasn't Connor's job to supply the law, it was his responsibility to supply the facts. And as Magistrate Judge Fink explained, he would have made the same decision even if he had read the entire Facebook page himself. So Novak can't show that these statements were material to the magistrate judge's probable-cause determination. This exception to the warrant defense does not apply.

Nor does the second exception. That one applies if "the warrant is so lacking in indicia of probable cause, that official belief in the existence of probable cause is unreasonable." *Yancey v. Carroll County*, 876 F.2d 1238, 1243 (6th Cir. 1989). But as discussed above, the question of probable cause is a close one. So even if the warrants were not supported by probable cause, reliance on them was far from unreasonable. Thus, the officers are entitled to a "complete defense" on these claims. *Sykes*, 625 F.3d at 305.

Malicious Prosecution. Novak also alleges malicious prosecution under section 1983. To prevail, Novak must first show that the officers participated in or influenced the decision to criminally prosecute him. *Id.* at 308. And because we construe participation in light of traditional "tort causation principles," the officers must have done more than passively cooperate. *Id.* at 308 n.5. Instead, Novak must show that the officers aided in the decision to prosecute. *Id.*

They did not. A prosecutor's independent charging decision typically breaks the causal chain for malicious-prosecution purposes. *Id.* at 316. The only exception is when an officer could "reasonably foresee that his misconduct"—read, false statements—would result in an independent decision to prosecute the plaintiff. *Id.* (citation omitted). Here, the prosecutor independently decided to charge Novak. He reviewed the content of Novak's Facebook page along with the police report, heard from Connor that the police had received a handful of calls about the page, and determined that the page was not protected speech. And Novak does not argue on appeal that the police report included any false statements. Nor does he contend that the prosecutor relied on false statements from Connor in deciding to prosecute him. So there

was no misconduct at play here to maintain the causal chain through the prosecutor's independent decision to bring a case against Novak.[4]

A plaintiff can also show that an officer "participated" by alleging that an officer deliberately or recklessly gave false testimony at trial. *Johnson v. Moseley*, 790 F.3d 649, 655 (6th Cir. 2015). Novak says that happened here—he alleges that Connor lied to the jurors by telling them Novak's Facebook page interrupted his work on another case. Specifically, he told them he had to postpone a DNA swab and missed a pretrial conference.

But Novak does not support this allegation. Instead, he merely points out that the DNA swab's and pretrial conference's original dates aren't marked in Connor's log, and asserts that they were scheduled for a different day—thus implying that Connor lied that he had other obligations the day he worked on Novak's case. Not quite a smoking gun. And more importantly, not enough to support anything beyond "negligence or innocent mistake," even assuming Connor got the dates wrong at all. *Id.* (quoting *Robertson v. Lucas*, 753 F.3d 606, 617 n.7 (6th Cir. 2014)). The district court properly granted summary judgment for the officers on Novak's malicious-prosecution claim.

3. Prior Restraint

Novak next argues that the officers violated the First Amendment by imposing prior restraints on his speech. A prior restraint is an administrative or judicial order that forbids certain speech *ahead of* when that speech is planned to take place. *Alexander v. United States*, 509 U.S. 544, 550 (1993). It may also include threats of prosecution or an "order to a private party to take a specific action" when an officer acts with government authority. *Novak*, 932 F.3d at 433. Because the right to speak without censorship lies at the core of the First Amendment, prior restraints face a "heavy presumption against" validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

[4]Malicious-prosecution claims also require three other elements, one of which is the absence of probable cause. *Thompson v. Clark*, 142 S. Ct. 1332, 1337–38 (2022); *Sykes*, 625 F.3d at 308–09. Because we resolve Novak's claim on the first element, we need not discuss the rest here.

Novak claims that three actions constitute unlawful prior restraints: (1) Riley's television interview announcing the investigation of Novak's page; (2) the seizure of his phone and laptop; and (3) Connor's letter to Facebook. But none of these acts meets the definition of a prior restraint.[5]

First, Riley's interview. Novak claims that Lieutenant Riley "publicly threatened to criminally prosecute" the Facebook page's author. Appellant's Br. 47. And he's right that "the threat of invoking legal sanctions" may be an unlawful prior restraint. *See Bantam Books*, 372 U.S. at 67. But Novak provides no facts to support his claim. While he references a television interview and a press release, he does not point to any record evidence of a threat. By contrast, the officers point out that while Riley did announce a criminal investigation into the page, the interview's focus was to "warn the public" that the page was fake and "to stop any continued interruption at the communication center." R. 95-1, Pg. ID 5508. Indeed, even Novak admitted in his deposition that Riley didn't threaten criminal prosecution in his interview. So Novak has presented no dispute of fact as to whether there was even a threat.

Second, the seizure. On this front, Novak argues that the officers "effected a classic prior restraint" by "block[ing] virtually all channels of communication that would otherwise have been available to Novak." Appellant's Br. 48. In support of this argument, he cites the Supreme Court's decision in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). In *Gilleo*, the Court expressed skepticism of laws that "foreclose an entire medium of expression" like picketing, distributing pamphlets, or displaying residential signs. *Id.* at 55–56. But the opinion did not classify such restrictions as prior restraints. And more importantly, it's irrelevant here. Seizing Novak's phone and laptop did not block all channels of communication. Indeed, the seizure didn't even block him from using Facebook. Novak remained free to borrow friends' electronics or to use a library computer if he wished to continue his social-media antics. So taking his phone and laptop imposed no prior restraint on Novak's speech.

[5]Novak argues that the goal of these actions was as much to prevent future speech as to punish past speech. That may be true, but the problem for him is that the officers' actions don't amount to a prior restraint. So even if they were entirely aimed at censoring the content of future posts on the page, his claim can't succeed.

Last, Detective Connor's letter to Facebook. In this letter—sent soon after the Parma Police Department discovered Novak's page—Connor asked Facebook to retain records related to the page in anticipation of a search warrant. Connor then wrote: "It is further requested that this account be taken down or suspended immediately." R. 98-5, Pg. ID 6413. That's all. No demand; no threat. Indeed, Connor himself testified that he didn't have "any expectation" whether Facebook would comply with his request. R. 107-1, Pg. ID 19171. So the letter was a far cry from an "order" under our prior-restraint doctrine; it was a mere request. *See Novak*, 932 F.3d at 433. What's more, by the time Facebook got around to considering the request, Novak had deleted the page himself. The letter thus failed to have any effect at all on Novak's ability to speak, since he removed the page of his own accord.

So Novak's prior-restraint claim against Lieutenant Riley and Detective Connor fails as well.

B. Municipal Liability

But Novak didn't just sue the officers. He also sued the City of Parma under a theory of municipal liability. To show that Parma is liable under section 1983, Novak can't just show he suffered a constitutional injury inflicted solely by a City employee. Instead, he must show both that he suffered an injury *and* that the alleged violation was caused by the City's policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). There are four avenues to make such a claim: official policy or legislation; action authorized by a designated decisionmaker; failure to train or supervise employees; or a custom of acquiescence in rights violations. *Jackson v. City of Cleveland*, 925 F.3d 793, 828 (6th Cir. 2019). Novak pursues all but the official-policy path. But even assuming Novak suffered a constitutional violation (no small assumption, as discussed above), none of his arguments is persuasive.

Authorized Action. Municipal liability attaches to actions taken by a city's authorized policymakers only when those actions set official municipal policy. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 477, 481–83 (1986). And as with any municipal-liability claim, that policy must have caused the plaintiff's alleged injury. *Monell*, 436 U.S. at 691.

Novak argues that Parma's Law Director, Timothy Dobeck, set the City's official policy when he determined that Riley and Connor had probable cause to continue investigating Novak. And he contends that because Dobeck had the final say over the City's legal opinions, his advice to the officers set Parma's policy on the matter. *See Bible Believers v. Wayne County*, 805 F.3d 228, 260 (6th Cir. 2015) (en banc). But by Novak's lights, every city prosecutor would "set policy" for the municipality several times a day, every time he assessed probable cause. And that cannot be the case.

This argument also overstates Dobeck's role in both municipal decisionmaking and Novak's alleged violations. The Supreme Court in *Pembaur* was careful to distinguish mere "advice" from "orders." 475 U.S. at 484–85. And here, neither Dobeck nor the officers considered his probable-cause determination an order to keep investigating Novak. *Cf. id.* at 485 (declining to "disingenuously label[] the Prosecutor's clear command mere 'legal advice'"). Yet even if Dobeck had made the final municipal determination that the officers had probable cause to arrest Novak, the judges' independent determinations eliminate the causal connection. *Id.* at 484 (noting that a prosecutor's command that officers forcibly enter "directly caused the violation of petitioner's Fourth Amendment rights"). For both of these reasons, Novak's authorized-action theory fails.[6]

Failure to Train. A municipality may be liable for failing to train its police officers only if (1) the officers' training "is inadequate to the tasks that the officers must perform"; (2) this inadequacy stems from the municipality's "deliberate indifference" to the constitutional rights at issue; and (3) the inadequacy "actually caused," or "closely relate[s] to," the claimed violation. *Roell v. Hamilton County*, 870 F.3d 471, 487 (6th Cir. 2017) (cleaned up). Here, Novak claims that Parma should have trained its officers "that pure speech is not a crime" save for a few exceptions. Appellant's Br. 59.

Novak's claim can survive summary judgment if he points to evidence that Parma "fail[ed] to provide *any* training on key duties with direct impact" on free-speech issues.

[6]Below, Novak also argued that the officers were considered policymakers under this theory of municipal liability. But as he makes no such argument on appeal, he has abandoned it. *See Boyd v. Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991).

Gregory v. City of Louisville, 444 F.3d 725, 754 (6th Cir. 2006). He says that's the case because Parma officers' only First Amendment training covered protests. There was no discussion of the complexities of parody or other forms of protected speech. What Novak fails to appreciate is that the intricacies of parody are not part of the officers' "key duties" the way protest management is. So there was no duty to further train them here.

What's more, Novak cannot show that deficiencies in training caused the alleged constitutional violations. Indeed, the officers were trained to contact the Law Department (namely, Dobeck) when difficult questions arose. That's just what they did: Riley and Connor looked to Dobeck for advice before pursuing a case. Once he assured them of probable cause, they obtained independent warrants for Novak's arrest and the search of his apartment from two different judges. As the district court pointed out, it strains belief to think an introductory primer on the First Amendment would have led the officers to a different conclusion than three trained lawyers. So Novak can't show that any failure to train actually caused or closely relates to his objections.

Custom. Finally, Novak contends that Parma had an established custom and pattern of "indifference to protected speech in criminal investigations." Appellant's Br. 57. And he runs through a list of cases where Parma had to reverse course over protected-speech claims. But he does not explain how this list of cases could form a "clear and persistent pattern" so strong that it resembles official policy condoned by the City. *Thomas v. City of Chattanooga*, 398 F.3d 426, 432 (6th Cir. 2005). Perhaps unsurprising, since it's a "heavy burden" to show municipal liability based on custom. *Id.* at 433. Novak doesn't even suggest (as he must) that this pattern resulted from a deliberate choice "from among various alternatives" that amounts to an unwritten "legal institution." *Doe v. Claiborne County ex rel. Claiborne Cnty. Bd. of Educ.*, 103 F.3d 495, 507–08 (6th Cir. 1996) (cleaned up). Nor does he explain how that *policy*—despite independent warrants from Magistrate Judge Fink and Judge O'Donnell—caused a constitutional violation. *See Thomas*, 398 F.3d at 429 (quoting *Doe*, 103 F.3d at 508). He simply argues that "Parma should have known better." Appellant's Br. 58. This is not enough to support a finding of municipal liability, so we affirm.

C. State-Law Claims

Novak brings a jumble of state-law claims against the defendants as well. But Ohio law provides the officers statutory immunity so long as they didn't act "with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b). To find this exception applicable, Ohio courts have looked for "intent to harm," "a complete lack of care," or "an intentional deviation from a definite rule of conduct." *Henderson v. City of Euclid*, No. 101149, 2015 WL 114601, at *11 (Ohio Ct. App. Jan. 8, 2015). And here, the burden lies with Novak to identify specific facts that undermine the officers' immunity. *See Szefcyk v. Kucirek*, No. 15CA010742, 2016 WL 228601, at *3 (Ohio Ct. App. Jan. 19, 2016).

Novak has not done so. He argues the officers are liable since they acted with "a malicious state of mind." Appellant's Br. 62. Ohio law defines that concept as a "willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through unlawful or unjustified conduct." *Schoenfield v. Navarre*, 843 N.E.2d 234, 239 (Ohio Ct. App. 2005) (cleaned up). As we have discussed at length above, the officers' conduct may have been lawful and justified by probable cause. But even if it wasn't, the officers' mistaken understanding of First Amendment law is far from intentional harm.

Novak identifies several pieces of evidence that he argues show the officers acted with malice. He points out that Connor said he "didn't care about Novak's First Amendment rights" and argues that Connor lied to Magistrate Judge Fink, to the grand jury, and at trial. R. 123, Pg. ID 24409. We examine each of these in turn.

In context, Connor's deposition testimony specified that he wasn't focused on First Amendment concerns because it "wasn't the focus of [his] investigation." R. 107-1, Pg. ID 19148. But failure to spot the issue doesn't offer evidence for a jury to conclude that Connor acted with a "desire to harm" Novak, as required to show malicious intent. *Schoenfield*, 843 N.E.2d at 239 (citation omitted). At most, it shows negligence.

Novak next says Connor misled Magistrate Judge Fink to obtain a warrant for his arrest. The purported lies? That callers believed the page was real, and that Connor didn't specify the posts were speech and the page was a parody. But as discussed above, none of these statements

misrepresented the facts in this case. The call transcripts support Connor's assertion that some people thought the page might be real. And describing the facts as "posts" on a "fake" page rather than "speech" on a "parody" page was merely his portrayal. It cannot support a finding of malice.

According to Novak, Connor's grand-jury testimony also evinces his malicious intent. Connor testified before the grand jury that Lieutenant Riley told him about Novak's Facebook page and said that "now the police department including the 911 call center and city hall were getting inundated with phone calls" about the account. R. 86-1, Pg. ID 4431. Connor also testified that he had listened to the calls to "the 911 dispatch center," and he found that "people honest to God believed" that the Department had published the posts and that "this was real information." *Id.* at 4432.

Novak takes issue with these statements because, according to him, the call center was hardly "inundated" by the few calls it received about the page. And he says it was misleading to say the calls came to the 911 dispatch center when no one actually called 911. But that cherry-picks Connor's testimony. Immediately after saying that Riley told him the call center was "inundated," Connor specified that there were just 11 calls. *Id.* at 4431–32. And though it was the non-emergency dispatch line, not 911, that received phone calls about the page, Connor simply noted that the calls had come in to the "911 dispatch center"—he didn't say people had called 911. This was entirely accurate, since both 911 calls and non-emergency calls go to the same dispatch center.

Novak's last objection is about the nature of the calls. He argues that Connor misrepresented their content by saying that callers "honest to God believed" the page was real. *Id.* at 4432. But this is closer to mischaracterization than misrepresentation. The transcripts show that most callers were confused, wondering whether the real page had been hacked and asking the dispatcher to confirm the Department hadn't posted the things they'd seen. Certainly, it was a stretch for Connor to say people thought the *content* of Novak's posts was real. But without more, these inconsistencies can't support a jury finding that Connor intended to harm Novak.

Connor's trial testimony is no more help. As discussed above, Novak has not shown that Connor was anything but truthful, or at most negligent, in discussing his scheduling conflicts on another case (the DNA swab and pretrial conference). So this final piece of evidence does little for Novak in his quest to show malice.

Thus, Novak's state-law claims likewise fail.

D. Miscellaneous Claims

Privacy Protection Act. Throughout this litigation, Novak has maintained a claim under the Privacy Protection Act, which bars certain searches and seizures of work-product materials. *See* 42 U.S.C. § 2000aa(a). But on this appeal, Novak fails to develop any argument suggesting we should reverse the district court's grant of summary judgment to the defendants. So he has forfeited this claim. *See Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 621 (6th Cir. 2013) ("Issues adverted to in a perfunctory manner, without some effort to develop an argument, are deemed forfeited.").

Conspiracy. Novak also began his suit alleging Riley, Connor, and an unnamed individual conspired to violate his rights. In our prior appeal, we noted that Novak would need to provide more facts to maintain his conspiracy argument. *Novak*, 932 F.3d at 436–37. As the district court found below, Novak failed to do so. And he makes no mention of the claim on appeal. So we affirm the district court. *See Boyd v. Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991).

* * *

Little did Anthony Novak know when he launched "The City of Parma Police Department" page that he'd wind up a defendant in court. So too for the officers who arrested him. At the end of the day, neither got all they wanted—Novak won't be punished for his alleged crime, and the defendants are entitled to summary judgment on Novak's civil claims.

But granting the officers qualified immunity does not mean their actions were justified or should be condoned. Indeed, it is cases like these when government officials have a particular obligation to act *reasonably*. Was Novak's Facebook page worth a criminal prosecution, two

appeals, and countless hours of Novak's and the government's time? We have our doubts. And from the beginning, any one of the officials involved could have allowed "the entire story to turn out differently," simply by saying "No." Bari Weiss, *Some Thoughts About Courage*, Common Sense (Oct. 19, 2021). Unfortunately, no one did.

Because the law compels it, we affirm.

EXHIBIT B

***Novak* v. *City of Parma*, 932 F.3d 421 (6th Cir. 2019)**

Opinion of the United States Court of Appeals

for the Sixth Circuit

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0170p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTHONY NOVAK,

Plaintiff-Appellee,

v.

No. 18-3373

CITY OF PARMA; KEVIN RILEY, Individually and in his Official Capacity as an Employee of the City of Parma, Ohio; THOMAS CONNOR, Individually and as an Employee of the City of Parma, Ohio,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:17-cv-02148—Dan A. Polster, District Judge.

Argued: June 20, 2019

Decided and Filed: July 29, 2019

Before: MERRITT, THAPAR, and READLER, Circuit Judges.

COUNSEL

ARGUED: Steven D. Strang, GALLAGHER SHARP LLP, Columbus, Ohio, for Appellants. Subodh Chandra, THE CHANDRA LAW FIRM LLC, Cleveland, Ohio, for Appellee. **ON BRIEF:** Steven D. Strang, Monica A. Sansalone, GALLAGHER SHARP LLP, Columbus, Ohio, for Appellants. Subodh Chandra, Patrick S. Kabat, THE CHANDRA LAW FIRM LLC, Cleveland, Ohio, for Appellee.

OPINION

THAPAR, Circuit Judge. Apple pie, baseball, and the right to ridicule the government. Each holds an important place in American history and tradition. So thought Anthony Novak when he created a Facebook page to mock the Parma Police Department. He styled his page to look like the department's official Facebook page. But the similarities ended there. Novak shared posts like an advertisement for a "Pedophile Reform event," at which pedophiles would receive honorary police commissions.

Novak's page delighted, disgusted, and confused. Not everyone understood it. But when it comes to parody, the law requires a reasonable reader standard, not a "most gullible person on Facebook" standard. The First Amendment does not depend on whether everyone is in on the joke. Neither is it bothered by public disapproval, whether tepid or red-hot.

Novak's Facebook page was either a protected parody in the great American tradition of ridiculing the government or a disruptive violation of state law. Maybe both. At this stage, we decide only whether the officers are entitled to qualified immunity. For some of Novak's claims they are, but for others they are not.

I.

This case comes to us after a motion to dismiss, so we take the facts as Novak alleges them and draw reasonable inferences in his favor. *Courtright v. City of Battle Creek*, 839 F.3d 513, 520 (6th Cir. 2016). Novak created a "farcical Facebook account" designed to look like the police department's official page. R. 6, Pg. ID 1239. The page was up for twelve hours and published several posts. Among the posts was a recruitment advertisement that "strongly encourag[ed] minorities to not apply." *Id.* at 1250. Novak also posted an apology from the department for "neglecting to inform the public about an armed white male who robbed a Subway sandwich shop," while promising to bring to justice an "African American woman" who was loitering outside the Subway during the robbery. *Id.*

The page was polarizing. Some of its about 100 followers thought it was "the funniest thing ever." *Id.* at 1253. Others were angry. And yet others were confused, wondering whether this was the actual Parma police official Facebook page. A handful of people were so angry or confused that they called the police station. In all, the station received twelve minutes of calls. Others continued to enjoy the page, which soon "became a platform for a wide range of citizens to air their grievances about the Department." *Id.* at 1259. The officers later testified that they worried the page would confuse the public and that the "likely result is that people would call." *Id.* at 1271.

One of the page's audiences—the Parma Police Department—did not find the page funny. Once the officers got wind of Novak's page, they "all stopped what [they] were doing to take a look at it, and a couple of [them] tried to figure out who did it." *Id.* at 1253. One officer said they "just wanted it down." *Id.* at 1254. They took several steps to make that happen.

A Facebook battle ensued. First, the department posted a warning on its official Facebook page. The warning alerted the public to the fake page and assured them that the matter was "currently being investigated." *Id.* at 1255–56. Then Novak reposted the exact same warning on his own page. He claims he did this to "deepen his satire." *Id.* at 1259. For the same reason, Novak deleted "pedantic comments" on his page explaining that the page was fake, as these "clumsy explication[s]" only "belabored the joke." *Id.* at 1253.

After that, the conflict moved offline and into the real world. Officer Kevin Riley assigned Officer Thomas Connor to the case and tasked him with finding out who ran the page. So Connor sent a letter to Facebook requesting that the page be shut down immediately. He also sent an email to a different Facebook representative asking that the page be taken down. The police also informed local news outlets of the investigation. The case of the fake police page even appeared on the nightly news. At that point, Novak decided to delete his creation. He had heard of the department's investigation and was worried about the consequences.

Though Novak was done posting, the police department was not done investigating. They still wanted to find the person behind the laptop. So Connor subpoenaed records from Facebook. Riley directed Connor to go further and obtain a search warrant for Facebook. Novak

alleges that Connor made several "material misrepresentations and omissions" to obtain that warrant. *Id.* at 1260. The warrant still issued, and Facebook disclosed that Novak was the one behind the fake account.

Once the department realized that Novak was the cyber culprit, Riley directed Connor to obtain two more warrants—one to search Novak's apartment and one to arrest him. The warrants said that Novak unlawfully impaired the department's functions, in violation of Ohio Rev. Code § 2909.04(B). Novak responds that, other than twelve minutes of phone calls to the department, the police department suffered no disruption to its functions. And Novak claims the officers were unaware of the twelve minutes of call time when they obtained the warrants. But, once again, the warrants still issued, and the department arrested Novak. The case went to trial, and Novak was acquitted.

After he was acquitted of the criminal charge, Novak sued the City of Parma and Officers Riley and Connor. He alleged (in over thirty claims) that the city and its officers violated his constitutional and statutory rights under federal and Ohio law. The defendants moved to dismiss his thirty-plus claims. The district court granted the motion in part and denied it in part, with twenty-six claims left standing. On appeal, the police claim that qualified immunity shields them from Novak's lawsuit. We review de novo whether the officers are entitled to qualified immunity and issues "inextricably intertwined" with that question. *Courtright*, 839 F.3d at 517–18, 523.

II.

Qualified immunity protects government officials like the Parma police officers from being liable for money damages if their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine balances "the need to hold public officials accountable when they exercise power irresponsibly" with "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Officers Riley and Connor are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). For a right to be "clearly established," the "constitutionality of the officer's conduct" must have been "beyond debate" in the "particular circumstances before him." *Id.* at 589–90 (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011)). The Supreme Court has cautioned that "clearly established" must not be defined "at a high level of generality." *Id.* at 590. Instead, we must be sensitive to the fact that police officers work in the real world, which is often messier than law books would have us believe. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) ("Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in circumstances that are tense, uncertain, and rapidly evolving." (internal quotation marks and citation omitted)). So when it comes to holding police officers liable for heat-of-the-moment decisions they make in the line of duty, abstract legal principles will not do the trick.

On both the facts and the law, specificity is our guiding light. But we must also be mindful of the stage of the proceedings. This case reaches us early, after a motion to dismiss. And while we always hope to resolve qualified immunity claims at the earliest possible point in the litigation, we cannot resolve such claims when we need more factual development to do so. *Phillips v. Roane Cty.*, 534 F.3d 531, 538 (6th Cir. 2008) (noting that an appeal of a denial of qualified immunity must be "premised not on a factual dispute, but rather on 'neat abstract issues of law'" (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995))). We consider each of Novak's claims under these standards.

III. Retaliation

Novak argues that the officers retaliated against him because of his protected speech. The retaliation claim turns on two issues: (1) whether Novak's Facebook page was a parody and (2) whether the Parma police had probable cause to arrest Novak for his page. Because resolving both issues involves questions of fact, the claim survives. *Greene v. Barber*, 310 F.3d 889, 898 (6th Cir. 2002) ("Because of the fact-intensive nature of the requisite inquiry, . . . we would be

usurping the role of the jury were we to attempt to [resolve it] . . . at this stage of the proceeding.").

To allege a retaliation claim, Novak must show that: (1) he "engaged in a constitutionally protected activity," (2) the officers' adverse actions caused Novak "to suffer an injury that would likely chill a person of ordinary firmness" from continuing that activity, and (3) the officers were motivated, at least in part, by his exercise of his constitutional rights. *Paige v. Coyner*, 614 F.3d 273, 277 (6th Cir. 2010). At this stage, the parties dispute whether Novak's Facebook page was protected speech.

a. Parody

Was Novak's speech protected? The Supreme Court has repeatedly reminded us that almost all speech is protected other than "in a few limited areas." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted). These "limited areas" include speech expressed as part of a crime, obscene expression, incitement, and fraud. *See United States v. Alvarez*, 567 U.S. 709, 717, 720 (2012). It is clearly established, though, that parody does not fall in one of these "limited areas." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56–57 (1988). It is protected speech. *Id.*

The question, then, is whether Novak's page was a parody. The officers claim that his Facebook page was false and meant to mislead the public, not a parody. But they are wrong to think that we just look to a few confused people to determine if the page is protected parody.

Our nation's long-held First Amendment protection for parody does not rise and fall with whether a few people are confused. Instead, we must apply a "reasonable reader" test. *Id.* Speech that "could not reasonably have been interpreted as stating actual facts" is a parody, even if "patently offensive." *Id.* The test is not whether one person, or even ten people, or even one hundred people were confused by Novak's page. Indeed, the genius of parody is that it comes close enough to reality to spark a moment of doubt in the reader's mind before she realizes the joke. "The germ of parody lies in the definition of the Greek *parodeia* . . . as a song sung alongside another." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (internal quotation marks omitted). And masterful parody may skirt that line even closer. Benjamin

Franklin's 1784 satirical essay in the *Journal de Paris* came so close to the truth that it anticipated reality before it happened. Franklin spoke of the benefits of daylight and joked that the French should consider waking up earlier to save money on candles. In his tongue-in-cheek proposal, Franklin recommended several measures for the implementation of his plan. He suggested that: "Every morning, as soon as the sun rises, let all the bells in every church be set ringing; and if that is not sufficient?, let cannon be fired in every street, to wake the sluggards effectually, and make them open their eyes to see their true interest." Benjamin Franklin, *An Economical Project, Letter to the Editor of the Journal of Paris* (1784), http://www.webexhibits.org/daylightsaving/franklin3.html. Through his satire, Franklin predicted the reality of daylight saving time, which would come a century and a half later.

And a parody need not spoil its own punchline by declaring itself a parody. "Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived)." *Campbell*, 510 U.S. at 583 n.17. Imagine if *The Onion* were required to disclaim that parodical headlines like the following are, in reality, false: *Presidential Debate Sidetracked By Booker, De Blasio Arguing About Best Place In Lower Manhattan To Get Tapas*, or, *John Bolton Urges War Against the Sun After Uncovering Evidence It Has Nuclear Capabilities*. *News in Brief*, The Onion (June 26, 2019), https://politics.theonion.com/presidential-debate-sidetracked-by-booker-de-blasio-ar-1835870332; *News in Brief*, The Onion (June 10, 2019), https://politics.theonion.com/john-bolton-urges-war-against-the-sun-after-uncovering-1835805360. The law of parody does not require us to strain credulity so far. And that is not because everyone always understands the joke. Susanna Kim, *All the Times People Were Fooled by* The Onion, ABC News (June 1, 2015), https://abcnews.go.com/International/times-people-fooled-onion/story?id=31444478.

Instead, the test for parody is whether a reasonable reader would have seen Novak's Facebook page and concluded that the posts stated "actual facts." *Hustler*, 485 U.S. at 50. Our nation boasts a long history of protecting parody and satire. "[F]rom the early cartoon portraying George Washington as an ass down to the present day, . . . satirical cartoons have played a prominent role in public and political debate." *Id.* at 54. And parody, like all protected speech, need not be high-minded or respectful to find safe haven under the First Amendment. "One of

the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944) (Frankfurter, J.). "The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided." *Hustler*, 485 U.S. at 54. We uphold this right, even where parody shocks us, because "[o]ur trust in the good sense of the people on deliberate reflection goes deep." *Baumgartner*, 322 U.S. at 674.

Whether Novak's page was a protected parody is a question of fact that we cannot answer at this stage. *See Hustler*, 485 U.S. at 57 ("The Court of Appeals interpreted the jury's finding to be that the ad parody was not reasonably believable, and in accordance with our custom we accept this finding." (internal quotation marks and citation omitted)). Instead, the jury will have to answer that question. At this stage, though, Novak has alleged enough facts that a reasonable jury could find that his page was a parody.

b. Probable Cause

Since we accept for now that the page was protected speech, we move to the second question: did the Parma police have probable cause to arrest Novak? Probable cause exists where there is a "fair probability" or "substantial chance" that officers will discover evidence of criminal activity. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009). To answer this question, we need more facts. We need to know whether the citizen calls to the police station gave the officers probable cause to think there was a "disruption" or "interruption" of police operations under Ohio law. Thus, whether the police had probable cause to arrest Novak is an issue of fact, which we do not have jurisdiction to decide. *Swiecicki v. Delgado*, 463 F.3d 489, 498 (6th Cir. 2006) ("Probable cause is an issue of fact for the jury to resolve if there are any genuine issues of material fact that are relevant to the inquiry."), *abrogated on other grounds by Wallace v. Kato*, 549 U.S. 384 (2007). Of course, a retaliation claim is like a flow chart—once you decide one issue, it leads to the next. So, we move on. In the probable cause inquiry that follows, we assume that Novak's page was protected speech.

If the police *did not* have probable cause to arrest Novak, then he may bring a claim of retaliation. *Nieves*, 139 S. Ct. at 1725. To prevail on this claim, Novak will need to show that the officers arrested him based on a "forbidden" retaliatory motive. *Id.* at 1722–23. But retaliatory motive is often difficult to prove. After all, "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest." *Id.* at 1723–24 (quoting *Reichle v. Howards*, 566 U.S. 658, 668 (2012)) (explaining that the "content and tone" of a suspect's speech may indicate whether he presents a threat). A plaintiff alleging retaliatory arrest must disentangle these "wholly legitimate" considerations of speech from any wholly illegitimate retaliatory motives.

To do so, the threshold question Novak must answer is whether "retaliation was a substantial or motivating factor" for his arrest. *Id.* at 1725. Novak bears the burden of making that showing. If he does, the next question is whether the officers would have arrested him absent that retaliatory motive. *Id.* (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1952–53 (2018)). The burden to answer that lies on the officers. *Id.* If they show that they would have arrested Novak even if he had not criticized the police department, his retaliatory-arrest claim fails. *Id.* So the questions will be: (1) Can Novak show that the officers were motivated by retaliatory animus, not legitimate motivations? (Novak's burden); if yes, (2) Can the officers justify Novak's arrest based on something other than retaliation—i.e., a mistaken but honest belief that there was probable cause? (Officers' burden).

If the officers did have probable cause, on the other hand, they are entitled to qualified immunity. The Supreme Court has said as much. "This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." *Reichle*, 566 U.S. at 664–65. The Supreme Court said that in 2012, and it remains true today.

The Supreme Court decided two retaliation cases after *Reichle*. Neither case clearly established Novak's right to be free from a retaliatory arrest based on probable cause. First, the Supreme Court decided *Lozman v. City of Riviera Beach*. There, the Court held that a plaintiff can bring a retaliation claim if the police had probable cause to arrest but only against official municipal policies of retaliation. 138 S. Ct. at 1954–55. So *Lozman* does not apply where, as here, the plaintiff sues individual officers. *Nieves*, 139 S. Ct. at 1722 (noting that the facts in

Lozman were "far afield from the typical retaliatory arrest claim" and recognizing that *Lozman*'s holding was "limited . . . to arrests that result from official policies of retaliation"). Second, the Court held most recently in *Nieves* that a plaintiff generally cannot bring a retaliation claim if the police had probable cause to arrest. *Id.* at 1725. Though *Nieves* also created an exception to that general rule that we will discuss later, the exception does not apply here because the officers would not have been aware of it at the time of Novak's arrest since the case was decided later.

Nor has our circuit clearly established the law on this issue. In *Sandul v. Larion*, the Sixth Circuit denied an officer qualified immunity for a First Amendment retaliation claim and held that "protected speech cannot serve as the basis for a violation of any of the . . . ordinances." 119 F.3d 1250, 1256 (6th Cir. 1997). But in that case, the ordinance criminalized the plaintiff's speech directly, and there was little question whether the speech was protected. *Id.* at 1255–56 ("These cases should leave little doubt in the mind of a reasonable officer that the mere words and gesture 'f—k you' are constitutionally protected speech."). Plus, it is not clearly established how we reconcile the apparent holding in *Sandul* that protected speech cannot be the basis for probable cause with the rule that protected speech can be a "wholly legitimate consideration" for officers when they decide whether to arrest someone. *Reichle*, 566 U.S. at 668. "[I]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.* at 669–70 (citation omitted). Simply put, Ohio's statute appears to punish the effects of speech (interruptions), not the speech itself, and whether enforcing such a statute in these circumstances violates the First Amendment is not clearly established. So the officers would be entitled to qualified immunity.

To sum up, to resolve the retaliation claim, the factfinder below will have to decide: (1) whether Novak's Facebook page was a parody, and thus protected speech, and; (2) whether the officers had probable cause to arrest Novak under the Ohio statute. If the officers did not have probable cause, they are not entitled to qualified immunity, and Novak can attempt to show the arrest was retaliatory. If the officers did have probable cause, they are entitled to qualified immunity even if Novak's page was protected speech because the law at the time did not clearly establish that charging Novak under the statute would violate his constitutional rights.

c. Future Issues

At this stage, we have jurisdiction to review only whether the officers are entitled to qualified immunity. But a few interesting issues remain. They do not bear on the qualified immunity analysis above because, as with most interesting legal issues, the law is not clearly established.

Issue 1. The Supreme Court held recently in *Nieves* that to bring a First Amendment retaliatory arrest claim, a plaintiff must generally show that there was no probable cause for the arrest. 139 S. Ct. at 1727. But the *Nieves* Court also recognized a narrow exception to this rule "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* For example, "[i]f an individual who has been vocally complaining about police conduct is arrested for jaywalking . . . it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest." *Id.* It is plausible that Novak's arrest under Ohio Rev. Code § 2909.04(B), or one like it, would trigger the exception—i.e., if officers never or rarely arrested someone under this statute. Unfortunately for Novak, this exception was not clearly established before *Nieves.*

Issue 2. Even if Novak's case would not fall within the narrow exception of *Nieves*, 139 S. Ct. at 1727, there is good reason to believe that *in the future* probable cause alone may not protect the officers.

First, this case may not be subject to the general rule of *Nieves* because the sole basis for probable cause was speech. Besides posting to his Facebook page, Novak committed no other act that could have created probable cause. In other First Amendment retaliation cases on point, by contrast, the defendant's conduct was a mix of protected speech and unprotected conduct. That is, the defendants both said something and did something. *See, e.g.*, *id.* at 1720–21 (defendant made remarks to police officers (protected speech) and acted aggressively toward them in an intoxicated state (unprotected conduct)); *Reichle*, 566 U.S. at 660–61 (defendant made political remarks (protected speech) and unlawfully touched the Vice President (unprotected conduct)); *Swiecki*, 463 F.3d at 491–92 (defendant made comments to the officer

(protected speech) and engaged in disorderly conduct while intoxicated (unprotected conduct)). Here, we have nothing like that. Novak did not create a Facebook page criticizing police *and* use his computer to hack into police servers to disrupt operations. The sole basis for probable cause to arrest Novak was his speech. And there is good reason to believe that, based on the reasoning underlying the First Amendment retaliation cases, this is an important difference.

This is important because in *Nieves* and its predecessors, the Court based its reasoning on the thorny causation issue that comes up in cases with both protected speech and unprotected conduct. The idea is that in cases where the plaintiff both did something and said something to get arrested, the factfinder will not be able to disentangle whether the officer arrested him because of what he did or because of what he said. "[R]etaliatory arrest cases . . . present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668. For example, in *Mt. Healthy*, the Court held there was no retaliation "if the same decision would have been reached absent [plaintiff's] protected speech." *Nieves*, 139 S. Ct. at 1722 (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977)). Here, that inquiry gets us nowhere because "absent [Novak's] protected speech," there would be no basis for probable cause. So, in this case, the causal connection is not so tenuous. And the reason for requiring that plaintiff show an absence of probable cause where probable cause is based only on protected speech is not so clear.

Second, this case strikes at the heart of a problem the Court has recognized in the recent retaliation cases. "[T]here is a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman*, 138 S. Ct. at 1953. The Court also recognized this risk in *Nieves.* The jaywalking exception acknowledges that officers can use probable cause as a pretext for retaliation. "In such a case, . . . probable cause does little to prove or disprove the causal connection between animus and injury . . . ." *Nieves*, 139 S. Ct. at 1727. Novak's case is prime ground for the pretext that the Supreme Court has worried about.

For one, potential probable cause was based on protected speech alone. That is not dispositive because the officers' consideration of his protected speech may have been "wholly legitimate." *Id.* at 1723–24. But the fact that the arrest was made based only on protected

speech at least raises a concern that probable cause "does little to prove or disprove the causal connection" between Novak's criticism of the police and his arrest. *Id.* at 1727.

Issue 3. Finally, the vague language of the Ohio statute further heightens the concern raised in Issue 2. That statute makes it a crime to "use any computer . . . or the internet so as to disrupt, interrupt, or impair the functions of any police . . . operations." Ohio Rev. Code § 2909.04(B). To see how broad this statute reaches, consider an example. An activist tweets the following message: "The police are violating our rights #TakeAction #MakeYourVoiceHeard." People in the community see the tweet and begin calling the police department to share their views. A small protest even forms in the town square. Police station employees spend time fielding the calls, and a couple of officers go down to monitor the protest. Under the plain text of the Ohio statute, have these acts of civic engagement "interrupt[ed]" police operations? Taken at face value, the Ohio law seems to criminalize speech well in the heartland of First Amendment protection. This broad reach gives the police cover to retaliate against all kinds of speech under the banner of probable cause. Critical online comments, mail-in or phone bank campaigns, or even informational websites that incite others to "disrupt" or "interrupt" police operations could violate the law. *See id.*

Where a statute gives police broad cover to find probable cause on speech alone, probable cause does little to disentangle retaliatory motives from legitimate ones. Thus, this case raises new questions under *Nieves*. It may be that, based on the Supreme Court's reasoning in that case and others, the general rule of requiring plaintiffs to prove the absence of probable cause should not apply here. We need not decide that now.

IV. Other Claims

Prior Restraint. Novak alleges that the Parma police imposed a prior restraint on his speech. This claim survives, for now.

A prior restraint is an "administrative" or "judicial order[]" that forbids protected speech in advance. *Alexander v. United States*, 509 U.S. 544, 550 (1993). An action taken after the speech is expressed, like a punishment for disfavored speech, is not a prior restraint. *Id.* at 554 (admonishing that courts not "blur the line separating prior restraints from subsequent

punishments" for speech). The First Amendment guarantees "greater protection from prior restraints." *Id.* Indeed, we generally presume prior restraints are unconstitutional. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). But the question is whether Novak has alleged a prior restraint. He alleges that the police issued a press release threatening to prosecute him, sent a letter and an email to Facebook demanding the page be taken down, and confiscated some of his computer equipment. He says the letter and email to Facebook "demanded" that the page be taken down with an "implicit threat of adverse governmental action" against Facebook if they refused. R. 6, Pg. ID 1257. This question turns on whether these communications were an administrative order. *Alexander*, 509 U.S. at 550.

First, in light of our long history of guarding against prior restraints on speech, *cf. Respublica v. Oswald*, 1 U.S. (Dall.) 319, 325 (Pa. 1788); *see also* 4 William Blackstone, *Commentaries on the Laws of England* *151, we should not be overly formalistic in defining what counts as an administrative order. But courts have not always been clear about what counts as an administrative order, and that poses a problem when we are talking about what is clearly established. Take *Alexander*. That case held that a prior restraint must raise a "legal impediment" to speech and described the "classic examples of prior restraints" as temporary restraining orders, permanent injunctions, and court orders. *Alexander*, 509 U.S. at 550–51. But the formality of these classic cases should be a sufficient condition for prior restraint, not a necessary one. *See id.* at 575 (Kennedy, J., dissenting) ("Though perhaps not in the form of a classic prior restraint, the application of the forfeiture statute here bears its censorial cast."). A government official should not have to declare his order official or jump through certain procedural hoops to create a prior restraint. Such a rule would allow government officials to cloak unconstitutional restraints on speech under the cover of informality. To borrow a concept, when an officer "carr[ies] a badge of authority of the government and represent[s] it in some capacity," *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting), his order to a private party to take a specific action may fairly be called an "administrative order." This is true even if the order is not on its terms binding. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (recognizing "a system of prior administrative restraints" even where affected parties were free to ignore the notices). And because taking down the page

would mean Novak could no longer post critical comments about the police on his page, the letter and email to Facebook could be administrative orders that constituted a prior restraint.

Novak also plausibly alleges that the officers created a prior restraint with their press release threatening to take legal action. In the release, the department announced that it had opened a criminal investigation into Novak's page. Under *Bantam Books*, a threat of prosecution can trigger a prior restraint, even if the threat is non-binding. 372 U.S. at 60, 71. True, the facts in *Bantam Books* were more extreme than what we have here. There, Rhode Island created an eerily titled "Commission to Encourage Morality in Youth" to investigate obscene or impure literature. *Id.* at 59. The commission sent notices to publishers saying certain books were too objectionable to sell and that violators may be prosecuted. *Id.* at 60–62. Police then visited the publishers' book distributors to see if the objectionable books had been removed. *Id.* at 63. But the facts of *Bantam Books* need not be perfectly analogous for the rule to apply. Rather, we need more facts to determine whether the facts in this case are close enough.

These issues were not briefed here or decided below. And the officers do not argue that their Facebook communications were not an administrative order. So, we leave this decision in the first instance in the capable hands of the district court. The prior restraint claim goes on.

Additional First Amendment Claims. Novak argues that when Officers Riley and Connor deleted comments on the official police Facebook page, they unlawfully censored speech in a public forum and violated his right to receive information. These claims fail because they are not based on clearly established law.

The First Amendment no doubt applies to the wild and "vast democratic forums of the Internet." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). But when it comes to online speech, the law lags behind the times. And rightly so. "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Id.* at 1736; *see also id.* at 1744 (Alito, J., concurring in the judgment) (noting that courts should "proceed circumspectly, taking one step at a time" in applying "free speech precedents" to the Internet).

Courts have not reached consensus on how First Amendment protections will apply to comments on social media platforms. So far, the courts that have considered the issue have taken different approaches. *See Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1012–13 (E.D. Ky. 2018) (denying preliminary injunction regarding the deletion of Facebook and Twitter comments in a case of first impression). *But see Davison v. Randall*, 912 F.3d 666, 687–88 (4th Cir. 2019) (holding that a government official violated the First Amendment by banning a critical constituent from a Facebook page). No doubt, any right Novak or the commenters may have to post or receive comments was not "beyond debate" at the time the officers deleted the comments. *al–Kidd*, 563 U.S. at 741. Riley and Connor are entitled to qualified immunity from these claims.

Anonymity. Novak argues that the officers violated his right to speak anonymously. This claim does not survive because Novak does not allege a violation of clearly established law.

The right to speak anonymously is deeply rooted in American political tradition and in First Amendment doctrine. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995); *id.* at 371 (Thomas, J., concurring in the judgment). From Thomas Paine's "Common Sense" (originally published anonymously during the Revolution) to the debates between Federalists and Anti-Federalists during Ratification, anonymity was core at the Founding. *Id.* at 368 (Thomas, J., concurring in the judgment). When some Federalists encouraged newspapers to ban anonymous speech, the Anti-Federalists defended their right to remain anonymous. *Id.* at 364–66 (Thomas, J., concurring in the judgment). Free speech was originally understood to include the right to speak without being known. Consistent with this original understanding, the Supreme Court has upheld the right by striking down laws banning anonymous speech. *Id.* at 357; *id.* at 371 (Thomas, J., concurring in the judgment); *Talley v. California*, 362 U.S. 60, 65 (1960).

But Novak is not contesting a law or policy that bans anonymous speech. Instead, he argues that the police officers disclosed his identity as part of their criminal investigation. Yet he has pointed to no law clearly establishing that investigative actions by police can violate the right to speak anonymously. Investigations are often public events. So too are criminal trials. *See Craig v. Harney*, 331 U.S. 367, 374 (1947). True, the Supreme Court has recognized that courts

can reduce a criminal trial's publicity, but only under the right to a fair trial, not under a right to remain anonymous. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976).

It is not clearly established that announcements made in an ongoing criminal investigation can violate Novak's First Amendment right to speak anonymously. The officers are entitled to qualified immunity on this claim.

Search and seizure and malicious prosecution. Novak alleges that the officers unlawfully searched him and seized his property. He also alleges wrongful arrest and malicious prosecution. These claims survive as well at this stage of the litigation. Ultimately, Novak will have to show that Officer Connor lied to get a warrant (for unlawful seizure) or lied in the course of his prosecution (for malicious prosecution). And Novak will have to make this showing in light of the Ohio statute that grants broad discretion to officers.

To prove malicious prosecution, Novak must show (1) that the officers' "deliberate or reckless falsehoods result[ed] in arrest and prosecution without probable cause" and (2) that the officers did more than passively participate in the decision to prosecute or to keep prosecuting him. *Newman v. Twp. of Hamburg*, 773 F.3d 769, 772 (6th Cir. 2014); *see also Johnson v. Moseley*, 790 F.3d 649, 654–55 (6th Cir. 2015). Novak must also show the absence of probable cause. *See Sykes v. Anderson*, 625 F.3d 294, 305 (6th Cir. 2010).

Usually, a warrant from a neutral magistrate, like the ones Connor got in this case, would be a "complete defense" to these § 1983 claims. *Id.* at 305, 310 & n.8; *Knott v. Sullivan*, 418 F.3d 561, 568–69 (6th Cir. 2005). Not so here. Warrants are typically a defense because they demonstrate probable cause. But warrants do not demonstrate probable cause if the officer "ma[de] false statements and omissions to the judge" and if probable cause would not exist but for those false statements or omissions. *Sykes*, 625 F.3d at 305 (quoting *Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir. 2003)). In these limited circumstances, officers may be held liable for their searches, seizures, and arrests even though they obtained a warrant. *Id.* at 308.

Thus, these claims turn on whether Officer Connor made false statements or omissions. According to Novak, Officer Connor falsely represented that Novak (1) "disrupted and impaired" the functioning of the Parma Police Department "by knowingly posting false

information," (2) "altered or affected" the department's official page, and (3) falsely represented he was "a representative of the Parma Police Department." R. 6, Pg. ID 1265–66. Further, Novak says that Connor knew there was no interruption or disruption. As for malicious prosecution, he alleges that Connor and Riley lied at trial by testifying that Novak's page caused a disruption when they knew it did not. *See Moseley*, 790 F.3d at 655 (noting a plausible allegation of malicious prosecution has been made when officers testify at trial and provide "false statements [and] flagrant misrepresentations, or fail[] to disclose key items of evidence" (citing *Sykes*, 625 F.3d at 301–02, 306–07, 311–17)). For now, those allegations are enough.

Privacy Protection Act. Novak alleges a violation of the Privacy Protection Act. This claim too depends on whether the officers lacked probable cause to search Novak's apartment and seize his property. Because Novak has alleged facts that make it plausible that the officers lacked probable cause, the claim survives for now.

The Privacy Protection Act makes it unlawful for a government officer to "search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate" information to the public. 42 U.S.C. § 2000aa(a). But the statute has a "suspect exception." *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 499 F.3d 553, 567 (6th Cir. 2007). The Act does not apply if the officers have "probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." 42 U.S.C. § 2000aa(a)(1); *see S.H.A.R.K.*, 499 F.3d at 567. Novak has alleged that the officers lacked probable cause to search and seize the contents of his apartment, so the "suspect exception" does not apply at this stage. The claim goes forward.

Supervisory liability. Novak seeks to hold Riley, Connor's supervisor, liable for Connor's alleged constitutional violations. But Novak sues under § 1983, and under that law, a plaintiff cannot sue for vicarious liability or respondeat superior. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). So Riley can be held responsible only for his own actions, not for his supervision of anyone else. *Id.* Novak must allege that Riley "encouraged the specific [unconstitutional conduct] or in some other way directly participated in it." *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 470 (6th Cir. 2006) (quoting *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)). He has so alleged, so the supervisory liability claim survives.

Novak alleges that Officer Riley first assigned Officer Connor to investigate the Facebook page and then directed Connor to take the allegedly unconstitutional actions. Novak also attaches a transcript from his criminal trial where Riley testified that he "contacted Detective Connor, asked him to look into [Novak's page], [and] assigned the case to him." R. 6-1, Pg. ID 1369. At this stage, these allegations are enough. Novak may proceed against Riley for his own actions and for any of Connor's actions that Riley directed or supervised.

Conspiracy. Novak brings a claim against Riley, Connor, and "John Doe" of the Ohio Internet Crimes Against Children Task Force for conspiring to shut down his Facebook page. John Doe allegedly told Connor how to contact Facebook and shut down the page.

In this circuit, the test for conspiracy is simple. "All that must be shown [for conspiracy] is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury . . . ." *Hooks v. Hooks*, 771 F.2d 935, 943–44 (6th Cir. 1985). The officers respond that Novak's allegations are conclusory. But allegations alone, even if conclusory or improbable, may suffice for this early stage of litigation. Novak names the coconspirators, suggests that they came to an agreement, and alleges that they acted against his Facebook page. These are "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

But that is not the end of the conspiracy inquiry. In the time since the district court denied the officers' motion to dismiss, our circuit has changed its law on conspiracy. We held that the "intracorporate conspiracy doctrine" applies to § 1983 lawsuits like this one. *Jackson v. City of Cleveland*, 925 F.3d 793, 818 (6th Cir. 2019). That doctrine holds that "members of the same legal entity cannot conspire *with one another* as long as their alleged acts were within the scope of their employment." *Id.* at 819 (citation omitted). At this time, the intracorporate conspiracy doctrine does not apply here. Novak alleges that Doe is a member of a different agency than Riley and Connor—the Ohio Internet Crimes Against Children Task Force. So they are not in the same "legal entity." With more facts, the district court should consider whether Doe does work for the Task Force and whether the Task Force is a different agency for purposes of the intracorporate conspiracy doctrine under *Jackson*.

Municipal liability. Novak brings several claims against the City of Parma. The district court denied Parma's motion to dismiss on these claims, and the city now appeals. We do not have jurisdiction over these claims.

This appeal is limited to qualified immunity and issues "inextricably intertwined" with it. *Courtright*, 839 F.3d at 523–24. Two claims are "inextricably intertwined" if resolving one claim will "necessarily determine" the other. *Id.* Here, the officers' liability depends on their actions against Novak. The city's liability, in contrast, depends on a separate analysis of "its municipal policies, training programs, and customs." *Id.* So Parma's liability is not "inextricably intertwined" with qualified immunity, and we do not have jurisdiction to consider municipal liability at this stage. *Id.*

State claims. Finally, Novak brings several state law claims. The officers raise one defense. They argue that they are protected by an Ohio statute that insulates police officers from liability unless their actions were taken "with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b). The officers say that Novak has not shown their conduct was in bad faith, wanton, or reckless. Here again, the stage of proceedings informs this question. As the district court rightly noted, to dismiss Novak's complaint at this stage, we must find that it is "devoid of [allegations] tending to show that the [officers] acted" as Novak alleges. *Irving v. Austin*, 741 N.E.2d 931, 934 (Ohio Ct. App. 2000); *see also Range v. Douglas*, 763 F.3d 573, 586 (6th Cir. 2014). The complaint is not devoid of such allegations. Indeed, it is filled to the brim with them. Novak alleges that the officers lied to Facebook to take down his page, lied to secure warrants to arrest him, and lied on the witness stand about their actions. At this early motion-to-dismiss stage, that is enough to plausibly allege that the officers acted with a "dishonest purpose" constituting bad faith. *Cook v. Hubbard Exempted Vill. Bd. of Educ.*, 688 N.E.2d 1058, 1061 (Ohio. Ct. App. 1996). Novak's state law claims live to fight another day.

* * *

Though Novak's Facebook page mocking the Parma Police Department has since left the cyber world, several of his legal claims will live on. Others will end here. We REVERSE the district court's decision to deny the motion to dismiss on Novak's claims related to anonymous speech, censorship in a public forum, and the right to receive speech. We AFFIRM the district court's decision with respect to all other claims except municipal liability, over which we lack jurisdiction.