Appendix A

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.

Appendix A

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.

Appendix A

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]

Whether these actions—deleting comments that made clear the page was fake and reposting the Department's warning message—are protected speech is

[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.

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.

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[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.

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 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

[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.

"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 calls occurred 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]

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[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

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.*

308–09. Because we resolve Novak's claim on the first element, we need not discuss the rest here.

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).

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

[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.

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.

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. *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

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[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).

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.

Appendix B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY NOVAK, Plaintiff, v. THE CITY OF PARMA, *et al.* Defendants.	Case No. 1:17-cv-2148 JUDGE DAN AARON POLSTER **OPINION & ORDER**

Before the Court are the following motions:

1. Motion for Summary Judgment filed by Defendant, the City of Parma ("Parma") (ECF Doc. 100);

2. Motion for Summary Judgment filed by Defendants Kevin Riley ("Riley") and Thomas Connor ("Connor") (ECF Doc. 101); and

3. Motion for Partial Summary Judgment filed by Plaintiff Anthony Novak ("Novak") (ECF Doc. 102).

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On December 22, 2020, the parties filed oppositions to the motions for summary judgment. ECF Doc. 122, ECF Doc. 123, ECF Doc. 124. On January 12, 2021, they filed replies. ECF Doc. 125, ECF Doc. 126, ECF Doc. 127. For the reasons stated below, the Court GRANTS Defendants' motions for summary judgment (ECF Doc. 100 and ECF Doc. 101) and DENIES Novak's motion for partial summary judgment. ECF Doc. 102.

I. Introduction

Plaintiff Anthony Novak ("Novak") created a Facebook page that mimicked the official Parma Police Department's official Facebook page. He used it to post false information about the police department. As he sees it, his page was a parody and was clearly protected by the First Amendment.

The Parma Police Department saw it differently. They started receiving calls from the public about Novak's Facebook page and opened an investigation. Novak portrays this investigation as a hot-headed police pursuit designed to punish him for making fun of them. But the parties' Fed. R. Civ. P. 56 materials do not support Novak's one-sided portrayal.

The Sixth Circuit aptly noted that 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." And, in the context of Fed. R. Civ. P. 12, the Sixth Circuit recognized, as did this Court, that Novak's portrayal of the events precluded dismissal, even when qualified

immunity was considered. *Novak v. City of Parma,* 932 F.3d 421, 424 (6th Cir. July 29, 2019).

But the Fed. R. Civ. P. 56 materials have revealed a different picture of the investigation and prosecution of Novak. The evidence does not show that Detective Thomas Connor and his co-defendants were acting as hot-headed police officers seeking revenge against Novak for his "parody." Rather, it shows that they sought advice from multiple sources about the legality of Novak's Facebook page and followed the proper procedures by obtaining warrants before arresting Novak, searching his property, and presenting the facts of their investigation to the County Prosecutor and grand jury.

Novak's Facebook page may very well be protected by the First Amendment. At the very least, there is a genuine dispute of material fact on that issue. *Novak,* 932 F.3d at 428. But Novak mistakenly believes that his First Amendment right to post a parody on Facebook, if that is what he did, was absolute. It wasn't.

Moreover, determining if Novak's Facebook page was protected by the First Amendment is not the only important issue in this case. Indeed, the Court does not even have to resolve the First Amendment issue to rule on the parties' motions for summary judgment. Because even if the content of Novak's Facebook page *was* protected, Novak's conduct in confusing the public and disrupting police operations was not. And, if the defendants had probable cause to arrest Novak for knowingly disrupting police operations, they are immune from civil liability. *Reichle v. Howards,* 566 U.S.

658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985; *Novak,* 932 F.3d at 429.

Nor does the fact that Novak was ultimately acquitted of the crime of disrupting police operations expose defendants to civil liability if they had probable cause to believe that Novak committed that crime. Conviction requires proof beyond a reasonable doubt, but charging someone with a crime requires only probable cause. *See Lozman v. City of Riviera Beach,* 138 S. Ct. 1945, 1952, 138 L. Ed. 2d 342 (2018).

Here, after considering the parties' arguments and the materials submitted pursuant to Fed. R. Civ. P. 56, the Court recognizes that there are no genuine disputes of material fact as to whether the defendants had probable cause to investigate and charge Novak with a violation of Ohio Rev. Code § 2909.04(B). For this reason, the defendants are entitled to summary judgment as further explained below.

II. Statement of Facts

On March 1, 2016, around 11:00 p.m., Novak posted a Facebook page mimicking the official Parma Police Department page. Novak's page purported to be the official police page; it had the same name, cover photo, and profile photo. Novak Depo., ECF Doc. 90 at 106. The only distinguishing features were that small font text identified Novak's page as a "Community" page, and it lacked the "Police Station-Government Organization" designation held by the official department page. *Id.* Novak's page also lacked the official

"blue checkmark" denoting Facebook verification. ECF Doc. 6 at 14.

Novak published six posts on the fake Facebook page. The topics of his posts included: criminalizing assisting the homeless; announcing openings for Parma Police officers (but discouraging minorities from applying); prioritizing a search for an African-American loitering suspect over a search for a white armed robbery suspect; advertising free abortions for teenagers provided by police in the Wal-Mart parking lot; announcing a "pedophile reform" event; and instituting a daytime curfew for families. ECF Doc. 6 at 13.

In the following hours, Novak's Facebook page generated around 50,000 views and numerous posts. Novak Depo., ECF Doc. 90 at 131. Novak deleted comments claiming the page was a hoax. *Id*. at 104. His roommate later testified that Novak was using the fake Facebook page to "mess with people." Kozelka Depo., ECF Doc. 97-1 at 15-16. Several citizens contacted the Parma Police Department non-emergency dispatch line, the city's Law Department, and Parma City Hall. Connor Depo., ECF Doc. 71-7 at 184. The main reasons for these calls were to alert the city and to verify that Novak's Facebook page was not the official police department page. Riley Depo., ECF Doc. 105-1 at 31-32. Seven of the calls to the Parma Police dispatch line were recorded. *Id*. at 32.

On March 2, 2016, Captain Kevin Riley, then a lieutenant, assigned Detective Thomas Connor to investigate the page. Connor Depo., ECF Doc. 71-7 at

20-21. Connor looked at Novak's page and determined that the official department page had not been hacked. He then contacted Timothy Dobeck, the Law Director and Prosecutor for the City of Parma. *Id.* Dobeck and Connor reviewed statutes involving impersonation of a police officer and disruption of public services. *Id.* at 178-179. Dobeck advised Connor that Novak's conduct may have violated Ohio Rev. Code § 2909.04(B), disrupting public service. *Id.* Ohio Rev. Code §2909.04(B) prohibits "knowingly us[ing] any computer, computer system, computer network, telecommunications device, or other electronic device or system of the internet so as to disrupt, interrupt, or impair the functions of any police….operations."

After seeking advice from Dobeck[1], Detective Connor applied for a search warrant for Novak's IP address from Facebook on March 2, 2016. Dobeck Depo., ECF Doc. 79-3 at 126; Novak Depo., ECF Doc. 90, Exhibit 8. He also subpoenaed Facebook and requested that Novak's page be taken down. Connor Depo., ECF Doc. 71-7 at 336. Connor identified the first Facebook profile to share the fake account as "anthony.h.novak." ECF Doc. 71-7 at 184.

Captain Riley also spoke to Dobeck on March 2, 2016 and received the same advice – to investigate the page as a possible violation of disrupting public services. Riley Depo., ECF Doc. 71-1 at 176. On the official Parma Police Department Facebook, Captain

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[1] Dobeck also reviewed the affidavits for search warrant that Detective Connor prepared. Dobeck Depo., ECF Doc. 79-3 at 127, 159-160.

Riley notified the public that Novak's Facebook page was a fake. *Id.* at 99. But Novak replicated this warning and posted it on the fake page as well. *Id.* Such conduct went far beyond mere parody or poking fun at the police and was consistent with the testimony of his roommate that Novak was using his Facebook page to "mess with people." Kozelka Depo., ECF Doc. 97-1 at 15-16. It was also evidence that Novak was trying to disrupt police operations. Captain Riley also appeared on Channel 8 warning the public about the fake page. *Id.* at 223. Cleveland.com also interviewed him about the fake Facebook page. *Id.* After learning about the Channel 8 broadcast, Novak voluntarily deleted the Facebook page. Novak Depo., ECF Doc. 90 at 125. The page had been viewable on Facebook for 12 hours. *Id.*

On March 3, 2016, Detective Connor applied for another search warrant, this time seeking all Facebook records related to the now-deleted page. Novak Depo., ECF Doc. 90-1 at 526. Parma Municipal Judge Kenneth Spanagel issued a search warrant around 12:45 p.m. on March 3, 2016. Novak Depo., ECF Doc. 90-1 at 526. On March 18, 2016, Connor reviewed the thousands of pages of documents received from Facebook as a result of the subpoena (Connor Depo., ECF Doc. 71-7 at 289), and shared them with Dobeck. Dobeck Depo., ECF Doc. 79-3 at 52. Detective Connor then sought an arrest warrant for Anthony Novak on March 18, 2016. *Id.* at 57, 125-26. Magistrate Judge Edward Fink issued the warrant, based on a violation of the disrupting public services statute. Fink Depo. pp. 82-84, ECF Doc. 92-1 at 22.

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Novak was arrested on March 25, 2016. Connor Depo., ECF Doc. 71-7 at 308. That same day, Detective Connor applied for a search warrant for Novak's apartment. O'Donnell Depo., ECF Doc. 108-1 at 29-31. Judge Deanna O'Donnell issued the search warrant. *Id*. On March 28, 2016, Judge O'Donnell issued a second search warrant, granting police authority to search the contents of electronic devices seized from Novak's apartment. *Id*. at 35, Ex. 8. Because disrupting public services is a felony, the case was transferred to the Cuyahoga County Court of Common Pleas. Dobeck Depo., ECF Doc. 79-3 at 238-41.

The assistant prosecutor for Cuyahoga County presented the facts to a grand jury in April 2016. *Id.* at 65-66, 240. On April 11, 2016, a grand jury indicted Novak with a violation of Ohio Rev. Code § 2909.04(B). The case proceeded to trial in August 2016. Connor Depo., ECF Doc. 71-7 at 319. Following the government's case, the trial court denied a motion to dismiss on First Amendment grounds and a motion for acquittal. ECF Doc. 6-1 at 256. In denying the motion for acquittal, the trial judge ruled that there was evidence from which a reasonable jury could conclude that Novak was guilty of knowingly interrupting the operations of the police department.

Novak was acquitted on August 11, 2016. *Id.* After his acquittal, Novak filed this civil rights action against the City of Parma; Parma police officers, Kevin Riley and Thomas Connor; and John Doe[2], a

[2] Novak did not amend his complaint or further pursue his claim against this John Doe defendant.

law enforcement official and member of the Ohio Internet Crimes Against Children Task Force. ECF Doc. 1.

III. Procedural History and Remaining Claims

Novak filed this lawsuit on October 10, 2017, and a week later, filed a First Amended Complaint asserting 30 claims against the various defendants. ECF Doc. 6. On April 5, 2018, the Court issued an order and opinion dismissing four of Novak's claims. ECF Doc. 19. The Court dismissed Novak's property retention claim because such a claim does not exist (ECF Doc. 19 at 12), and his replevin claim because it was moot. ECF Doc. 19 at 20-21. The Court also dismissed without prejudice Novak's challenges to the constitutionality of Ohio Rev. Code § 2909.04 because it was not necessary to decide those claims[3]. ECF Doc. 19 at 18. The Court denied dismissal on the remaining claims because Novak had alleged facts that, if true, would defeat defendants' claim of qualified immunity in this case. ECF Doc. 19. Because the Court's decision involved a question of qualified immunity, it was immediately appealed.

On July 30, 2019, the Sixth Circuit Court of Appeals substantially affirmed the Court's decision.[4] ECF Doc. 24. The Court accepted Novak's allegations as true and drew all reasonable inferences in his

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[3] Novak never sought to refile these claims.

[4] As shown in the following chart, the Sixth Circuit reversed the Court's decision to deny the motion to dismiss on Novak's claims related to anonymous speech, censorship in a public forum, and right to receive speech. ECF Doc. 24 at 21.

favor. ECF Doc. 24 at 2. The Sixth Circuit determined that there was a question of fact as to whether Novak's Facebook page was a protected parody and that a jury would have to make that decision. ECF Doc. 24 at 8. The Sixth Circuit did not make a finding on the issue of probable cause; it determined that more facts were needed. *Id.* And the Sixth Circuit recognized, as this Court must also, that *if* the officers had probable cause, they were entitled to qualified immunity because there would be no constitutional violation. ECF Doc. 24 at 9.

The status of Novak's claims is as follows:

Claim #:	**Type of Claim:**	**Against:**	**Pending or Disposed:**
Claim 1	First Amendment Retaliation, 42 U.S.C. § 1983 – Prior Restraint (ECF Doc. 6 at 38)	Riley and Connor	Pending
Claim 2	First Amendment Retaliation, 42 U.S.C. § 1983 – Anonymous Speech (ECF Doc. 6 at 40)	Riley and Connor	Dismissed by Court of Appeals (ECF Doc. 24 at 16-17)

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Claim 3	First Amendment Retaliation, 42 U.S.C. § 1983 – Criticism of Police Officers (ECF Doc. 6 at 41)	Riley and Connor	Pending
Claim 4	First Amendment Retaliation, 42 U.S.C. § 1983 – Right to Receive Speech (ECF Doc. 6 at 42)	Riley and Connor	Dismissed by Court of Appeals (ECF Doc. 24 at 15)
Claim 5	First Amendment Retaliation, 42 U.S.C. § 1983 – Designated Public Forum (ECF Doc. 6 at 43)	Riley and Connor	Dismissed by Court of Appeals (ECF Doc. 24 at 15)
Claim 6	First Amendment Retaliation, 42 U.S.C. § 1983 – Retaliatory Arrest (ECF Doc. 6 at 45)	Riley and Connor	Pending

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Claim 7	Fourth Amendment Violation, 42 U.S.C. § 1983 – Wrongful Arrest (ECF Doc. 6 at 46)	Riley and Connor	Pending
Claim 8	Fourth Amendment Violation, 42 U.S.C. § 1983 – Unlawful Search (ECF Doc. 6 at 47)	Riley and Connor	Pending
Claim 9	Fourth Amendment Retaliation, 42 U.S.C. § 1983 – Property Seizure (ECF Doc. 6 at 467	Riley and Connor	Pending
Claim 10	Fourth Amendment Retaliation, 42 U.S.C. § 1983 – Property Retention (ECF Doc. 6 at 48)	Riley and Connor	Dismissed with prejudice – ECF Doc. 19 at 12.
Claim 11	Fourth Amendment Violation, 42 U.S.C. § 1983 – Malicious Prosecution (ECF Doc. 6 at 49)	Riley and Connor	Pending

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Claim 12	Municipal Monell Liability, 42 U.S.C. § 1983 – Authorized Action (ECF Doc. 6 at 50)	Parma	Pending
Claim 13	Municipal Monell Liability, 42 U.S.C. § 1983 – Authorized Action (ECF Doc. 6 at 51)	Parma	Pending
Claim 14	Municipal Monell Liability, 42 U.S.C. § 1983 – Failure to Train (ECF Doc. 6 at 52)	Parma	Pending
Claim 15	Conspiracy to Violate Civil Rights, 42 U.S.C. § 1983 (ECF Doc. 6 at 54)	Riley, Connor and John Doe	Pending
Claim 16	Federal Privacy Protection Act (ECF Doc. 6 at 55)	Riley, Connor and Parma	Pending

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Claim 17	Constitutional Challenge to Ohio Rev. Code §2909.04(B) as vague and over-broad (ECF Doc. 6 at 56)	Riley, Connor and Parma	Dismissed without prejudice - ECF Doc. 19 at 18-19.
Claim 18a	Constitutional Challenge to Ohio Rev. Code § 2909.04(B) as applied (ECF Doc. 6 at 56)	Riley, Connor and Parma	Dismissed without prejudice - ECF Doc. 19 at 18-19.
Claim 18b	Supervisor Liability (ECF Doc. 6 at 57)	Riley	Pending
Claim 19	False Writings, Ohio Rev. Code § 2921.03(C) (ECF Doc. 6 at 57)	Riley and Connor	Pending
Claim 20	False Writings, Ohio Rev. Code § 2307.60(A)(1) and 2921.03(A) (ECF Doc. 6 at 58)	Riley and Connor	Pending

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Claim 21	Civil Liability for Criminal Acts under Ohio Rev. Code § 2307.60(A)(1) and 2921.12 – Tampering with Evidence (ECF Doc. 6 at 59)	Riley and Connor	Pending
Claim 22	Civil Liability for Criminal Acts under Ohio Rev. Code § 2307.60(A)(1) and 2921.45 – Interference with Civil Rights (ECF Doc. 6 at 60)	Riley and Connor	Pending
Claim 23	Civil Liability for Criminal Acts under Ohio Rev. Code § 2307.60(A)(1) and 2921.13 – Falsification (ECF Doc. 6 at 60)	Riley and Connor	Pending

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Claim 24	Civil Liability for Criminal Acts under Ohio Rev. Code § 2307.60(A)(1) and 2921.11 – Perjury (ECF Doc. 6 at 61)	Riley and Connor	Pending
Claim 25	Civil Liability for Criminal Acts under Ohio Rev. Code § 2307.60(A)(1) and 2921.32 – Obstruction of Justice (ECF Doc. 6 at 62)	Riley and Connor	Pending
Claim 26	Civil Liability for Criminal Acts under Ohio Rev. Code § 2307.60(A)(1) and 2921.44(E) –Dereliction of Duty (ECF Doc. 6 at 62)	Riley and Connor	Pending
Claim 27	Malicious Crim-inal Prosecution (ECF Doc. 6 at 63)	Riley and Connor	Pending

Claim 28	Tortious Interference with Contract (ECF Doc. 6 at 64)	Riley and Connor	Pending
Claim 29	Replevin (ECF Doc. 6 at 64)	Parma	Dismissed with Prejudice, ECF Doc. 19 at 20-21.

IV. Standard of Review

Summary judgment is appropriate when there exists no genuine dispute with respect to the material facts and, in light of the facts presented, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The court may look to the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits when ruling on the motion. Fed. R. Civ. P. 56(c). The facts must be viewed in the light most favorable to the non-moving party and the benefit of all reasonable inferences in favor of the non-movant must be afforded to those facts. *Id*. The mere "scintilla of evidence" within the record that militates against the overwhelming weight of contradictory corroboration does not create a genuine issue of fact. *Bible Believers v. Wayne Cty.,* 805 F.3d 228 (6th Cir. 2015), citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

V. Brief Summary of Parties' Arguments[5]

A. Defendants Connor's and Riley's Motion for Summary Judgment

Defendants Connor and Riley filed their motion for summary judgment on November 13, 2020. ECF Doc. 101. They characterize Novak's conduct as "creat[ing] a fake Parma Police Facebook page that was nearly identical to the official Parma Police page," and they argue that his conduct was not protected by the Constitution. They further argue that they had probable cause to charge him with a violation of Ohio Rev. Code § 2909.04.

B. Defendant City of Parma's Motion for Summary Judgment

On November 13, 2020, the City of Parma ("Parma") filed a motion for summary judgment. ECF Doc. 100. Parma argues that it cannot be held liable under § 1983 because Novak's constitutional rights were not violated. Parma also contends that it did not have an official policy that led to the investigation and arrest of Novak; the alleged constitutional violation was not the result of a widespread practice or custom; and it cannot be held liable under a final policymaker theory.

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[5] This brief summary is not intended to fully re-state the parties' arguments.

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C. Plaintiff Anthony Novak's Motion for Partial Summary Judgment

Plaintiff Anthony Novak ("Novak") has moved for summary judgment on four of his remaining Fourth Amendment claims: Claim 7 - §1983 claim for wrongful arrest; Claim 8 - §1983 claim for unlawful search; Claim 9 - §1983 claim for unlawful property seizure; and Claim 11 - § 1983 claim for malicious prosecution. He has also moved for summary judgment on the issue of probable cause for all of the remaining claims in the amended complaint. Specifically, he has asked this Court to hold, as a matter of law, that his parody Facebook page was protected speech and that defendants lacked probable cause to arrest him for a violation of Ohio Rev. Code § 2909.04.

Citing *Gerics v. Trevino,* 974 F.3d 798 (6th Cir. 2020)[6], Novak argues that the Court is permitted to decide the legal question of probable cause. He argues that this applies to both the probable cause determination (ECF Doc. 102 at 15) and to the issue of whether his Facebook page was a parody. ECF Doc. 102 at 24. He argues that the Court should find, as a matter of law, that Officer Connor lacked probable cause to suspect that Novak had violated Ohio Rev. Code § 2909.04(B). ECF Doc. 102 at 16. This is based on his position that his Facebook page did not "disrupt, interrupt or impair" the functions or operations

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[6] *Gerics* held that the district court should have decided the issue of probable cause because the facts were undisputed. *Gerics,* 974 F.3d at 805-806.

of the Parma Police Department. Novak contends that, as a matter of law, "nine calls to the dispatch center, three phone calls to the law department, three phone calls to the safety department and what appeared to be two emails to the safety department reporting the existence of the page" could not be considered a "disruption" of police services. He argues that the Court must read a "substantiality" requirement into the statute. Novak also argues that Detective Connor decided on his own to investigate his Facebook page, and that any interruption to his otherwise planned work activities cannot be attributed to Novak. ECF Doc. 102 at 19.

Novak also asserts that he did not have the required *mens rea* to violate Ohio Rev. Code § 2909.04(B). The statute provides that no one may "knowingly" use a computer "so as to disrupt, interrupt or impair" police operations. Novak cites Connor's grand jury testimony where he stated that Novak "may have thought" he was creating a parody, but he wasn't. ECF Doc. 86-1 at 7. Novak argues that this shows that he could not have "knowingly" violated the statute.

Novak contends that defendants lacked probable cause to arrest him, search his residence and electronics, seize his property and prosecute him under Ohio Rev. Code § 2909.04. Novak argues that because Connor made material omissions or misrepresentations to Magistrate Fink and other judicial officers, the warrants he obtained do not establish probable cause. ECF Doc. 102 at 20. He further argues that the

government had no legitimate interest in seizing his electronics. Finally, Novak argues that there was no probable cause to prosecute him and that Connor lied to the grand jury by telling them that the police department, dispatch and city hall were "getting inundated" with calls from residents about his Facebook page.

VI. Law & Analysis

A. Qualified Immunity

Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (Kennedy, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)) (for the proposition that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law").

Because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (emphasis deleted). The "driving force" behind creation of the qualified

immunity doctrine was a desire to ensure that "'insubstantial claims' against government officials [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640, n. 2, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Accordingly, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam). In this particular case, the question could not be resolved prior to discovery because Novak alleged facts that, if true, would have shown a lack of probable cause. Now that the parties have conducted discovery, the immunity question is ready for resolution. *See Novak v. City of Parma*, 932 F.3d 421 (6th Cir. July 29, 2019).

Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985. citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). To be clearly established, a right must be sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that right.' *Id.*, at 741, 131 S. Ct. 2074, 2083, 179 L. Ed. 1149 (quoting *Anderson*, 483 U.S. at 640.) In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." 563 U.S., at 741, 131 S. Ct. 2074, 2083, 179 L. Ed. 1149. This "clearly established" standard protects the balance between vindication of constitutional rights and

government officials' effective performance of their duties by ensuring that officials can " 'reasonably . . . anticipate when their conduct may give rise to liability for damages.' *Anderson, supra*, at 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (quoting *Davis v. Scherer,* 468 U.S. 183, 195, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)).

B. Alleged Constitutionally Protected Conduct

Novak's remaining claims are largely based on an alleged violation of his First and Fourth Amendment rights. Novak contends that his First Amendment rights were violated when the police arrested and prosecuted him for a violation of Ohio Rev. Code § 2909.04. But the Supreme Court has previously explained that the right allegedly violated must be established, "'not as a broad general proposition,' *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam), but in a "particularized" sense so that the "contours" of the right are clear to a reasonable official. *Anderson, supra,* at 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523. So here, as in *Reichle,* the constitutional right at question is not whether Novak was entitled to be free from retaliatory action based on his speech. He was. *See Kennedy v. City of Villa Hills, Ky.,* 635 F.3d 210, 219 (6th Cir. 2011). The more specific question that the instant case presents is: whether Novak was free from an arrest that was supported by probable cause. And *that* question was already clearly decided prior to Novak's arrest. *See Reichle,* 566 U.S. at 665.

The fundamental problem with Novak's claims is that the Supreme 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 664-665. "The Supreme Court said that in 2012, and it remains true today." *Novak v. Parma,* 932 F.3d 421, 429 (2019). Thus, even if Novak could show, as a matter of law, that he had a First Amendment right to post a parody on Facebook about the Parma police, if the defendants had probable cause to investigate and arrest him under Ohio Rev. Code § 2909.04, Novak cannot show any constitutional violation. In short, if defendants had probable cause, Novak's First Amendment claim, though significant in a general sense, is irrelevant to this Court's determination on the motions for summary judgment.

1. First Amendment Claims

"[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Houston, Tex. v. Hill,* 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed. 2d 398. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-463. The "right to be free from retaliatory arrest after insulting an officer was clearly established" before Novak's arrest in 2016. *See Kennedy,* 635 F.3d at 219 (6th Cir. 2011). But here, Novak's conduct did more than insult a police officer, it also disrupted police operations in violation of Ohio Rev. Code § 2909.04(B).

Novak claims that he clearly had a First Amendment right to post a "parody" on a Facebook page about the Parma Police Department. The Sixth Circuit Court of Appeals dedicated several pages of its opinion to considering whether Novak's Facebook page was, in fact, a parody protected by the First Amendment and concluded there was a dispute of fact on that issue.[7] ECF Doc. 24 at 8. This Court agrees that there is a genuine dispute of material facts on whether the Facebook post was protected by the First Amendment.

But Novak's conduct also confused some members of the public, leading them to believe that his was the real Parma Police Facebook page. ECF Doc. 86-1 at 4. When Connor consulted with Law Director Dobeck, they reasoned that Novak's conduct may have violated Ohio Rev. Code § 2909.04(B) with the following elements: 1) "knowingly;" 2) "using a computer;" and 3) "to disrupt, interrupt, or impair the functions of any police … operations." And Connor's investigation resulted in a finding of probable cause on each of those prima facie elements. Because defendants had probable cause, it is not necessary for this Court to decide whether the content of Novak's Facebook page was protected by the First Amendment. *Reichle,* 566 U.S. at 664-665*; Novak,* 932 F.3d at 429 ("If the officers did have probable cause, . . . they are entitled to qualified

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[7] Novak and defendants disagree. They both seemingly argue that the Court should decide, as a matter of law, whether Novak's posting was constitutionally protected activity. ECF Doc. 102 at 24-25; ECF Doc. 101-5 at 10-11. But such a determination is not necessary in this case.

immunity."); *Phillips v. Blair*, 786 F. App'x 519, 529 (6th Cir. 2019) ("Without controlling authority clearly establishing a First Amendment right to be free from a retaliatory arrest otherwise supported by probable cause, we also reverse the denial of qualified immunity on this claim."); *Marshall v. City of Farmington Hills,* 693 F. App'x 417, 426-427 (6th Cir. 2017) (finding that officers who had probable cause were entitled to qualified immunity on a retaliatory arrest claim).

At this stage, the survival of Novak's constitutional claims can be boiled down to one question: Did Officers Riley and Connor have probable cause to believe that Novak violated Ohio Rev. Code § 2909.04? The Court agrees with Novak (ECF Doc. 102 at 15) that this is a legal question for the Court because the material facts leading up to Novak's arrest and prosecution are generally undisputed. *See Gerics v. Trevino,* 974 F.3d 798, 806 (6th Cir. 2020). And, if there is no genuine dispute of material fact on the question of probable cause, then Novak has failed to show any violation of a clearly established constitutional right.

a. Prior Restraint

Novak has also asserted a First Amendment claim based on prior restraint. (Claim 1). "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications in advance of the time that such communications are to occur." *Alexander v. United States,* 509 U.S. 544, 550 (1993). In affirming this Court's denial of defendants' motion to dismiss, the Sixth Circuit questioned whether prior restraints had occurred when: 1)

Detective Connor sent a letter to Facebook; and 2) Captain Riley issued a press release. *Novak,* 932 F.3d at 433. Either of these communications could constitute a prior restraint, but only if each qualified as an "administrative order." *Id.* at 422.

Since then, two developments lead the Court to conclude that these communications were not administrative orders under the *Alexander* standard. First, discovery has shown that Detective Connor's letter to Facebook only requested that the false page be taken down. He did not necessarily expect Facebook to comply with his request. Connor Depo., ECF Doc. 107-1 at 336-337. And, Captain Riley testified that the primary purpose of the press release was to warn the public that the page was fake and to stop the continued phone calls that the police were receiving. Riley Depo., ECF Doc. 105-1 at 225-227. While the Sixth Circuit did note that something might be considered an "administrative order" even if it "is not on its terms binding," 932 F.3d at 433, there still must be the lurking threat of some form of action that the official intends to enforce in the event of noncompliance. In the instant case, any such threat no longer existed because Novak voluntarily deleted his Facebook page.

Second, the record reflects that both communications were sent after the creation of the Facebook page and the posting of most, if not all, of the material. At that stage, Novak had already spoken, so to speak; the words were out there, and therefore it is not clear that any threat that existed in Captain Riley's press release was a prior restraint, rather than

a reference to prosecution post-publication. Any threat that may have existed from Riley's press release could only be a reference to prosecution post-publication. And the Supreme Court has acknowledged the "well-established distinction between prior restraints and subsequent criminal punishments." *Alexander*, 509 U.S. at 548. If the press release threatened post-facto enforcement, therefore, it would not also qualify as a prior restraint. Prior restraint typically exists when "a public official has been given discretionary power to deny use *in advance of* actual expression." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989)) (emphasis added). Neither Connor nor Riley had the power to deny Novak's use of Facebook; on the contrary, the request and press release only arose after Novak used the forum. As such, the prior restraint claim fails.

2. Fourth Amendment Claims

Novak's Fourth Amendment claims will also fail if defendants had probable cause to arrest him for a violation of Ohio Rev. Code §2909.04. The Fourth Amendment protects "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures[.]" U.S. Const. amend. IV. Given our common-law tradition treating the home as "first among equals," *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), the Supreme Court has interpreted this language generally to require a warrant for a search of a private

residence. *E.g., Georgia v. Randolph*, 547 U.S. 103, 109, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006). That requirement, in turn, triggers another Fourth Amendment command: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Probable cause, the Supreme Court has "often" said, "is not a high bar." *Kaley v. United States,* 571 U.S. 320, 338, 134 S. Ct. 1090, 188 L. Ed. 2d 46 (2014); *Wesby*, 138 S. Ct. at 586. Here, defendants claim that they had probable cause, and it is undisputed that they obtained warrants for Novak's arrest and the search of his house and electronic devices. If there are no disputes of material fact as to the existence of probable cause, defendants are entitled to summary judgment on his Fourth Amendment claims as well.

3. Probable Cause

Novak argues that defendants did not have probable cause to arrest him, to search his property and/or his electronic devices. Defendants charged and prosecuted Novak with a violation of Ohio Rev Code §2909.04(B), which provides that "[n]o person shall knowingly use any computer, computer system, computer network, telecommunications device, or other electronic device or system or the internet so as to disrupt, interrupt, or impair the functions of any police, fire, educational, commercial, or governmental operations." There is no dispute that Novak used a computer and the internet to post his Facebook page.

However, he argues that Connor lacked probable cause to believe that Novak 1) "knowingly" violated the statute; and 2) actually "disrupted, interrupted, or impaired" the police operations.

"Probable cause exists 'if the facts and circumstances are such that a reasonably prudent person would be warranted in believing that an offense had been committed and that evidence thereof would be found on the premises to be searched.'" *Peffer v. Stephens*, 880 F.3d 256, 263 (6th Cir. 2018) (quoting *Greene v. Reeves*, 80 F.3d 1101, 1106 (6th Cir. 1996)). The officer must examine "the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence." *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000).

Here, the Rule 56 materials do not show a lack of probable cause on the "knowingly" or "disruption" elements of Ohio Rev. Code § 2909.04(B). Officer Connor became aware that someone had posted a Facebook page that appeared almost identical to the Parma Police Department's official page. Members of the public began calling the police department and posting on the fake Facebook page. Thus, Connor sought legal advice from Parma's Law Director, Timothy Dobeck. Connor and Dobeck determined that Novak had potentially violated Ohio Rev. Code § 2909.04. Then, as further detailed below, Connor methodically discussed the facts of the case with several judicial officers and sought the appropriate search warrants for his investigation. None of the judicial officers identified a lack of probable cause.

Novak does not dispute that he posted the fake Parma Police Facebook page. Rather, he contends that Connor knew that Novak had not "knowingly" "disrupted" "police operations." Novak argues that Connor knew that Novak thought his Facebook page was a satire or parody. And he argues that his Facebook page did not actually disrupt police operations.

Regarding the "knowingly" element of Ohio Rev. Code § 2909.04, intent is often difficult to prove and can be established by circumstantial evidence and inferences therefrom. *U.S. v. Goodwin,* 748 F. App'x 651, 655 (6th Cir. 2018). And in the context of probable cause, a reasonable officer is permitted to make inferences as to intent. *See U.S. v. Tagg,* 886 F.3d 579, 589 (6th Cir. 2018). Here, Connor had probable cause to believe that Novak was ***knowingly*** disrupting police business. Connor's investigation showed that Novak had deleted comments claiming that his page was a hoax. Novak Depo., ECF Doc. 90 at 131. And, when the police department attempted to warn the public about Novak's fake page, Novak copied the official warning and posted it on his page as well. Riley Depo., ECF Doc. 71-1 at 99. In other words, Novak took deliberate steps in real time to perpetuate the hoax which led to the police disruption. Officer Connor was permitted to infer that these deliberate steps evidenced the "knowingly" element of Ohio Rev. Code § 2909.04.[8]

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[8] Novak's roommate, Kozelka, also later testified that Novak was "messing with" the public through his Facebook page. Kozelka Depo. pp. 45-51, ECF Doc. 97-1 at 15.

Appendix B

Regarding the "disruption or interruption of police operations" element of Ohio Rev. Code § 2909.04, Novak argues that there was no real disruption or interruption of police operations. But Novak's argument is contrary to Connor's own testimony (ECF Doc. 107-1 at 232), and is based entirely on Novak's subjective interpretation of what should be required to substantiate a "disruption" of police operations under the statute.[9] Detective Connor didn't write Ohio Rev. Code § 2909.04, and the statute doesn't specify that the disruption of police operations must be "substantial."

Novak cites several cases in which courts determined statues were overly broad when they proscribed constitutionally protected activity. *See, City of Houston, Tex. v. Hill,* 482 U.S. 451, 455 (1987); *State v. Schwing*, 42 Ohio St. 2d 295, 306 (1975); *State v. Brand*, 2 Ohio App. 3d 460, 460 (1981); *Toledo v. Thompson-Bean*, 173 Ohio App. 3d 566, 573 (2007); *City of Euclid v. Moore*, No. 75143, 1999 Ohio App.LEXIS 5900 at * (8th Dist. Dec. 9, 1999). But none of these cases held that, in the absence of any clear legal precedent and for purposes of qualified immunity, a police officer should question whether a statute is constitutional. Moreover, in addition to Connor's testimony that *he* reasonably believed that Novak had violated the statute, several other law

[9] Novak's assertion is also contrary to his roommate's understanding that Novak posted the fake Facebook page to "mess with" the public, not as a parody on the police. *See* Kozelka Depo., ECF Doc. 97-1 at 15.

enforcement officials reviewed the facts before charges were brought against Novak.

a. Dobeck's Legal Advice

Although not necessarily dispositive, the fact that Connor sought legal advice from Law Director Dobeck is a factor suggesting that Connor's investigation was reasonable and that he had probable cause. After Connor was told to investigate the Facebook page, he sought legal advice from Dobeck. Connor testified that if Dobeck had advised that Novak should not be charged, he would not have charged him. ECF Doc. 107-1 at 261. Consultation with [an attorney] is a factor to be considered in evaluating whether an officer acted reasonably.[10] *Hasalah v. City of Kirtland,* 2013 U.S. Dist. LEXIS 71042 (N.D. Ohio May 20, 2013); *see also Cox v. Hainey*, 391 F.3d 25 (1st Cir. 2004) (officer was entitled to qualified immunity because he met with the prosecutor, discussed the case and the prosecutor stated that the officer had probable cause);

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[10] Reliance would not satisfy this standard if an objectively reasonable officer would have cause to believe that the prosecutor's advice was flawed, off point, or otherwise untrustworthy. Cf. *Groh v. Ramirez,* 540 U.S. 551, 124 S. Ct. 1284, 1293-94, 157 L. Ed. 2d 1068 (2004) (holding that qualified immunity could not shield an officer from liability for actions predicated upon an obviously deficient arrest warrant). Law enforcement officers have an independent duty to exercise their professional judgment and can be brought to book for objectively unreasonable mistakes regardless of whether another government official (say, a prosecutor or a magistrate) happens to compound the error. *See Malley v. Briggs,* 475 U.S. 335, 340-41, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986). However, in this case, Connor did not make an objectively unreasonable mistake.

Konja v. Seitzinger, 363 F. 3d 645, 648 (7th Cir. 2004) (awarding officer qualified immunity and holding that the officer's consultation with prosecutor "goes far" to establish qualified immunity); *Dixon v. Wallowa County*, 336 F.3d 1013 (9th Cir. 2003) (a reasonable officer could have believed that his conduct was lawful based on the prosecutor's advice); *Wadkins v. Arnold,* 214 F.3d 535, 543 (4th Cir. 2000) (police officer who consulted with prosecutor and obtained a warrant from the magistrate judge acted reasonably and was, therefore, entitled to qualified immunity). The fact that Connor sought legal advice before proceeding with his investigation lends support to the reasonableness of his investigation and arrest of Novak.

b. Warrants Issued by Magistrate Fink and Judge O'Donnell

After seeking advice from Law Director Dobeck, Connor appeared before Magistrate Edward Fink to obtain an arrest warrant. ECF Doc. 107-1 at 294. Detective Connor told Magistrate Fink that people were calling into the police station about Novak's Facebook page. Magistrate Fink considered this a disruption and issued the warrant. ECF Doc. 92-1 at 14.

Normally, "[p]olice officers are entitled to rely on a judicially secured warrant for immunity from a § 1983 action for illegal search and seizure unless 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). However, "an officer cannot rely

on a judicial determination of probable cause if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant." *Id.* A plaintiff, thus, may challenge an officer's qualified immunity defense in a civil rights case by showing that (1) the officer's warrant affidavit contained a false statement or omission that was made either deliberately or with reckless disregard for the truth; and (2) the false statement or omission was material to the finding of probable cause. *See Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir. 2003); *Sykes v. Anderson*, 625 F.3d 294, 305 (6th Cir. 2010).

Here, Novak has not shown that Detective Connor made any false statements to Magistrate Fink. ECF Doc. 92-1 at 14. Novak's contention that Detective Connor lied to Magistrate Fink to secure the warrant (ECF Doc. 102 at 20) is not supported by Magistrate Fink's testimony. ECF Doc. 92-1 at 14. Nor has Novak shown that Connor omitted material information when seeking the warrant. Novak argues that Detective Connor should have told Magistrate Fink that Novak's conduct was speech and that his Facebook page was a parody or joke. ECF Doc. 102 at 21. But that was not how Detective Connor saw it, and he was not misleading Magistrate Fink by failing to characterize it that way.

Similarly, Connor obtained search warrants from Judge Kenneth Spanagel and Judge Deanna O'Donnell. Connor's affidavit for search warrant relayed the general facts of his investigation (ECF Doc. 108-1 at

183-187), including that there had been "numerous" calls and complaints to the police department. ECF Doc. 108-1 at 25. Judge O'Donnell testified that "numerous" to her meant two, three, four or above. ECF Doc. 108-1 at 28. Thus, even if Connor's affidavit had stated the exact amount of calls – eleven,[11] Judge O'Donnell would have issued the search warrants. Judge O'Donnell also testified that she thought people would have believed that Novak's Facebook page was real. ECF Doc. 108-1 at 19. Like the warrant issued by Magistrate Fink, the warrants issued by Judges Spanagel and O'Donnell lend support to the reasonableness of Connor's investigation and arrest of Novak. Novak has not shown that Connor obtained the search warrant from Judges Spanagel and O'Donnell by making material misrepresentations or omissions.

c. Decision to Prosecute and Grand Jury Indictment

Novak's failure to show that Connor misled others also impacts his malicious prosecution claim. As police officers, Riley and Connor lacked the authority to prosecute, but Novak could still proceed with his malicious prosecution claim against them if he could show that they influenced or participated in the decision to prosecute. *Sykes v. Anderson*, 625 F.3d 294, 311 (6th Cir. 2010). The term "participated" is

[11] Novak argues that the number of calls was insignificant (as a matter of law) and did not disrupt police operations – but there were more than two, three or four calls – the number Judge O'Donnell thought could constitute "numerous." Connor testified to the grand jury that there had been eleven calls. ECF Doc. 102-7 at 4.

construed "within the context of tort causation principles." *Webb v. United States,* 789 F.3d 647, 659 (6th Cir. 2015), (quoting *Sykes*, 625 F.3d at 308 n.5). Prosecution must have been a reasonably foreseeable consequence of the defendants' conduct, and the conduct must have actually influenced the decision to prosecute. *See Sykes*, 625 F.3d at 314-15. An indictment or the filing of charges by a prosecutor, if independently supported and insulated from the officers' influence, can break the chain of causation, unless the officer "could reasonably foresee that his misconduct would contribute to an independent decision that results in a deprivation of liberty." *Id.* at 316 (citations and internal quotation marks omitted). The officer must have participated "in a way that aids in the decision, as opposed to passively or neutrally participating," *Webb,* 789 F.3d at 660 (quoting *Sykes*, 625 F.3d at 308 n.5), which requirement is satisfied by showing some "element of blameworthiness or culpability in the participation," *Johnson v. Moseley*, 790 F.3d 649, 655 (6th Cir. 2015)

As with his other claims, in order to defeat the defense of qualified immunity on his malicious prosecution claims, Novak must show a lack of probable cause. Specifically, he must point to a genuine dispute of material fact showing Riley and Connor acted in a way that would permit an inference of blameworthiness or culpability – "less than malice" but more than "negligence or innocent mistake"—and that their "deliberate or reckless falsehoods result[ed] in [Novak's] prosecution **without probable cause**." *Johnson,* 790 F.3d at 655. (emphasis added).

Regarding the decision to prosecute, Cuyahoga County Prosecutor McGinty testified that he made the decision independently and, like the police officers, he did not consider Novak's Facebook page to be protected speech. ECF Doc. 93-1 at 5. He also stated that he independently looked at the police report and screenshots of Novak's Facebook page before deciding to prosecute. He testified that Connor told him that the police had received "multiple calls" about the Facebook page. ECF Doc. 93-1 at 14. McGinty's decision to prosecute was an independent one. And the facts supporting his decision were accurate. Novak has failed to show that Riley and Connor misled Prosecutor McGinty or that they were somehow culpable in influencing him to prosecute Novak. The fact that McGinty made an independent decision to seek an indictment insulates the officers from a malicious prosecution claim and also lends support to a finding that the officers had probable cause to arrest Novak in the first place.

The prosecutor took the matter to a grand jury. As a general rule, "the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause." *Webb v. United States,* 789 F.3d at 659, citing *Barnes v. Wright,* 449 F.3d 709, 716 (6th Cir. 2006). An exception to this general rule applies when defendants knowingly or recklessly present false testimony to the grand jury to obtain the indictment. *Martin v. Maurer,* 581 F. App'x 509, 511 (6th Cir. 2014); *Robertson v. Lucas,* 753 F.3d 606, 616 (6th Cir. 2014).

Novak argues that Connor "crossed the line from fact witness to advocate," when he told the grand jury that the police department, dispatch and city hall were "getting innundanted" with calls from residents who "honest to God" believe police had posted this page. ECF Doc. 102 at 23; ECF Doc. 102-7. But Connor later told the grand jury that the dispatch center had received 11 phone calls. ECF Doc. 102-7 at 4. So, facts were presented to the jury by which they could decide whether this was a disruption of police operations. Novak also contends that Connor crossed the line when he told the grand jury that Novak's Facebook page was not a parody. True, Connor expressed his opinion that Novak's Facebook page was not a parody, but he also referred to this as an "argument." The grand jury was free to reject Connor's "argument" about Novak's Facebook page. ECF Doc. 102-7 at 7. Novak has not shown that Connor lied or misled the grand jury. The grand jury indictment lends further support that defendants had probable cause to investigate and arrest Novak for a violation of Ohio Rev. Code § 2909.04.

Finally, the trial judge denied a motion to dismiss on First Amendment grounds and a motion for acquittal following the government's case. ECF Doc. 6-1 at 256. In denying the motion for acquittal, the trial judge ruled that there was evidence from which a reasonable jury could conclude that Novak was guilty of knowingly interrupting the operations of the police department. The standard of conviction – proof beyond a reasonable doubt – is far more stringent than mere probable cause. Thus, the trial court's

determination that there was sufficient evidence to support Novak's conviction lends support to a finding that the officers had probable cause to investigate and arrest Novak.

Novak has failed to show a lack of probable cause for his arrest, search, seizure and prosecution. Defendant Connor sought legal advice before proceeding with his investigation against Novak. He properly obtained an arrest warrant; there are no facts showing he misled Magistrate Fink. He obtained valid search warrants; there are no facts showing he misled Judges Spanagel or O'Donnell. Prosecutor McGinty made an independent decision to prosecute; there are no facts showing Connor misled Prosecutor McGinty. And, a grand jury decided to indict Novak; there are no facts showing that Connor falsely testified to the grand jury. In short, Novak has failed to show that Officers Riley and Connor lacked probable cause for his investigation and arrest. There are no genuine disputes of material fact on the issue of probable cause. Novak has failed to show any violation of a clearly established constitutional right. For this reason, Riley and Connor are entitled to summary judgment on Novak's pending First Amendment and Fourth Amendment claims, Claims 1, 3, 6, 7, 8, 9, and 11, and his malicious prosecution claim, Claim 27.

C. *Monell* Liability against Parma

Section 1983 creates a federal cause of action against state or local officials who, while acting under the color of state law, deprive a person of a federal right. 42 U.S.C. § 1983. To prevail in a § 1983 suit

against a municipality, a plaintiff must show that the alleged federal right violation occurred because of a municipal policy or custom. *Monell v. Dep't of Social Servs.,* 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). A municipality "may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id*. Section 1983 liability does not attach to a municipality based on the actions of its employee tortfeasors under the doctrine of respondeat superior; instead, such liability may only be imposed on the basis of the municipality's own custom or policy. *Monell*, 436 U.S. at 691. "Under § 1983, local governments are responsible only for their own illegal acts" and may not be held vicariously liable for the actions of their employees. *D'Ambrosio v. Marino*, 747 F.3d 378, 386 (6th Cir. 2014) (quoting *Connick v. Thompson,* 563 U.S. 51, 131 S. Ct. 1350, 1359, 179 L. Ed. 2d 417 (2011)).

To bring a claim under § 1983, a plaintiff must "identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law." *Watkins v. City of Battle Creek,* 273 F.3d 682, 685 (6th Cir. 2001) (quoting *Russo v. City of Cincinnati,* 953 F.2d 1036, 1042 (6th Cir. 1992)). Here, Novak has failed to identify the violation of any constitutional right because, as already stated, the Supreme 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 664-665. And because probable cause existed, Novak has also failed to show a Fourth Amendment violation. Because Novak has failed to

show an underlying constitutional violation, Parma is entitled to summary judgment on Novak's *Monell* claims.

Moreover, Novak's *Monell* claims would fail even if he had shown an underlying violation of his constitutional rights. There are at least four avenues a plaintiff may take to prove the existence of a municipality's illegal policy or custom, but all of them require an underlying constitutional violation. The plaintiff can look to (1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations. *Id*.; *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986); *Stemler v. City of Florence,* 126 F.3d 856, 865 (6th Cir. 1997); *Doe v. Claiborne County*, 103 F.3d 495, 507 (6th Cir. 1996). Here, Novak has asserted claims for *Monell* liability based on an authorized action and on a failure to train. (See Claims 12, 13, and 14). Claims 12 and 13 are based on Connor and Dobeck's decision to investigate and prosecute Novak. Claim 14 alleges that Parma failed to adequately train its employees on clearly established First Amendment rights.

Parma claims that it did not have an express policy that violated Novak's rights and that Timothy Dobeck was not a policymaker for the City of Parma. Parma acknowledges that Dobeck reviewed this incident for possible criminal conduct, but contends he

only gave advice and did not create policy for Parma. Parma also argues that *Pembaur v. City of Cincinnati,* is distinguishable. ECF Doc. 100-5 at 23.

Novak first argues that *Connor* had policymaking authority over his investigation. He argues that Connor made final decisions and had "unfettered discretion" over his investigation. ECF Doc. 124 at 22-24. Citing *Pembaur,* Novak also argues that Dobeck had policymaking authority. Finally, he argues that Parma failed to properly train its officers on First Amendment rights.

1. Authorized Action or Policymaker Liability under *Monell*

In *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (March 25, 1986), the Supreme Court held that a county defendant was subject to liability under *Monell* because its prosecutor's instruction to the deputy sheriff to make a warrantless entrance into a third party's property to seize witnesses constituted a decision by an official authorized to establish county policy, even though the actions were only taken once. *Id.* at syllabus. However, the Court stated that it might have found for the county defendant if the prosecutor had only rendered "legal advice." *Id.* at 484-485.

Parma argues that Dobeck only gave legal advice to Connor in this case; that he was not making policy; and that it is not liable under *Monell* for Dobeck's advice. Conversely, Novak argues that both Connor and Dobeck were policymakers with "unfettered

discretion" as to whether he would be charged under Ohio Rev. Code § 2909.04. Here, the undisputed facts support Parma's argument. During their depositions, Connor and Dobeck were careful to describe their interaction with one another as Connor "seeking advice." *See e.g.,* Dobeck Depo., ECF Doc. 96-1 at 4-5; Connor Depo., ECF Doc. 107-1 at 167-170. Novak hasn't cited any evidence that Dobeck "ordered" Connor to charge Novak with a crime.[12] In fact, Law Director Dobeck testified that he did not authorize the charge against Novak; he only gave legal advice and that Detective Connor sought search warrants from Judges O'Donnell, Spanagel and Magistrate Fink. Dobeck Depo., ECF Doc. 96-1 at 13.

The fact that Connor sought warrants from several different officials *after* he discussed the case with Dobeck undermines Novak's policymaking argument. In *Pembaur,* the prosecutor ordered the police officers to enter a third-party's property without a warrant to seize witnesses. Shortly after the prosecutor gave these instructions, the police officers executed them. *Pembaur,* 475 U.S. at 484-485. There was no impartial subsequent review. But here, after Connor discussed the facts with Dobeck, he applied to Magistrate Fink for a warrant. Magistrate Fink did not perceive a violation of Novak's constitutional rights and

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[12] Connor testified that he would not have charged Novak if Dobeck had advised against it. However, he did not testify that Dobeck ordered him to proceed with the investigation. Here, that distinction is significant and distinguishes this case from *Pembaur*.

issued a warrant for his arrest. Fink Depo., ECF Doc. 92-1 at 82-84.

This is not a case in which Parma is only "disingenuously arguing" that Dobeck rendered legal advice rather than a final decision for Parma. After Connor sought legal advice from Dobeck, he sought warrants from several judicial officers and testified before a grand jury, which ultimately indicted Novak. Dobeck did not make policy for Parma by advising Connor. And, his advice – that Novak may have violated Ohio Rev. Code § 2909.04 and that Connor should obtain warrants – was not a violation of any constitutional right.

Novak cites several cases arguing that Monell liability applies when investigating officers have "unfettered discretion" and cause right violations. *Monistere v. City of Memphis,* 115 F. App'x 845 (6th Cir. 2004). *Rush v. City of Mansfield,* 771 F. Supp.2d 827 (N.D. Ohio Feb. 11, 2011); *Cline v. City of Mansfield,* 745 F. Supp.2d 773 (N.D. Ohio Sep. 30, 2010). But Novak's cases are inapposite; they involve officer conduct that was not reviewed by an impartial judicial officer and was not supported by a valid warrant. Moreover, Connor and Dobeck did not have "unfettered discretion." As already stated, their decision to continue with the investigation against Novak was reviewed by several other judicial officers and a grand jury before charges were brought.

The instant case is distinguishable from *Pembaur*. Parma did not assign unfettered discretion to Connor and Dobeck. Their decision to move forward with an

investigation against Novak was reviewed by several impartial judicial officers. Connor obtained an arrest warrant and search warrants. And it was a grand jury who decided to indict Novak. These facts are not in dispute. Because there was no violation of Novak's constitutional rights and because Connor and Dobeck did not make any policy on behalf of Parma, the City of Parma is entitled to summary judgment on Novak's *Monell* – policymaker theory of liability asserted in Claims 12 and 13 of his amended complaint. ECF Doc. 6 at 50-51.

2. Failure to Train

Novak has also asserted a claim for *Monell* liability for Parma's failure to train its officers on First Amendment rights.[13] (Claim 14 – ECF Doc. 6 at 52). Inadequate training can be the basis for a § 1983 municipal liability claim when it "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Roell v. Hamilton Cty., Ohio/Hamilton Cty. Bd. of Cty. Comm'rs,* 870 F.3d 471, 487 (6th Cir. 2017). But "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson,* 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011)). To succeed on an inadequate training claim, a plaintiff must prove: "(1) that a training program is inadequate to the tasks that the officers must perform; (2) that the inadequacy is the result of the [municipality's] deliberate indifference; and (3)

[13] As with his policymaker claims, this claim fails because Novak has not shown an underlying constitutional violation.

that the inadequacy is closely related to or actually caused the plaintiff's injury." *Roell,* 870 F.3d at 487 (quoting *Brown v. Chapman*, 814 F.3d 447, 463 (6th Cir. 2016)).

Here, Novak argues that Parma failed to adequately train its officers on potential First Amendment violations. ECF Doc. 124 at 29. But officers' tasks do not so regularly involve First Amendment issues to mandate training on this subject. And because the recognition of First Amendment issues is based on common law, it is not stagnant. Thus, Parma would have been required to regularly train its officers on updates to First Amendment law. And even if it had, First Amendment training may not have precluded an investigation into Novak's Facebook page. Several lawyers (Dobeck, McGinty, Spanagel and O'Donnell) reviewed the facts of this case and failed to identify any First Amendment violation. If their law degrees inadequately trained them to recognize a potential First Amendment violation, it is very unlikely that Parma could have provided officer training that would have halted this investigation.

Officer Connor testified that he was trained to seek advice from the Law Department for things that he didn't know in the "legal sense." ECF Doc. 107-1 at 261. Given the fluidity and complexity of First Amendment corpus juris, this was a better policy than attempting to train law enforcement officers on potential First Amendment violations. In addition to failing to show an underlying constitutional violation, Novak has failed to show that Parma's training program was

inadequate to its officers tasks; that this inadequacy was the result of Parma's deliberate indifference; and that the inadequacy was closely related to or actually caused his injury. Because there are no genuine disputes of material fact on these elements, Parma is entitled to summary judgment on Novak's claim for *Monell* liability for failure to train (Claim 14).

D. Conspiracy

Novak has also asserted a conspiracy claim against Riley, Connor and John Doe. (Claim 15, ECF Doc. 6 at 54). Riley and Connor point out that Novak has not pursued a claim against the "John Doe" defendant and that the Sixth Circuit has held that "members of the same legal entity cannot conspire with one another if their acts were within the scope of their employment." *See Jackson v. City of Cleveland,* 925 F.3d 793, 818 (6th Cir. 2019). Novak has not opposed Riley and Connor's motion for summary judgment on the conspiracy claim. The Sixth Circuit cited *Jackson,* and permitted Novak's conspiracy claim to continue only because he had named a John Doe defendant who could have been working for a different legal entity. *Novak*, 932 F.3d at 436-437. But Novak has never amended his pleadings or even argued that John Doe worked for a different entity. Because Riley and Connor both work for the Parma Police Department and Novak has not pursued any claim against the John Doe defendant, the intracorporate conspiracy doctrine applies and Riley and Connor are entitled to summary judgment on Novak's conspiracy claim. *Id.*

Appendix B

E. Federal Privacy Protection Act

Novak has asserted a Federal Privacy Protection Act against all three defendants. The Federal 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)(1). 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.

Like his other claims, Novak's Privacy Protection Act claim depends on whether Riley and Connor had probable cause to search and seize the contents of his apartment. *See Novak,* 932 F.3d at 435-436. As explained above, before searching and seizing any of Novak's property, Connor obtained a valid search warrant, and there are no facts suggesting that he made false statements or omissions to obtain it. Because defendants' search of Novak's property was pursuant to a valid search warrant supported by probable cause, defendants are entitled to summary judgment on Novak's Federal Privacy Protection Act claim (Claim 16).

Appendix B

F. Supervisor Liability

Claim 18b of Novak's amended complaint is a supervisor liability claim against Defendant Riley. ECF Doc. 6 at 57. Respondeat superior is not a proper basis for liability under § 1983. *McQueen v. Beecher Cmty. Sch.,* 433 F.3d 460, 470 (6th Cir. 2006), citing *Leary v. Daeschner,* 349 F.3d 888, 903 (6th Cir. 2003); *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.), cert. denied, 469 U.S. 845, 105 S. Ct. 156, 83 L. Ed. 2d 93 (1984). Nor can the liability of supervisors be based solely on the right to control employees, *Bellamy*, 729 F.2d at 421, or "simple awareness of employees' misconduct." *Leary,* 349 F.3d at 903; *Bellamy*, 729 F.2d at 421. Furthermore, "a supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor 'either encouraged the specific incident of misconduct or in some other way directly participated in it.'" *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (quoting *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982)). "At a minimum a plaintiff must show that the [supervisor] at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Id*. (quoting *Hays*, 668 F.2d at 874).

As already explained, Officers Riley and Connor are immune from liability for the charges that were brought against Novak. They had probable cause to believe that a violation of Ohio Rev. Code § 2909.04 had occurred. Even if the content of Novak's Facebook page was protected by the First Amendment, Novak did not have a First Amendment right to be free from

a retaliatory arrest that was supported by probable cause. There was no constitutional violation. Defendant Riley is immune from liability and is entitled to summary judgment on Novak's supervisor liability claim.

G. State Law Claims

Novak has asserted several claims based on various state laws and a tortious interference with contract claim against Defendants Riley and Connor (Claims 19, 20, 21, 22, 23, 24, 25, 26, and 28). The parties seem to agree that Riley and Connor are entitled to state law immunity on these claims unless they acted with "malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b). Novak's state law claims survived defendants' motion to dismiss because he alleged that Connor misled Magistrate Fink and the grand jury to advance his investigation and prosecution of Novak. But the Rule 56 materials have not evidenced any misleading, malicious purpose or bad faith on Detective Connor's part. As already stated, he was not obligated to explain to Magistrate Fink or the grand jury that Novak viewed his Facebook page as a parody protected by the First Amendment. Connor didn't see it that way, and he had probable cause to believe that Novak had violated Ohio Rev. Code § 2909.04. Because Novak has not shown that there are any genuine disputes of material fact on the question of whether Connor and/or Riley acted with malicious purpose, in bad faith, or in a wanton or reckless manner, they are entitled to immunity and summary

judgment on his state law claims and his claim for tortious interference with contract.

VII. Conclusion

It has been almost exactly 5 years since Novak posted his Facebook page that led to the events in this case. While the doctrine of qualified immunity has generated a great deal of recent controversy, that has mainly involved the use of force by law enforcement officers, particularly the use of deadly force.

This case at its core revolves around the decision whether or not to prosecute. One can legitimately question whether 11 calls to the police office from members of the public confused by Novak's Facebook page was enough of an interference to warrant the expenditure of resources to investigate and prosecute Novak. But that was a judgment call for the police officers to make. So long as they had probable cause to believe that Novak had violated the law, which they did, the doctrine of qualified immunity justifiably shields them from personal liability. The police officers sought legal advice from the Parma Law Director, and then sought and obtained warrants at every step of the way. Each judge who approved a warrant made a determination that there was probable cause. And ultimately the Cuyahoga County Prosecutor made an independent review of the evidence and concluded it was sufficient to prosecute, and he sought and obtained a grand jury indictment. Under the facts of this case and Supreme Court and 6th Circuit case law, the officers are entitled to qualified immunity.

Appendix B

Because there are no genuine disputes of material fact on any of Novak's remaining claims, the Court GRANTS summary judgment in favor of defendants (ECF Doc. 100 and ECF Doc. 101) and DENIES summary judgment in favor of plaintiff. ECF Doc. 102. The Court does not reach the issue of punitive damages because defendants are entitled to summary judgment on all of the remaining claims.

Dated: February 24, 2021

s/Dan Aaron Polster
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTHONY NOVAK, *Plaintiff-Appellee,* *v.* 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.*	No. 18-3373

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.

Appendix C

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" stand-

ard. 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 suf-

fered 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.

Appendix C

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 dis-

prove 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 un-

der *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 communica-

tions 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 prosecu-

tion). 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. Met-*

ro 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.

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY NOVAK, Plaintiff, vs. THE CITY OF PARMA, *et al.* Defendants.	Case No. 1:17-CV-2148 JUDGE DAN AARON POLSTER **OPINION AND ORDER**

Plaintiff Anthony Novak filed this civil rights action against the City of Parma (the "City"), Parma police officers Kevin Riley and Thomas Connor ("the Officer Defendants"), and John Doe, a law enforcement official and member of the Ohio Internet Crimes Against Children Task Force (collectively, the "Defendants") on October 10, 2017. Doc #: 1.[1] He filed his First Amended Complaint on October 18, 2017. Doc #: 6.[2] Before the Court are two motions: the City and the Officer Defendants each filed a Motion to Dismiss for Failure to State a Claim on January 15, 2018. Doc #:

[1] Plaintiff previously filed this action on September 19, 2016 but it was later dismissed without prejudice on January 25, 2017. *See Novak v. City of Parma*, et al., 1:16-cv-2335.

[2] All citations are to the First Amended Complaint, Doc #: 6.

12, 13. Plaintiff filed his Responses to the Motions on February 28, 2018. Doc #: 15, 16. The Defendants filed Replies on March 28, 2018. Doc #: 17, 18.

For the following reasons, the Motions are **GRANTED in part** and **DENIED in part**. Plaintiff's Claims 10 (Property Retention) and 29 (Replevin) are **DISMISSED WITH PREJUDICE**. Claims 17 (Unconstitutionally Vague and Overbroad) and 18 (Unconstitutional As Applied) are **DISMISSED WITHOUT PREJUDICE**. All remaining claims may proceed.

I. Facts

On a motion to dismiss, the court construes all well-pleaded facts in the light most favorable to the plaintiff. *Johansen v. Presley*, 977 F. Supp. 2d 871, 876 (W.D. Tenn. 2013).

A. The Facebook Page

On March 2, 2016, Plaintiff created a Facebook page (the "Facebook Page") to criticize the Parma Police Department (the "Department") by posting parodies of Department releases. Compl. ¶ 45. Specifically, he created the Facebook Page to anonymously voice his criticism and frustration on matters of public concern like the Department's policing priorities, racial sensitivity, and respect for civil rights, among others. Compl. ¶ 49, 62. He posted six times to the Facebook Page during the 12 hours it remained online and attracted less than 100 followers. Compl. ¶¶ 45, 55. The six posts included ones such as:

a. An apology for neglecting to inform the public about an armed white male who robbed a Subway sandwich shop, requesting assistance identifying the "African American woman" loitering in front of the shop while it was robbed "so that she may be brought to justice."

b. A "Food Drive to benefit teen abortions" at which officers "will be giving out free abortions to teens using an experimental technique discovered by the Parma Police Department" "in a police van in the parking lot at Giant Eagle."

c. A "temporary law" introduced by the Department forbidding "residence [sic] of Parma from giving ANY HOMELESS person food, money or shelter in our city" as "an attempt to have the homeless population eventually leave our city due to starvation."

Id. Unlike the Department's official page, the Facebook Page displayed the logo "We no [sic] crime." and was designated as a "community" fora instead of the official designations used in official police department pages. Compl. ¶ 46. Plaintiff's Facebook Page also lacked the official Facebook verification feature. Compl. ¶ 47. This feature signals to a person visiting a Facebook page that the authenticity of the page has not been verified. *Id.* The Department's official website links users directly to the Department's official Facebook account. *Id.* The Department's official Facebook account remained fully accessible on March 2, 2016. Compl. ¶ 62.

The same day that Plaintiff posted the Facebook Page, the Department posted a notice on its official Facebook page warning the public about the Facebook Page and informing them that the Department was investigating it. Compl. ¶ 76. By the end of the day, the Department had deleted dozens of comments from users mocking the Department for its inability to take a joke. Compl. ¶¶ 77-78. During that time, the Department also issued a press release to news outlets announcing the criminal investigation. Compl. ¶ 92. Once Plaintiff became aware of the Department's threats of criminal investigation, he took down the Facebook Page. Compl. ¶ 97.

B. The Investigation

Based solely on the Facebook Page's content, the Defendants took quick action to identify and punish its anonymous author. Compl. ¶ 64. Officer Riley opened a criminal investigation and assigned Officer Connor to the case, based on Officer Connor's experience with child-pornography investigations.[3] Compl. ¶ 69. Officer Riley believed that Officer Connor could leverage his experience combating child pornography to force Facebook to shut down the Facebook Page. Compl. ¶ 70. Officer Connor spent two days monitoring Facebook and drafting a preliminary investigative report (the "Report"). Compl. ¶ 73. The Report contains no allegation or evidence that any police services were disrupted by the Facebook Page. *Id.* Officer Connor also sent a takedown notice to Facebook stating

[3] No allegation has ever been made that anything posted on the Facebook Page constituted child pornography. Compl. ¶ 53.

that the Facebook Page was under criminal investigation. Compl. ¶ 81.

Next, Officer Connor contacted John Doe, an officer on the Ohio Internet Crimes Against Children Task Force, to obtain the non-public contact information for the Facebook employee responsible for shutting down accounts engaged in illegal activity like child pornography. Compl. ¶ 85. Officer Doe provided Officer Connor with this individual's email address and Officer Connor promptly sent another takedown request. Compl. ¶¶ 86-87. Officer Connor also prepared and issued a subpoena to Facebook for the IP address of the Facebook Page's author. Compl. ¶ 90. Officer Riley directed Officer Connor to prepare a search warrant and affidavit against Facebook under Ohio Rev. Code § 2909.04(B). Compl. ¶¶ 99-100. This statute criminalizes the use of the internet to "disrupt, interrupt, or impair the functions of" the police. *Id.* Neither the warrant nor the affidavit identified a single police function or service that was disrupted by Plaintiff's Facebook Page. Compl. ¶ 102. Nor did they disclose that the Facebook Page was a parody. *Id.*

On March 18, 2016, Officer Connor received nearly 3,000 pages of records from Facebook in response to his warrant. Compl. ¶ 103. These records identified Plaintiff as the author of the Facebook Page. *Id.* The Officer Defendants consulted the City's law director and decided to pursue a criminal charges against Plaintiff. Compl. ¶ 104. The Complaint charging Plaintiff with a single felony count of violating §

2909.04(B) was filed that same day. Compl. ¶105. Officer Connor then applied for and obtained an arrest warrant from a Parma Municipal Court magistrate. Compl. ¶ 107. The warrant application stated only that Plaintiff created a fake Facebook account, purporting to be a legitimate Department page. *Id.* It did not mention any disruption in police operations. *Id.* Plaintiff was arrested on March 25, 2016 and spent four days in Cuyahoga County jail. Compl. ¶ 108-09. When word got out of Plaintiff's arrest, the public responded by flooding the Department's official Facebook page with accusations that the Department violated Plaintiff's First Amendment rights. Compl. ¶ 110-113.

On March 25, 2016, the day of Plaintiff's arrest, Officer Connor–under Officer Riley's supervision–submitted a warrant application to search Plaintiff's apartment. Compl. ¶ 116. The application was based solely on Officer Connor's assertions that the Facebook Page's fake posts were disrupting police functions. *Id.* The Officer Defendants had no evidence of any disruption in police services, nearly three weeks after Plaintiff took the Facebook Page down. Compl. ¶ 118. Officer Connor also included misrepresentations in his warrant affidavit including that Plaintiff purported to be a Department representative on the Facebook Page and altered or affected the Department's official page. Compl. ¶ 119. The Parma Municipal Court signed the warrant. Compl. ¶ 121. The Department's SWAT team executed the warrant on Plaintiff's apartment, that same day. Compl. ¶ 122. The SWAT team seized every electronic device in

Plaintiff's residence including: two laptops, two hard drives, two videogaming consoles, a smartphone, a cell phone, and a computer tablet. Compl. ¶ 123. The Officer Defendants once again obtained and executed a warrant to search Plaintiff's electronic devices, relying on the same misrepresentations as with the previous warrants. Compl. ¶ 127. Nothing incriminating was found. Compl. ¶ 131.

C. The Prosecution

A grand jury returned a one-count indictment against Plaintiff. Compl. ¶ 132. At trial, both Officer Defendants testified against Plaintiff. Compl. ¶¶ 141-44. Officer Riley testified that he sought to shut down the Facebook Page to address officer safety concerns at the two locations referenced in the Facebook Page posts (i.e., the Giant Eagle where officers were performing free teen abortions using experimental techniques). Compl. ¶ 143. None of the warrants, subpoenas, or charging documents reflected any officer safety concerns. Compl. ¶ 144. The only evidence of disruption presented by Cuyahoga County prosecutors at trial was phone calls made by Parma residents complaining about the Facebook Page's affront to its officers, notifying the Department that the Facebook existed, or enquiring whether the Department authorized the Facebook Page. Compl. ¶ 147. These calls made up twelve minutes of total call time and were documented on April 5, 2016, over a week after Plaintiff was arrested and all the warrants had been executed. Compl. ¶ 148. After all evidence was presented

and closing arguments concluded, the jury acquitted Plaintiff on August 11, 2016. Compl. ¶ 151.

Plaintiff then brought the instant action asserting twenty-five claims against Officer Connor, twenty-six claims against Officer Riley, seven claims against the City, and one claim against Officer John Doe.

II. Legal Standard

In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, a district court must accept as true all well-pleaded allegations and draw all reasonable inferences in favor of the non-moving party. *Shoup v. Doyle*, 974 F. Supp. 2d 1058, 1071 (S.D. Ohio 2013); *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 538 (6th Cir. 2012). A court need not, however, credit bald assertions, legal conclusions, or unwarranted inferences. *Kavanagh v. Zwilling*, 578 F. App'x 24, 24 (2d Cir. 2014) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To survive a motion to dismiss, a complaint must include "enough facts to state a claim to relief that is plausible on its face," and not merely "conceivable." *Twombly*, 550 U.S. at 570. The factual allegations must be sufficient "to raise a right to relief above the speculative level." *Id.* at 555. Although Rule 12(b)(6) does not impose a probability requirement at the pleading stage, a plaintiff must present enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements of a cause of action. *Phillips v. County of Allegheny*, 515 F.3d

224, 234 (3d Cir. 2008) (quotation marks omitted). Simply reciting the elements of a cause of action does not suffice. *Iqbal*, 556 U.S. at 678.

III. Discussion

A. Qualified Immunity

The Officer Defendants assert that Plaintiff cannot make a § 1983 claim against them in their individual capacities because they are entitled to qualified immunity. *See* Off. Mot. 2. To survive a motion to dismiss on qualified-immunity grounds, the plaintiff must allege facts that "plausibly mak[e] out a claim that the defendant's conduct violated a constitutional right that was clearly established law at the time, such that a reasonable officer would have known that his conduct violated that right." *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016) (quoting *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015)). Although a qualified immunity issue should be resolved as early as possible, "it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity." *Wesley v. Campbell*, 779 F.3d 421, 433 (6th Cir. 2015). Whether an officer is entitled to qualified immunity is usually dependent on the facts of the case and cannot be determined at the pleadings stage. *Oshop v. Tennessee Dep't of Children's Servs.*, No. 3:09-CV-0063, 2009 WL 1651479, at *7 (M.D. Tenn. June 10, 2009). Plaintiff pleaded sufficient facts to show that the Officer Defendants violated his First and Fourth Amendment rights and that those rights were clearly established. The fact that the Officer Defendants were apparently

unable to provide proof at Plaintiff's criminal trial of any disruption of police operations is a further reason why it is not appropriate to grant qualified immunity at this stage. Thus, the Court finds it premature to determine whether the Officer Defendants were entitled to qualified immunity.

B. First Amendment Retaliation Claims (Claims 1-6)

Plaintiff has pleaded sufficient facts to establish each of his First Amendment retaliation claims. In order to succeed on a retaliation claim, a plaintiff must establish the following elements: "(1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights." *Paige v. Coyner*, 614 F.3d 273, 277 (6th Cir. 2010) (quoting *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir.1998)). The Officer Defendants present two arguments for why Plaintiff has failed to state a First Amendment retaliation claim: (1) Plaintiff had no First Amendment right to create the Facebook Page; and (2) if he did, that right was not clearly established. Off. Mot. 3, 8. The Court will address the Officer Defendants' first argument below but their second argument merely restates their qualified immunity argument which the Court has determined is premature.

First, Plaintiff pleaded sufficient facts to establish that he was engaged in a constitutionally protected activity. He alleges that his Facebook Page was a parody. Compl. ¶¶ 45-54. Parody is a form of speech that is protected by the First Amendment. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); accord *Parks v. LaFace Records*, 329 F.3d 437, 456 (6th Cir. 2003) ("parody is an artistic form of expression protected by the First Amendment"). Parodies involve speech that cannot "reasonably be understood as describing actual facts about [the subject of the parody]." *Hustler Magazine, Inc.*, 485 U.S. at 57. No reasonable person–whether police officer or Parma citizen–would believe that Plaintiff's posts were describing actual facts about the Department (for example, that the Department was performing teen abortions using experimental techniques in a Wal-Mart parking lot). Despite the Defendants' attempts to argue otherwise, it cannot be seriously contended that the Facebook Page was anything but a parody. Thus, Plaintiff was engaged in constitutionally protected speech.

Next, Plaintiff alleges facts that would chill a person of *extra*ordinary firmness–let alone ordinary firmness–from exercising his First Amendment rights. The Department immediately responded to the Facebook Page by issuing press releases announcing a criminal investigation. Compl. ¶ 92. This action alone would have had a chilling effect sufficient to state a retaliation claim. But announcing the criminal investigation (at which time, like any reasonable person would have done, Plaintiff immediately took down the Facebook Page) was only the beginning. Officer

Defendants sought and executed numerous search warrants against Plaintiff. They sought an executed an arrest warrant against Plaintiff, charged him with a felony, and put him in Cuyahoga County jail. Compl. ¶ 108-09. They sought a grand jury indictment against Plaintiff and testified against him in a felony trial. Each of Defendants' actions alone would chill a person of ordinary firmness from exercising his First Amendment rights.

Lastly, Plaintiff pleaded facts that show that the Officer Defendants' actions were motivated by his constitutionally protected speech. The Defendants offer only one justification for their actions: Plaintiff disrupted police operations in violation of state law. But since the only evidence of "disruption" ever produced was a total of twelve minutes of calls made to the Department on March 2, 2016 (documented by the Department over a month later on April 5, 2016), the officers' motivation can certainly be called into question.

Plaintiff alleges facts, which if proven, show that the Officer Defendants abused their police power to punish Plaintiff for exercising his First Amendment rights. Plaintiff had a constitutional right to his Facebook Page on March 2, 2016 and he still does today. Absent a significant disruption in police operations, Plaintiff cannot be harassed or prosecuted for his speech. The Court cannot dismiss Plaintiff's retaliation claims.

Appendix D

C. Fourth Amendment Violation Claims (Claims 7-11)

Plaintiff makes five claims of Fourth Amendment violations and the Officer Defendants moved to dismiss all five.

1. Wrongful Arrest, Unlawful Search, and Unlawful Seizure

Plaintiff alleges that he was arrested, searched, and his property seized without probable cause. Compl. ¶¶ 219, 229, 237-38. The Officer Defendants argue that Plaintiff cannot establish any of these claims because they acted under search warrants issued by a magistrate. Off. Mot. 13-17. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV. Normally, a facially-valid warrant is a complete defense to § 1983 claims of unlawful searches or seizures (including arrests). *Id.* However, "[p]olice officers cannot, in good faith, rely on a judicial determination of probable cause when that determination was premised on an officer's own material misrepresentations to the court." *Gregory v. City of Louisville*, 444 F.3d 725, 758 (6th Cir. 2006) (citation omitted); *see also Ghaster v. City of Rocky River*, 913 F. Supp. 2d 443, 473 (N.D. Ohio 2012) ("[A]n action pursuant to § 1983 lies against a police officer who obtains an invalid search warrant by making in his affidavit material false statements either knowingly or in reckless disregard for the truth.").

Plaintiff alleges that none of the warrants executed against him–whether arrest or search warrants–were supported by probable cause. None of the warrants or affidavits drafted by Officer Connor identified a single police function or service that was disrupted by Plaintiff. *See, e.g.*, Compl. ¶ 102. The warrants also contained information that Officer Connor knew or should have known to be false including that the Facebook page purported to be the legitimate Department page, that Plaintiff purported to be a Department representative on the Facebook Page, and that Plaintiff altered or affected the Department's official page. The warrant application stated only that Plaintiff created a fake Facebook account, purporting to be a legitimate Department page. *Id.* These facts are sufficient to make out a claim that the warrant was invalid, and that Officer Connors knew or should have known that. Typically, only the officer who made the arrest or signed the warrant affidavit can be liable for § 1983 claims under the Fourth Amendment. *Schulz v. Gendregske*, 544 F. App'x 620, 625 (6th Cir. 2013). But Plaintiff alleges that Officer Riley supervised Officer Connors in drafting and executing the warrants so Plaintiff has properly alleged claim for supervisor liability against Officer Riley for his Fourth Amendment violations. *See* § III, H.

2. Property Retention

Plaintiff next alleges that the Officer Defendants violated the Fourth Amendment by unlawfully retaining his property. But the Fourth Amendment does not protect against unlawful property retention. "[T]he

Fourth Amendment protects an individual's interest in retaining possession of property but not the interest in regaining possession of property." *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999). So that, "[o]nce that act of taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies." *Id.* Thus, Plaintiff cannot establish a claim for unlawful property retention under the Fourth Amendment because such a claim does not exist. Accordingly, the Court must dismiss Claim 10 of the Complaint.

3. Malicious Prosecution

Plaintiff alleges that the Officer Defendants falsified evidence and submitted misleading investigative reports to establish probable cause for his criminal prosecution. Compl. ¶¶ 250-60. To support a claim of malicious prosecution, a plaintiff must establish that:

> (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor.

Robertson v. Lucas, 753 F.3d 606, 616 (6th Cir. 2014). The Officer Defendants argue that Plaintiff does not plead sufficient facts to establish the first two

elements of a malicious prosecution claim. Off. Mot. 11-13.

> The first element of a malicious prosecution claim requires a plaintiff to plead facts: giving rise to a reasonable inference that either of the defendant officers 'influenced or participated' in the prosecutor's decision to continue the prosecution after he or she had knowledge of facts that would have led any reasonable officer to conclude that probable cause had ceased to exist and that continuing the prosecution would be in violation of plaintiff's clearly established constitutional rights.

Johnson v. Moseley, 790 F.3d 649, 654 (6th Cir. 2015). Allegations that the officers testified for the prosecution and knowingly made false statements or failed to disclose evidence are sufficient to survive a motion to dismiss. *Id.* at 655. Plaintiff alleges that both Officer Defendants testified against Plaintiff at trial and falsified evidence. Compl. ¶¶ 141-44, 254. For example, Officer Riley testified at trial that he had grave concerns for officer safety and that disrupting protests would result from the Facebook Page. Compl. ¶ 143. Yet none of these concerns are listed in the warrant affidavits that Officer Riley approved. Compl. ¶ 144. These allegations are sufficient to establish the first element of a malicious prosecution claim.

The second element of a malicious prosecution claim requires a plaintiff to establish lack of probable cause for his criminal prosecution. The Officer Defendants argue that because the Grand Jury charged

Plaintiff with an indictment, probable cause existed for his prosecution. Off. Mot. 11-12. Previously, "the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause" for a prosecution, defeating a malicious prosecution claim. *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002). However, the Supreme Court recently determined that no step in the legal process, including a grand jury indictment, can extinguish a person's Fourth Amendment claim when the initial arrest was not based on probable cause. *Manuel v. Joliet*, 137 S.Ct. 911, 919 (2017). Applying *Manuel*, the Sixth Circuit determined that the presumption of probable cause created by a grand jury indictment is rebuttable where: (1) an officer knowingly or recklessly makes false statements in warrant affidavits or investigate reports; (2) these false statements are material to the plaintiff's ultimate prosecution; and (3) the false statement do not consist solely on grand jury testimony. *King v. Hardwood*, 852 F.3d 568, 587-88 (6th Cir. 2017), *cert. denied*, 2018 WL 311323 (Jan. 8, 2018). The Court already determined in § III(C)(1) that Plaintiff pleaded sufficient facts to show that Officer Connors knowingly made false statements in his warrant affidavits. These false statements were used to justify the City's law director's decision to file criminal charges against Plaintiff and are not grand jury testimony. Compl. ¶¶ 104-05. Thus, Plaintiff has pleaded sufficient facts to establish lack of probable cause for a malicious prosecution claim. Accordingly, the Court cannot dismiss Plaintiff's malicious prosecution claim.

Appendix D

D. Municipal Liability Claims (Claims 12-14)

"A municipality is liable for a constitutional violation when execution of the municipality's policy or custom inflicts the alleged injury." *Jones v. City of Cincinnati*, 521 F.3d 555, 560 (6th Cir.2008) (citing *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978)). "A plaintiff can make a showing of an illegal policy or custom by demonstrating one of the following: (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." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir.2013). Plaintiff makes three § 1983 claims against the City: (1) the City's law director and chief prosecutor authorized the Officer Defendants to seek and obtain the warrants (Claim 12); (2) he also authorized and implemented the unconstitutional policy of investigating and prosecuting protected speech (Claim 13); and (3) the City failed to train its officers on clearly established First Amendment rights (Claim 14). Defendants moved to dismiss all three claims so the Court will address each in turn.

1. Authorized Action

The City moved to dismiss Plaintiff's claim that the City is liable for violations of his constitutional rights because the City's law director and chief prosecutor authorized the Officer Defendants to seek and obtain the warrants against Plaintiff. Mot. 15. The

City argues that its law director and prosecutor did not have final policymaking authority. *Id.* at 16. "In Ohio, prosecutors and sheriffs are officials responsible for establishing policy with respect to decisions to prosecute, charge, and arrest, and a political subdivision may be held liable pursuant to *Monell* for the decisions of those individuals." *Ghaster v. City of Rocky River*, 913 F. Supp. 2d 443, 470 (N.D. Ohio 2012) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986)). Accordingly, the City's argument is without merit.

2. Unconstitutional Policy

Plaintiff alleges that the City had an illegal policy of criminally investigating and prosecuting protected speech. The City argues that Plaintiff's claim fails because he cannot show examples of past situations. But Plaintiff is only required to allege facts, "which if true, demonstrate the City's policy[.]" *Williams v. City of Cleveland*, No. 1:09-cv-1310, 2009 WL 2151778, *4 (N.D. Ohio July 16, 2009). Showing examples of past situations involving similar conduct is only one way to show an unconstitutional policy. Nevertheless, Plaintiff does allege other instances where the City prosecuted protected speech or disregarded its citizens First Amendment rights. *See* Compl. ¶ 278-80. Thus, Plaintiff's claim is sufficient to survive a motion to dismiss.

3. Failure to Train

The inadequacy of police training only serves as a basis for § 1983 liability "where the failure to train

amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Slusher v. Carson*, 540 F.3d 449, 457 (6th Cir. 2008) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). "To establish deliberate indifference, the plaintiff 'must show prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury.'" *St. John v. Hickey*, 411 F.3d 762, 776 (6th Cir.2005) (quoting *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir.2005)). Plaintiff alleges that the City showed deliberate indifference by failing to adequately train its officers on clearly established First Amendment rights. Compl. ¶ 277. Plaintiff cites to a 2001 Ohio Supreme Court case vacating obstructing official business criminal convictions and instances where the City's law director acknowledged the City's duty to train. Compl. ¶¶ 278-81. Plaintiff further alleges that the Officer Defendants were last trained on First Amendment rights nearly twenty years ago. Compl. ¶ 281-82. The City argues that Plaintiff's claim fails because he does not allege that City officials knew of a history of training problems or were on notice that training was deficient. Mot. 15. But taking Plaintiff's allegations as true–as the Court must do on a motion to dismiss–the City's failure to update or supplement its training of its officers on First Amendment rights for over twenty years does tend to show deliberate indifference.

E. Conspiracy to Violate Civil Rights (Claim 15)

Plaintiff claims that the Officer Defendants conspired with John Doe to violate his constitutional rights. Compl. ¶¶ 288-92. The Officer Defendants argue that Plaintiff's conspiracy claim fails because he does not allege any racial motivation, which they argue is required to plead a claim for civil conspiracy. Off. Mot. 17. But, as they concede, racial motivation is only required to establish a § 1985(3) claim for civil conspiracy; the same is not required for a § 1983 conspiracy claim. While Plaintiff mistakenly cites 42 U.S.C. § 1985(3), he clearly makes a § 1983 conspiracy claim against the Officer Defendants and John Doe. Accordingly, the Court cannot dismiss Plaintiff's civil conspiracy claim.

F. Federal Privacy Protection Act Claim (Claim 16)

Title 42 U.S.C. § 2000aa(a) of the Federal Privacy Protection Act (the "Act") provides that:

> Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce[.]

Subsection (b) similarly applies to documentary materials. 42 U.S.C. § 2000aa(b). The Defendants argue that the Act's "suspect exception" prevents Plaintiff from making a claim under the Act because the Officer Defendants had probable cause. Mot. 17. The Act does not apply if the government officers or employees 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) & (b)(1). As the Court already determined, Plaintiff adequately pleaded facts that show that probable cause did not exist for the search and seizure of his property, including the electronic devices he used to post his Facebook Page. The Defendants also argue that Plaintiff's Facebook Page does not affect "interstate or foreign commerce" and therefore cannot fall under the Act's protection. Mot. 18. The Defendants do not cite any legal authority as to why a Facebook Page would not affect interstate commerce, particularly when Facebook has over 1 billion users worldwide and millions of users across the United States. Further, the Sixth Circuit has long recognized that the Internet is a means of interstate commerce. *United States v. Fuller*, 77 F. App'x. 371, 379 (6th Cir. 2003). Accordingly, the Court cannot dismiss Plaintiff's Federal Privacy Protection Act claim.

G. O.R.C. § 2909.04(B) (Claims 17 and 18)

Plaintiff claims that O.R.C. § 2909.04(B) is unconstitutionally vague and overbroad. Compl. ¶¶ 302-12. The statute states that:

Appendix D

> No person shall knowingly use any computer, computer system, computer network, telecommunications device, or other electronic device or system or the internet so as to disrupt, interrupt, or impair the functions of any police, fire, educational, commercial, or governmental operations.

O.R.C. § 2909.04(B). Violating § 2909.04(B) is a felony of the fourth degree.

O.R.C. § 2909.04(C). Federal courts are obligated not to "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). "State legislators swear to uphold the state and federal constitutions" and "a presumption of constitutionality accompanies their enactments." *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 441 (6th Cir. 2016) (citations omitted). The Court finds it unnecessary in this case to address Plaintiff's constitutional challenges because the heart of Plaintiff's case is that the Officer Defendants misused the law to punish Plaintiff for his speech, not that the law itself was unconstitutional. The Officer Defendants justified their actions and warrant applications by claiming that the Facebook Page disrupted police operations. But Plaintiff claims that they were unable to present any evidence at trial that would rise to the level of disruption under O.R.C. § 2909.04(B). Thus, Plaintiff's claim is that the Officer Defendants misused the law, knowing that they did not have sufficient evidence to prove a violation.

Plaintiff's Claims 17 and 18 are dismissed without prejudice.

H. Supervisor Liability (Claim 18a)

Plaintiff alleges that Defendant Riley is liable for Defendant Connor's constitutional violations through supervisor liability. Compl. ¶¶ 313-14. Supervisor liability under § 1983 cannot be based on respondeat superior, the right to control employees, or on awareness of employee misconduct. *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 470 (6th Cir. 2006) (citations omitted). "[A] supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor 'either encouraged the specific incident of misconduct or in some other way directly participated in it.'" *Id.* (citation omitted). "At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). Plaintiff alleges that Officer Riley assigned Officer Connor to the case and directed him to obtain and execute the warrants against Plaintiff, knowing that doing so violated Plaintiff's First Amendment rights. *See, e.g.*, Compl. ¶¶ 69, 99-100, 116. These allegations are sufficient to support a claim for supervisor liability and therefore cannot be dismissed.

I. State Law Claims (Claims 19-29)

Plaintiff alleges ten violations of state law against the Officer Defendants including: (1) a false writings

claim under O.R.C § 2921.03(C), (2) seven claims for civil liability from criminal acts pursuant to O.R.C § 2307.60, (3) a malicious prosecution claim, and (4) a tortious interference with contract claim. Compl. ¶¶ 315-75. The Officer Defendants do not argue the elements of each claim; rather, they maintain that they are immune from liability under Ohio's Political Subdivision Tort Liability Act, O.R.C § 2744.01, *et seq*. O.R.C § 2744.03(A)(6) extends immunity from tort liability to police officers unless: (1) they act outside the scope of their employment; (2) they act with malicious purpose, in bad faith, or in wanton or reckless manner; or (3) a statute expressly provides for civil liability. O.R.C § 2744.03(A)(6). Whether an officer's behavior falls within one of these exceptions is typically a question of fact for the jury. *Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ.*, No. 1:11-CV-850, 2012 WL 5268946, at *10 (S.D. Ohio Oct. 23, 2012). To grant a motion to dismiss under § 2744.03(A)(6), the pleadings must be "devoid of evidence tending to show that the [officers] acted wantonly or recklessly." *Id.* (quoting *Irving v. Austin*, 741 N.E.2d 931, 934 (Ohio Ct. App. 2000)). Plaintiff has alleged sufficient facts that the Officer Defendants' conduct was in bad faith, wanton, or reckless. Thus, O.R.C § 2744.03(A)(6) does not immunize them from liability and these claims cannot be dismissed.

Plaintiff alleges his final state law claim against the City for replevin. Compl. ¶¶ 376-81. He alleges that the City seized his property, including his cell phone and laptop, but did not return them to him after he was acquitted at trial of the criminal charge.

Id. at ¶¶ 377-78. The City states that, after the instant complaint was filed, it returned Plaintiff's belongings to him. Mot. 19. Plaintiff does not dispute this. Thus, Plaintiff's replevin claim is moot and Count 29 must be dismissed.

IV. Conclusion

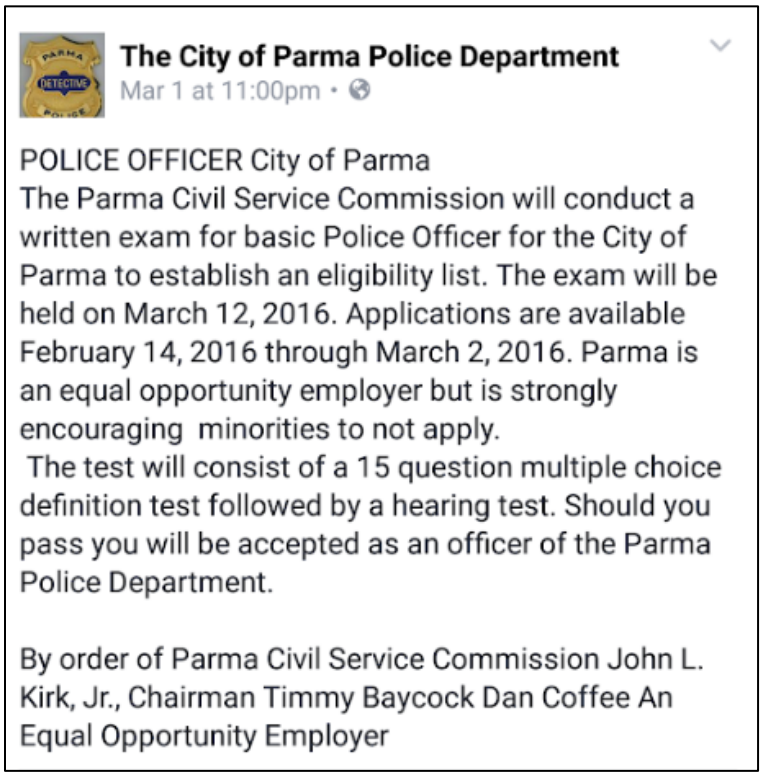
For the foregoing reasons, Plaintiff's Claims 10 (Property Retention) and 29 (Replevin) are **DISMISSED WITH PREJUDICE**. Claims 17 (Unconstitutionally Vague and Overbroad) and 18 (Unconstitutional As Applied) are **DISMISSED WITHOUT PREJUDICE**. His remaining twenty-six claims may proceed. Accordingly, the Motions are **GRANTED in part** and **DENIED in part**.

IT IS SO ORDERED.

/s/ Dan A. Polster Apr. 5, 2018
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

Appendix E

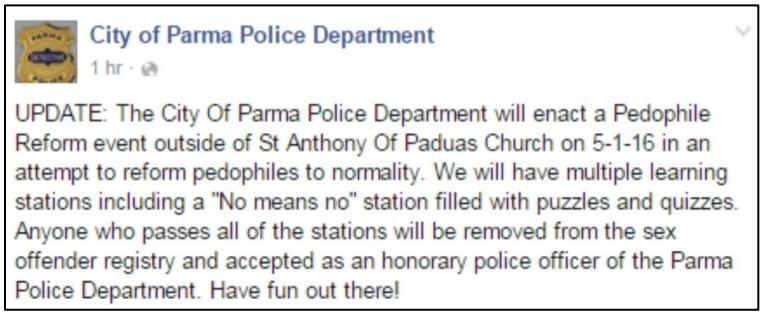
SCREENSHOTS OF PARODY FACEBOOK POSTS



The City of Parma Police Department
Mar 1 at 11:00pm •

POLICE OFFICER City of Parma
The Parma Civil Service Commission will conduct a written exam for basic Police Officer for the City of Parma to establish an eligibility list. The exam will be held on March 12, 2016. Applications are available February 14, 2016 through March 2, 2016. Parma is an equal opportunity employer but is strongly encouraging minorities to not apply.
The test will consist of a 15 question multiple choice definition test followed by a hearing test. Should you pass you will be accepted as an officer of the Parma Police Department.

By order of Parma Civil Service Commission John L. Kirk, Jr., Chairman Timmy Baycock Dan Coffee An Equal Opportunity Employer



City of Parma Police Department
1 hr ·

UPDATE: The City Of Parma Police Department will enact a Pedophile Reform event outside of St Anthony Of Paduas Church on 5-1-16 in an attempt to reform pedophiles to normality. We will have multiple learning stations including a "No means no" station filled with puzzles and quizzes. Anyone who passes all of the stations will be removed from the sex offender registry and accepted as an honorary police officer of the Parma Police Department. Have fun out there!

Appendix E

The City of Parma Police Department
14 hrs ·

PARMA, OHIO – Due to the slow increase of a homeless population in our city, The Parma Police Department is pleased to announce that it will be introducing a new temporary law that will forbid residence of Parma from giving ANY HOMELESS person food, money, or shelter in our city for 90 days. This is in an attempt to have the homeless population eventually leave our city due to starvation. Residents caught giving the homeless population food, shelter, or water will be sentenced to a minimum of 60 days in jail. You have been warned.

The City of Parma Police Department
2 hrs ·

The Parma Police Department & Parma Auxiliary Police Food Drive to benefit teen abortions will take place on Saturday. We will be giving out free abortions to teens using an experimental teqhnique discovered by the Parma Police Department. All teens must bring a note from their parent to be part of the experiment. The abortions will be held Saturday 4/19/2016 from noon to 4pm in a police van in the parking lot at Giant Eagle (7400 Broadview Rd.)

Appendix E

The City of Parma Police Department
added 2 new photos.
12 hrs ·

We have forgotten to post that on September 30, 2015 at approximately 10:00am the Parma Subway Sandwich Shop located at 5890 Broadview Rd. was robbed at knife point. The white male offender got away with a small amount of money and did not harm the clerk. Moments after an unrelated African American women was seen loitering for over 20 minutes in front of the store despite their no loitering policy. If you have any information regarding this African American womans whereabouts please contact The City Of Parma Police Department so that she may be brought to justice.
This is the best still photo we have of the offender. Mentor Police and Middleburg Hts. Police have reported similar loitering offenses which may be the same female.
The Parma Police Department is seeking assistance identifying the individual in the picture.
Please contact Det. Joe Tremble.