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[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 23-11203

STEVEN R. DEWITT,

Plaintiff-Appellant,

versus

UNKNOWN PERSON, et. al.,

Defendants,

CERESSA HANEY,
Supervisor,
TRENT SEXTON,
Police Officer,
MELANIE PRETTI,
Police Officer,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:21-cv-00340-AW-MAF

Before NEWSOM, BRASHER, and WILSON, Circuit Judges.

PER CURIAM:

Steven DeWitt appeals the dismissal of his 42 U.S.C. § 1983 complaint alleging the violation of his First Amendment rights stemming from an event in which he contends Probation Supervisor Ceressa Haney prevented him from conducting a "First Amendment audit" inside a probation office and then subsequently had him escorted from the premises by Officers Trent Sexton and Melanie Pretti.[1] Relying primarily on our decision in *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000), DeWitt asserts that the defendants violated his First Amendment right to film inside a state probation office. *Smith*, he says, stands for the proposition that citizens have a clearly established right to gather information about

[1] Dewitt has been superbly represented on appeal by Christian Tyrone Quarles and Carson W. Freund, both students in the Appellate Advocacy Clinic at the University of Alabama School of Law. We thank Messrs. Quarles and Freund for their service, not only to their client but also to the Court.

what public officials do on public property and to record matters of public interest. After careful review, and with the benefit of oral argument, we affirm the district court's decision.[2]

When ruling on a motion to dismiss, we accept "the facts alleged in the complaint as true, drawing all reasonable inferences in the plaintiffs favor." *Keating v. City of Miami,* 598 F.3d 753, 762 (11th Cir. 2010). To avoid dismissal, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)).

Qualified immunity shields officials from civil liability "so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna,* 577 U.S. 7, 11 (2015) (quotation marks and citations omitted). To be entitled to qualified immunity, the defendant officials must first show they acted within their discretionary authority. *Lewis* v. *City of W. Palm Beach,* 561 F.3d 1288, 1291 (11th Cir. 2009). DeWitt concedes that the defendants here were acting within their discretionary authority. Thus, the burden shifts to DeWitt to "show that qualified immunity is not appropriate." *Lee* v. *Ferraro,* 284 F.3d 1188, 1194 (11th Cir. 2002).

[2] We "review the denial of a Rule 12(b)(6) motion to dismiss on qualified or official immunity grounds *de novo,* applying the same standard as the district court." *Gates v. Khokhar,* 884 F.3d 1290, 1296 (11th Cir. 2018).

To overcome qualified immunity, the plaintiff must allege facts establishing two things: (1) that there was a violation of a constitutional right by the defendant official and (2) that the constitutional right violated was "clearly established" at the time of the alleged misconduct. *Jacoby* v. *Baldwin Cnty.*, 835 F.3d 1338, 1344 (11th Cir. 2016). We may affirm a grant of qualified immunity by addressing either prong or both. *Id.*

As to the second prong, the contours of the constitutional right at issue must be so clear "that every objectively reasonable official standing in the defendant's place would be on notice that what the defendant official was doing would be clearly unlawful given the circumstances." *Long v. Slaton*, 508 F.3d 576, 584 (11th Cir. 2007). The right "must be well-established enough that every reasonable official would have understood that what he is doing violates that right," and "existing precedent must have placed the statutory or constitutional question *beyond debate* and thus given the official fair warning that his conduct violated the law." *Gates*, 884 F.3d at 1296 (quotation marks and citations omitted); *see Mullenix*, *577* U.S. at 12 ('The dispositive question is whether the violative nature of *particular* conduct is clearly established." (quotation marks and citation omitted)).

"[A] right can be clearly established in one of three ways." *Crocker v. Beatty*, 995 F.3d 1232, 1240 (11th Cir. 2021). The plaintiff must point to either "(1) case law with indistinguishable facts, (2) a broad statement of principle within the Constitution, statute, or case law, or (3) conduct so egregious that a constitutional right was

clearly violated, even in the total absence of case law." *Id.* (quotation marks and citation omitted). When the plaintiff relies on a general rule to show the law is clearly established, it must apply with "obvious clarity to the circumstances." *Long*, 508 F.3d at 584 (quotation marks and citation omitted).

In *Smith v. City of Cumming*, we stated that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." 212 F.3d at 1333. We further stated that there is a "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." *Id.*

In *Crocker* v. *Beatty*, though, we clarified the outer boundary of *Smith*'s broad holding in a case involving a plaintiff who stopped on the shoulder of an interstate highway to photograph law-enforcement at the scene of a fatal car accident. *See* 995 F.3d at 1237–38, 1240–41. We noted that it was "decidedly *not* obvious that *Smith*'s general rule applies to the specific situation in question" in *Crocker* because "*Smith*'s declaration of a right to record police conduct came without much explanation." *Id.* at 1240-41 (quotation marks and citation omitted). We further emphasized that *Smith* "provided few details regarding the facts of the case, making it difficult to determine the context of the First Amendment right it recognized." *Id.* at 1241 (quotation marks and citation omitted). Importantly here, we explained that the "dearth of detail about the contours of the right announced in *Smith* undermines any claim

that it provides officers 'fair warning' under other circumstances." *Id.*

DeWitt relies on "a broad statement of principle within the Constitution, statute, or case law" to argue he had a clearly established right to film inside a state probation office. *Id.* at 1240 (citation omitted). Based primarily on *Smith*, he argues that he had a clearly established right to record matters of public interest and public officials on public property—and thus, he says, to conduct a "First Amendment audit" of a probation office. *See Smith*, 212 F.3d at 1333. Our ensuing decision in *Crocker*, though, explained that the language in *Smith* was too broad to clearly establish a First Amendment right to record police officers on the side of a highway. 995 F.3d at 1240–41. So too here. There are no details or facts in *Smith* that would communicate to any reasonable officer that DeWitt had a First Amendment right to film in the probation office. *See Smith*, 212 F.3d at 1333. Because neither *Smith* nor any case from the Supreme Court or this Court is sufficiently analogous to make clear to any reasonable official in the defendants' positions that preventing a person from filming inside the lobby of a probation office would violate that person's constitutional rights, DeWitt has failed to allege the violation of a clearly established right. Therefore, Haney and Officers Sexton and Pretti are entitled to qualified immunity. *See Jacoby*, 835 F.3d at 1344. Accordingly, we affirm.[3]

[3] DeWitt separately contends that the district court improperly dismissed his request for declaratory and injunctive relief on mootness grounds; he asserts

AFFIRMED.

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that this case falls into the capable-of-repetition-yet-evading-review exception for past harms. But DeWitt failed to plead in his complaint any facts to support the exception's application. Moreover, it is well settled that "[u]nder § 1983, a plaintiff cannot sue an official in [her] individual capacity for injunctive or declaratory relief." *Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1214 (10th Cir. 2022); *see also Knowlton v. City of Wauwatosa*, 119 F.4th 507, 519 (7th Cir. 2024) ("In an individual capacity suit, a plaintiff may only seek monetary damages; in an official capacity suit, a plaintiff may only seek injunctive or declaratory relief."); *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004), *overruled on other grounds by Munoz v. Superior Ct. of L.A. Cnty.*, 91 F.4th 977 (9th Cir. 2024) (same). And the operative complaint here names the defendants only in their individual capacities.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 12, 2025

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-11203-HH
Case Style: Steven Dewitt v. Ceressa Haney, et al
District Court Docket No: 4:21-cv-00340-AW-MAF

Opinion Issued
Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing
The time for filing a petition for panel rehearing or rehearing en banc is governed by 11th Cir. R. 40-2. Please see FRAP 40 and the accompanying circuit rules for information concerning petitions for rehearing. Among other things, **a petition for rehearing must include a Certificate of Interested Persons**. See 11th Cir. R. 40-3.

Costs
Each party to bear its own costs.

Bill of Costs
If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees
The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel
Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers
General Information: 404-335-6100 Attorney Admissions: 404-335-6122
Case Administration: 404-335-6135 Capital Cases: 404-335-6200
CM/ECF Help Desk: 404-335-6125 Cases Set for Oral Argument: 404-335-6141

OPIN-1 Ntc of Issuance of Opinion

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-11203

STEVEN R. DEWITT,

Plaintiff-Appellant,

versus

UNKNOWN PERSON, et. al.,

Defendants,

CERESSA HANEY,
Supervisor,
TRENT SEXTON,
Police Officer,
MELANIE PRETTI,
Police Officer,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:21-cv-00340-AW-MAF

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 12, 2025

For the Court: DAVID J. SMITH, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 08, 2025

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-11203-HH
Case Style: Steven Dewitt v. Ceressa Haney, et al
District Court Docket No: 4:21-cv-00340-AW-MAF

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11203

STEVEN R. DEWITT,

Plaintiff-Appellant,

versus

UNKNOWN PERSON, et. al.,

Defendants,

CERESSA HANEY,
Supervisor,
TRENT SEXTON,
Police Officer,
MELANIE PRETTI,
Police Officer,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:21-cv-00340-AW-MAF

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before NEWSOM, BRASHER, and WILSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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July 16, 2025

Clerk - Northern District of Florida
U.S. District Court
111 N ADAMS ST
TALLAHASSEE, FL 32301

Appeal Number: 23-11203-HH
Case Style: Steven Dewitt v. Ceressa Haney, et al
District Court Docket No: 4:21-cv-00340-AW-MAF

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court. The court's opinion was previously provided on the date of issuance.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

MDT-1 Letter Issuing Mandate

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-11203

STEVEN R. DEWITT,

Plaintiff-Appellant,

versus

UNKNOWN PERSON, et. al.,

Defendants,

CERESSA HANEY,
Supervisor,
TRENT SEXTON,
Police Officer,
MELANIE PRETTI,
Police Officer,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:21-cv-00340-AW-MAF

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 12, 2025

For the Court: DAVID J. SMITH, Clerk of Court

ISSUED AS MANDATE: July 16, 2025

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

STEVEN R. DEWITT,

Plaintiff,

vs. **Case No. 4:21cv340-AW-MAF**

CERESSA HANEY, TRENT SEXTON, and MELANIE PRETTI,

Defendants.
_____/

REPORT AND RECOMMENDATION[1]

Plaintiff is a pro se non-prisoner who initiated this civil rights action in August 2021. ECF No. 1. Plaintiff now proceeds with a third amended complaint, ECF No. 45, which names as Defendants two police officers, Sexton and Pretti, and the Supervisor of the Intervention & Detention

[1] Two prior Reports and Recommendations, ECF Nos. 32 and 43, have been vacated. The first addressed Defendants' motions to dismiss, ECF Nos. 13 and 20, and recommended the motions be granted in part and denied in part. ECF No. 32. Plaintiff then requested leave to file an amended complaint, ECF No. 33, and an Amended Report and Recommendation, ECF No. 43, was entered. Thereafter, Plaintiff again filed a motion requesting leave to file a third amended complaint. ECF No. 44. The motion was granted, ECF No. 47, and the Amended Report and Recommendation was vacated.

Alternatives Office, Ceressa Haney. Defendant Haney filed a motion to dismiss, ECF No. 51, and Plaintiff was directed to file a response, ECF No. 52. Defendants Sexton and Pretti filed a separate motion to dismiss, ECF No. 55, and Plaintiff was directed to respond to that motion as well, ECF No. 56. Plaintiff's amended response, ECF No. 58, to Defendant Haney's motion has been considered, as well as his response, ECF No. 61, to the motion to dismiss filed be Defendants Sexton and Pretti.

Allegations of the Third Amended Complaint, ECF No. 10

Plaintiff claims that all three Defendants violated his First Amendment rights. ECF No. 45. Plaintiff went to the Intervention & Detention Alternatives Office in Tallahassee on July 21, 2021. *Id.* at 5. He requested "to speak with a Virginia Jackson and to conduct a constitutional [sic] protected First Amendment audit of public interest." *Id.* While "gathering content and video footage for his story," Defendants Haney, Sexton, and Pritti told Plaintiff to leave the premises. *Id.* at 5-6.

Plaintiff alleged Defendant Haney told him that "security did not want him in the building." *Id.* at 7. Plaintiff was not allowed to wait in the "front lobby" and was "not allowed to record in the building without staff permission." *Id.* Plaintiff told Defendant Haney that "a probation

supervisor" named Anthony Washington had informed him that he "was well within his right to wait in the front lobby until Jackson returned from her lunch break." ECF No. 45 at 7. Plaintiff also told Defendant Haney that he "was well within his right to record while in the front lobby to which Haney advised Plaintiff that she would call police . . . if Plaintiff did not leave." *Id.*

Defendant Haney called the police and, according to Plaintiff, she "admitted to the 911 dispatcher that Plaintiff was inside of a publicly accessable [sic] building." *Id.* at 7. After law enforcement arrived, Defendant Haney spoke with the officers "in a room outside of Plaintiff's audible presence." *Id.* at 8. Defendant Haney exited the room and told Plaintiff "she was not trespassing him," but said she wanted Plaintiff to leave the building. *Id.* Plaintiff was not given an explanation as to why.

Defendant Sexton also exited the room and "threatened Plaintiff with arrest." *Id.* at 8. Defendant Sexton also asked to speak with Plaintiff outside the building, but Plaintiff said, "I can talk right here." *Id.* Defendant Sexton asked Plaintiff a second time to speak with him outside the building. *Id.* at 9. Again, Plaintiff questioned why he needed "to leave a publicly accessable [sic] area for [them] to talk." *Id.* Defendant Sexton advised Plaintiff that it was a private building and "they have the right to tell you to

leave." ECF No. 45 at 9. Plaintiff asked what crime he had committed, and Defendant Sexton told Plaintiff if he did not leave, he would be arrested for trespassing. *Id.* Plaintiff contends Defendant Sexton falsely told Plaintiff that the Intervention & Detention Alternatives Office was "a private entity" and he falsely stated in his "incident detail report" that Plaintiff "willingly" left the premises. *Id.* at 10.

As for Defendant Pretti, Plaintiff alleges she "failed to ask Plaintiff . . . why he was there at the Intervention & Detention Alternatives Office. ECF No. 45 at 10. He further contends she "unlawfully told [him] to leave the building and its surrounding premises under" threat of arrest. *Id.*

All Defendants are sued in their individual capacities only. *Id.* at 11. As relief, Plaintiff seeks a declaratory judgment, injunctive relief (training for the Defendants), and monetary damages of $100,000.00. *Id.*

Sexton and Pretti's motion to dismiss, ECF No. 55

Defendants present four arguments for dismissal. First, they contend Plaintiff's third amended complaint "should be dismissed because it is an impermissible shotgun pleading." ECF No. 55 at 6. Second, Defendants argue that Plaintiff failed to show a violation of his constitutional rights and, thus, the complaint should be dismissed for failure to state a claim upon

which relief can be granted. ECF No. 55 at 2, 8-9. Third, Defendants assert their entitlement to qualified immunity. *Id.* at 10-19. Fourth, they assert that Plaintiff's request for declaratory relief is improper and should be stricken" because Plaintiff has not pleaded "an actual, ongoing, continuous controversy between the parties." *Id.* at 19.

Haney's motion to dismiss, ECF No. 51

Similar to Defendants Sexton and Pretti, Defendant Haney also argues her entitlement to qualified immunity. ECF No. 51 at 4-6. Defendant Haney contends that her actions did not violate Plaintiff's constitutional rights. *Id.* at 6-10. In addition, Defendant argues that Plaintiff has not alleged the "proper elements for declaratory relief." *Id.* at 12.

Standard of Review

The issue on whether a complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failing to state a claim upon which relief can be granted is whether the plaintiff has alleged enough plausible facts to support the claim stated. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S.

662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 570, 127 S. Ct. 1955).[2] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S. Ct. at 1965); *see also* Wilborn v. Jones, 761 F. App'x 908, 910 (11th Cir. 2019). "The plausibility standard" is not the same as a "probability requirement," and "asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 677 (quoting Twombly, 550 U.S. at 556). A complaint that "pleads facts that are 'merely consistent with' a defendant's liability," falls "short of the line between possibility and plausibility." Iqbal, 129 556 U.S. at 677 (quoting Twombly, 550 U.S. at 557).

The pleading standard is not heightened, but flexible, in line with Rule 8's command to simply give fair notice to the defendant of the plaintiff's claim and the grounds upon which it rests. Swierkiewicz v. Sorema, 534

[2] The complaint's allegations must be accepted as true when ruling on a motion to dismiss, Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993), and dismissal is not permissible because of "a judge's disbelief of a complaint's factual allegations." Twombly, 127 S. Ct. at 1965, (quoting Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)).

U.S. 506, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions."). Pro se complaints are held to less stringent standards than those drafted by an attorney. Wright v. Newsome, 795 F.2d 964, 967 (11th Cir. 1986) (citing Haines v. Kerner, 404 U.S. 519, 520-521, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972)). Nevertheless, a complaint must provide sufficient notice of the claim and the grounds upon which it rests so that a "largely groundless claim" does not proceed through discovery and "take up the time of a number of other people . . . ." Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005) (quoted in Twombly, 550 U.S. at 558).

Analysis

A. Shotgun Pleading

"A shotgun pleading is a complaint that violates Federal Rule of Civil Procedure 8(a)(2), Rule 10(b), or both." Inform Inc. v. Google LLC, No. 21-13289, 2022 WL 3703958, at *4 (11th Cir. Aug. 26, 2022) (citing Barmapov v. Amuial, 986 F.3d 1321, 1324 (11th Cir. 2021)). In Weiland v. Palm Beach Cnty. Sheriff's Off., 792 F.3d 1313, 1321-23 (11th Cir. 2015),

the Eleventh Circuit "identified four main types of shotgun pleadings." Weiland, 792 F.3d at 1321-23 (cited in Google, 2022 WL 3703958, at *4).

> First, the most common type is a complaint "containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint." *Id.* at 1321. Second, the next most common type is a complaint that "does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action." *Id.* at 1321-22. Third is a complaint that does "not separate[e] into a different count each cause of action or claim for relief." *Id.* at 1322-23. And fourth, we've described the "relatively rare sin" of "asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Id.* at 1323.

Google, 2022 WL 3703958, at *4. Defendants Sexton and Pretti contend that Plaintiff's complaint "meets the second rough category of a shotgun pleading," contending it is "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action."

Plaintiff's complaint includes six pages of facts. The facts are in short, separately numbered paragraphs. Plaintiff's allegations are concise and to the point; he presents allegations as to what was said and by whom. The allegations are not conclusory, repetitive, or unconnected to a specific

Defendant. "The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." Weiland, 792 F.3d at 1323. Plaintiff's complaint is not a shotgun pleading. Defendants have adequate notice of the grounds presented to support Plaintiff's claims against them. They disagree that those facts state a constitutional violation, but they have notice of the facts. This argument for dismissal should be denied.

B. Failure to State a Claim

All Defendants assert that Plaintiff has failed to plead a violation of his constitutional rights. ECF No. 55 at 8-9; ECF No. 51 at 6-10. To be clear, Plaintiff claimed a denial of his First Amendment right to "Freedom of Expression." ECF No. 45 at 11. That claim is premised on the fact that he was not permitted to conduct a "First Amendment audit of public interest" because Defendants directed him to leave the building and would not permit him to "record while in the front lobby" *Id.* at 5, 7. In response to Defendants' motion to dismiss, Plaintiff acknowledges that he mistakenly labeled his claim as one of "freedom of expression," but he re-asserts that

his claim is based on the inability to record video in the office. ECF No. 61 at 5.

The Eleventh Circuit has recognized a First Amendment "right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000)[3] (citing to Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (finding that plaintiffs' interest in filming public meetings is protected by the First Amendment); *see also* Bowens v. Superintendent of Miami S. Beach Police Dep't, 557 F. App'x 857, 863 (11th Cir. 2014) (noting that "[j]ust as the plaintiffs in Smith had a right to film Cumming police in a public place, so too Bowens had a right to photograph Miami South Beach police that, accepting his allegations as true, the arresting officers violated"); Toole v. City of Atlanta, 798 F. App'x 381, 386 (11th Cir. 2019) (holding that plaintiff was present "to exercise his First Amendment right to protest and film police conduct," a right "subject to reasonable time, manner and place restrictions") (quoting Smith).

[3] The Smith court cited to a number of other cases as well. *See* Smith, 212 F.3d at 1333.

However, no court has yet recognized a right to conduct a "First Amendment audit" - the term used by Plaintiff. That term first appears in case law in 2020. There, a defendant was charged with cyberstalking, and part of the basis for that crime was:

> Defendant entered the Arizona Attorney General's Office ("AGO") and started videotaping in the lobby with a handheld recording device. AGO employees approached Defendant and told him that videotaping in the lobby was prohibited, but Defendant continued to videotape.

United States v. Hollingberry, No. 2003058MJ001PHXMTM, 2020 WL 2771773, at *4 (D. Ariz. May 28, 2020), *aff'd*, No. 20-10183, 2020 WL 5237342 (9th Cir. July 23, 2020). Defendant became angry with the employee who told him to leave, and with the employee who subsequently provided the surveillance video to the police prior to the Defendant's being cited with trespassing. Hollingberry, 2020 WL 2771773, at *4. In his anger, Defendant began posting videos on his YouTube channel, one of which was titled "False Arrest! Arizona Attorney General First Amendment Audit." 2020 WL 2771773, at *5.

No explanation of the term "First Amendment Audit" was provided, but it is apparent that this term is associated with a person's belief that he has the right to publicize the conduct of governmental employees. Counsel

for Defendant Haney pointed out one law review article which described "First Amendment auditors" as "individuals who film governmental employees in the course of their duties in the hopes of catching them violating someone's constitutional rights... (m)any have been linked to the anti-government sovereign citizens, a movement labeled as a top domestic terrorism threat by the FBI because of the way in which they go about their 'audits,' harassing city and government employees." *Jaffe, Caution Social Media Cyber Bullies: Identifying New Harms and Liabilities*, 66 Wayne L. Rev. 381 (2021).

In a 2021 case, plaintiffs reported watching "videos on YouTube of First Amendment Audits ("FAA")." Lybarger v. Snider, No. 19-CV-369-SPM, 2021 WL 1948435, at *2 (S.D. Ill. May 14, 2021), reconsideration denied, No. 19-CV-369-SPM, 2021 WL 3140741 (S.D. Ill. July 26, 2021), *aff'd sub nom.* Lyberger v. Snider, 42 F.4th 807 (7th Cir. 2022). The plaintiffs created their own YouTube channel to post videos of their "observations of law enforcement." The incident at issue in that case occurred when plaintiffs followed another citizen, not law enforcement or a government office, and recorded her driving her vehicle with her infant child

in her lap.[4] Summary judgment was granted in favor of the police officers who arrested the plaintiffs and confiscated their video camera. Ultimately the Seventh Circuit Court of Appeals held that "the plaintiffs were not engaged in constitutionally protected speech" and upheld entry of summary judgment in favor of the defendants. Notably, plaintiffs brought a First Amendment retaliation claim which was based on plaintiffs' refusal to produce identification and not on an asserted right to videotape other persons. Lyberger v. Snider, 42 F.4th 807, 814 (7th Cir. 2022). This case reveals the extent to which persons will defend the right to conduct "audits" and refuse to leave what is clearly private property based on the belief that they serve the public's interest in reporting crime.[5]

Another case which addressed an asserted right "to conduct a First Amendment audit" is Detreville v. Gurevich, No. 21-CV-00638-PAB-MEH, 2022 WL 17668171, at *1 (D. Colo. Dec. 14, 2022). In 2019, "plaintiff Kevin Detreville approached the Denver District 5 Police Station (the

[4] "The men took it upon themselves to follow [the woman] to her family's home and confront her; they refused to leave her family's property when asked to do so. After the woman called the police, the night ended with all three plaintiffs in handcuffs. In the end, however, the District Attorney's office declined to pursue criminal charges." Lyberger, 42 F.4th at 809.

[5] The crime plaintiffs sought to report was driving with the child in the woman's lap and not in a child seat.

'Station')" and began "using his cell phone to record his experience.'" Detreville, 2022 WL 17668171, at *1. After several police officers informed Detreville he was not permitted to video record in the Station without "prior permission from the Chief of Police," Detreville refused to stop recording and asserted his "First Amendment right to record officers." 2022 WL 17668171, at *1. Plaintiff was arrested, but the charge was ultimately dismissed. *Id.* at *2. When plaintiff sued the officers, the court held that defendants lacked probable cause to arrest plaintiff, denied defendants' qualified immunity defense, and found that plaintiff had "a clearly established right to record police officers in public places as of May 2019" based on Irizarry v. Yehia, 38 F.4th 1282, 1292 (10th Cir. 2022). Detreville, 2022 WL 17668171, at *6. That case is distinguishable from this case because Plaintiff was not attempting to video the conduct of law enforcement in a public place. It is similar, however, because Plaintiff refused to stop recording and asserted his right to do so.

A fourth case worthy of note is Berge v. Sch. Comm. of Gloucester, No. 22-CV-10346-AK, 2022 WL 17417578, at *1 (D. Mass. Dec. 5, 2022). In that case, plaintiff - an alleged "citizen journalist" who was publicly opposing COVID-19 restrictions - sued for the "alleged violation of his First

Amendment right to record and publish a video he created and subsequently posted to Facebook." Berge, 2022 WL 17417578, at *1. After filming an encounter with officials at the Administrative Office building a building "accessible to the general public," and then posting it to Facebook, plaintiff "received a letter from Gloucester Public Schools" that asserted plaintiff "was in violation of the Massachusetts Wiretap Statute" for recording his conversation with an official at the Office "without her consent" and uploading it to Facebook. 2022 WL 17417578, at *2. The letter demanded that plaintiff "immediately remove" the Facebook post "and/or any other communications to prevent the pursuit of legal (sic) in this matter." *Id.* Plaintiff then sued pursuant to 42 U.S.C. § 1983, asserting "a First Amendment right to record and publish the Recording . . . which defendants violated when they allegedly retaliated against him for protected activity within the scope of those rights." *Id.* Plaintiff sought declaratory relief - a declaration that "his actions did not violate the Massachusetts Wiretap Statute or FERPA." *Id.*

In the course of that case, plaintiff - represented by counsel - conceded and withdrew his First Amendment claim that he had a "right to record in that office." Berge, 2022 WL 17417578, at *3 (finding that in light

of counsel's compromise concession, plaintiff's First Amendment right to record a video claim was dismissed). Because of the concession, that case does little to explain a "First Amendment Audit." It does, however, reveal a similarity with Plaintiff in this case - Plaintiff Steven Dewitt is not a member of the press but, instead, considers himself a "citizen journalist" with a right to film persons in public places.

In responding to the motions to dismiss, Plaintiff has provided some clarification of this claim. According to Plaintiff, he was seeking to photograph and "film all publicly accessible areas of the pretrial office's interior and exterior premise, document activity and transaction between public safety officers, security guards and the general public as a whole . . . ." ECF No. 61 at 3. Plaintiff asserts that his "intended activity is in fact a matter of public interest." *Id.* While that explanation still provides more vagueness than clarity, it does sufficiently enable the Court to construe Plaintiff's claim not as a right to conduct a "First Amendment Audit" but, instead, as a right to record matters of public concern.

In Bowens, the plaintiff alleged he was "a freelance photojournalist for an independent media outlet." 557 F. App'x at 859. Plaintiff was arrested after taking photographs of officers arresting another individual on a public

street; officers took his camera, and deleted photographs. 557 F. App'x at 863. The district court dismissed his claim that he had a "constitutional right to gather, report, and photograph news events." 557 F. App'x at 860. The Eleventh Circuit reversed and, relying on Smith, held that Plaintiff had a First Amendment right to record and photograph Miami South Beach police officers. 557 F. App'x at 863. Other cases in this Circuit have also recognized such a right. *See* Armstrong v. City of Boaz, No. 4:16-CV-1065-VEH, 2017 WL 3129376, at *19 (N.D. Ala. July 24, 2017) (noting the right to record matters of public interest, but concluding that she failed to show the defendant deprived her of her First Amendment rights); Dunn v. City of Fort Valley, 464 F. Supp. 3d 1347, 1365 (M.D. Ga. 2020) (finding "Dunn engaged in an activity that is constitutionally protected" when he was taking "pictures of public officials on public property").

Assuming that the events and happenings Plaintiff was seeking to record are news worthy matters of public interest, it appears that case law in this Circuit acknowledges a First Amendment right to do so. Furthermore, Plaintiff provided specific facts as to each Defendant which shows they required him to leave the premises and stop filming. In light of the case law cited above, Plaintiff has presented a plausible claim and the

motions to dismiss should be denied as to the argument that Plaintiff has failed to state a claim upon which relief can be granted.

C. Qualified immunity

Defendants have asserted their entitlement to qualified immunity. "Qualified immunity 'shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Mullenix v. Luna, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (quoting Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)) (quoted in Crocker v. Beatty, 995 F.3d 1232, 1239 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 845 (2022). This is "an immunity from suit rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (quoted in Crocker, 995 F.3d at 1239). "The doctrine shields 'all but the plainly incompetent or those who knowingly violate the law.'" 995 F.3d at 1239 (citations omitted).

"To receive qualified immunity, the officer must first show that he acted within his discretionary authority." Lewis v. City of W. Palm Beach, 561 F.3d 1288, 1291 (11th Cir. 2009) (quoted in Crocker, 995 F.3d at 1239). Here, Plaintiff has not addressed whether or not Defendants were

acting within their discretionary authority. *See* ECF Nos. 58, 61. Accordingly, the issue of discretionary authority is undisputed and it is accepted that Defendants were acting within their discretionary authority.

Because Defendants have asserted qualified immunity, the burden shifts to Plaintiff to show two things: (1) facts demonstrating the Defendant violated a constitutional right and (2) that right was "clearly established" at the time of the alleged misconduct. Jacoby v. Baldwin Cnty., 835 F.3d 1338, 1344 (11th Cir. 2016) (cited in Crocker, 995 F.3d at 1240). First, as concluded above, Plaintiff has alleged facts which meet the first requirement - he has shown the violation of a constitutional right.

Second, there are three ways to show a right is "clearly established." The plaintiff must point to either (1) "case law with indistinguishable facts," (2) "a broad statement of principle within the Constitution, statute, or case law," or (3) "conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." Lewis v. City of W. Palm Beach, 561 F.3d 1288, 1291-92 (11th Cir. 2009). Even in cases of broad or general principles, "clearly established law" should not be defined "at a high level of generality." Plumhoff v. Rickard, 572 U.S. 765, 779, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014) (quoted in Crocker, 995 F.3d at 1240).

"[I]f a plaintiff relies on a general rule, it must be obvious that the general rule applies to the specific situation in question." Youmans v. Gagnon, 626 F.3d 557, 563 (11th Cir. 2010).

Plaintiff has asserted that Defendants violated clearly established law and points to the Smith case. ECF No. 58 at 7. He contends that Defendants' argument as to qualified immunity should be rejected. ECF No. 58 at 8; ECF No. 61 at 8.

As early as 2014, a prior case from this Court concluded there was "a clearly established First Amendment right, 'subject to reasonable time, manner and place restrictions,' to photograph or videotape police conduct," although the "restrictions" were "undeveloped." Bacon v. McKeithen, No. 5:14-CV-37-RS-CJK, 2014 WL 12479640, at *3 (N.D. Fla. Aug. 28, 2014) (citing to Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000)). Relying on Smith, which was deemed to be supported by the more recent Bowens decision, the Bacon Court held that "Bacon's conduct - videotaping a police officer without his consent at a traffic stop - was constitutionally protected, and Bacon's right to engage in this conduct was clearly established." Bacon, 2014 WL 12479640, at *4 (holding the officers were not entitled to qualified immunity).

A case from the Northern District of Georgia, also in 2014, similarly recognized that plaintiff had "a First Amendment interest in filming public officials at a public meeting." Tisdale v. Gravitt, 51 F. Supp. 3d 1378, 1388 (N.D. Ga. 2014). Citing to Smith, the court held that the right was clearly established based on a "broad, clearly established principle." Tisdale, 51 F. Supp. 3d at 1392. Nevertheless, finding the "restriction on video recording was a blanket ban on filming" which was "both content- and viewpoint-neutral," the court concluded that officials were not on notice that the policy would violate Plaintiff's constitutional rights. 51 F. Supp. 3d at 1393. Thus, the defendants were granted qualified immunity. *Id.*

A more recent 2020 case from the Middle District of Georgia also found, based on Smith that the "right to record public officials on public property is a clearly established First Amendment right." Dunn, 464 F. Supp. 3d at 1367. The court concluded qualified immunity did not apply and defendant's motion to dismiss was denied. *Id.*

Likewise, there is also a 2019 unpublished opinion of the Eleventh Circuit in Toole v. City of Atlanta in which defendants were denied qualified immunity. "Toole was involved in a protest march through the streets of downtown Atlanta following a grand jury's decision not to indict the officer

involved in the shooting of Michael Brown in Ferguson, Missouri." Toole, 798 F. App'x at 383. The court held that when plaintiff was "unlawfully arrested without arguable probable cause while engaging in protected First Amendment conduct - protesting and filming police activities -" his "clearly established First Amendment rights" were violated and the defendant was not entitled to qualified immunity." 798 F. App'x at 388.

These cases demonstrate differing views as to whether qualified immunity is appropriately granted. While the point could still be debated, the Eleventh Circuit has recently resolved the debate, but not without dissent.

In Crocker v. Beatty,[6] 995 F.3d 1232, the court reversed the district court's rejection of a qualified immunity defense. Plaintiff had argued that his First Amendment right to record an accident scene on the interstate was based on a "broad statement" of law, pointing to what the Eleventh

[6] The facts of that case concerned a citizen driving on I-95 when he saw an overturned vehicle in the median. "Crocker pulled over to the shoulder and got out of his car to see if he could help. Ten to fifteen other people did the same." Crocker, 995 F.3d at 1237. When "law-enforcement and emergency personnel began to arrive, Crocker and the other onlookers moved away." *Id.* While standing 40–50 feet from the accident scene, Crocker and other bystanders took pictures of the scene with their phones. *Id.* at 1238. A sheriff's deputy, Steven Beatty, approached Crocker and confiscated his phone, "without warning or explanation." *Id.* When Crocker tried to question the deputy, he was arrested for resisting an officer.

Circuit described as its "three-paragraph opinion in Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000)." Crocker, 995 F.3d at 1240 (noting that Smith had held there was a "right to record matters of public interest" under the First Amendment, "subject to reasonable time, manner and place restrictions"). The court disagreed, however, finding that it was "decidedly *not* 'obvious' that Smith's 'general rule applies to the specific situation in question' here." Crocker, 995 F.3d at 1240-41 (citing to Youmans v. Gagnon, 626 F.3d 557, 563 (11th Cir. 2010) (stating that a "judicial precedent with materially identical facts is not essential for the law to be clearly established, but the preexisting law must make it obvious that the defendant's acts violated the plaintiff's rights in the specific set of circumstances at issue")). The Eleventh Circuit concluded that "[t]he dearth of detail about the contours of the right announced in Smith undermines any claim that it provides officers 'fair warning' under other circumstances." Crocker, 995 F.3d at 1241. The court summarized the Smith opinion as providing "more vice than virtue for the purpose of clearly establishing the law here." *Id.* at 1241.

Notably, the dissent in Crocker would have held that the right to record was clearly established by Smith, demonstrating that reasonable

minds could differ on this point.[7] Yet it is precisely that difference of opinion which reveals that not "*every* reasonable police officer" would have known that Plaintiff had a right to record events at a county office and could not have been forced to leave the premises under threat of arrest. 995 F.3d at 1242. Moreover, this Court is bound to follow the holding of the Eleventh Circuit. Because Crocker establishes "that Smith's rule didn't apply with 'obvious clarity to the circumstances,'" - and the circumstances here are different than in Crocker - the Defendants in this case are entitled to qualified immunity. *Id.* at 1243. The motions to dismiss should be granted.

In light of the conclusion that Defendants are entitled to qualified immunity, there is no need to address Defendants' arguments that Plaintiff is not entitled to a declaratory judgment.

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[7] In dissent, Circuit Judge Martin stated: "In my view, Smith clearly establishes that Mr. Crocker had a right to photograph the accident scene and I would therefore reverse the grant of qualified immunity to Deputy Beatty on this claim." Crocker, 995 F.3d at 1259. Judge Martin found that the lack of specific facts detailed in Smith "does not do away with the right Smith announced" and, "[to the contrary, the broad pronouncement in Smith underscores the right's general applicability." 995 F.3d at 1260 (pointing out a number of district court's have relied on Smith to hold "that the right to record police activity is clearly established").

RECOMMENDATION

It is respectfully **RECOMMENDED** that the motion to dismiss, ECF No. 51, filed by Defendant Haney, and the motion to dismiss, ECF No. 55, filed by Defendants Pretti and Sexton, be **GRANTED** because Defendants are entitled to qualified immunity.

IN CHAMBERS at Tallahassee, Florida, on February 7, 2023.

S/ Martin A. Fitzpatrick
MARTIN A. FITZPATRICK
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Within fourteen (14) days after being served with a copy of this Report and Recommendation, a party may serve and file specific written objections to these proposed findings and recommendations. Fed. R. Civ. P. 72(b)(2). A copy of the objections shall be served upon all other parties. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Fed. R. Civ. P. 72(b)(2). Any different deadline that may appear on the electronic docket is for the Court's internal use only and does not control. If a party fails to object to the Magistrate Judge's findings or recommendations as to any particular claim or issue contained in this Report and Recommendation, that party waives the right to challenge on appeal the District Court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

STEVEN R. DEWITT,

Plaintiff,

v. **Case No. 4:21-cv-340-AW-MAF**

CERESSA HANEY, et al.,

Defendants.

_____/

ORDER GRANTING MOTIONS TO DISMISS

Steven Dewitt visited the Intervention & Detention Alternatives Office—a probation office in Tallahassee—to film content for a story. ECF No. 45 at 5-6.[1] Probation officer Cerresa Haney told Dewitt he could not film in the office's lobby and that she would call the police if he did not stop. *Id.* at 7. Dewitt kept at it—claiming he was conducting a "First Amendment audit"—and Haney called the police. *Id.* Officers Trent Sexton and Melanie Pretti responded to the call. *Id.* at 8-10. They told Dewitt to leave or face arrest. *Id.*

Dewitt sued Haney, Sexton, and Pretti, alleging First Amendment violations. He seeks damages, a declaration that Defendants' actions were unconstitutional, and an order requiring Defendants to "take a training course" on the Constitution. *Id.* at

[1] The facts come from the complaint and are accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

11. All Defendants moved to dismiss, asserting (1) qualified immunity on the damages claim and (2) a lack of jurisdiction as to Dewitt's requested prospective relief. ECF Nos. 51, 55.

In a report and recommendation, the magistrate judge concluded that (1) the complaint stated a claim that Defendants violated Dewitt's First Amendment right to record "matters of public interest" but that (2) Defendants had qualified immunity. ECF No. 62 at 17-24. All parties objected. Dewitt argues that qualified immunity does not apply (both because Defendants acted beyond their discretionary authority and because they violated a clearly established right) and that the magistrate judge "entirely fail[ed] to address his declaratory relief claim." ECF No. 68 at 2.[2] Defendants object to the conclusion that the complaint alleges a constitutional violation, although they welcome the qualified-immunity conclusion. ECF Nos. 64, 65. In other words, Defendants favor dismissal but do not care for the magistrate judge's reasoning.

Having reviewed the filings, and having considered de novo the issues presented in the objections, I agree with the magistrate judge as to qualified immunity. I do not reach the separate question of whether the complaint sufficiently

[2] Dewitt moved for leave to file amended objections because he inadvertently filed his original ones. *See* ECF Nos. 66, 67. This order grants that motion, and Dewitt's amended objections, ECF No. 68, are accepted as filed.

alleged a constitutional violation. And I dismiss the request for declaratory and injunctive relief for lack of jurisdiction.

To establish qualified immunity, Defendants had the initial burden of showing they acted within their discretionary authority. *Ingram v. Kubik*, 30 F.4th 1241, 1250 (11th Cir. 2022) (citing *Piazza v. Jefferson County*, 923 F.3d 947, 951 (11th Cir. 2019)). Dewitt objects to the magistrate judge's conclusion that they made that showing.

Dewitt did try to dispute whether Defendants acted within discretionary authority. *See* ECF No. 58 at 6 (arguing "[Haney] was not completely within her right to advise[] Plaintiff that he . . . had to leave" because IDAO is not a private entity); ECF No. 61 at 6 (arguing that Sexton and Pretti acted "contradictive" of their oaths to uphold the law). But his own allegations show otherwise. He alleges that Haney was the "probation supervisor" in the probation office when she asked him to stop recording or leave. It strains credulity to suggest that a probation supervisor acts outside her discretionary authority by asking a visitor to leave a probation office. The responding police officers—Sexton and Pretti—also acted in their discretionary authority by responding to a call. *Cf. Ellison v. Hobbs*, 786 F. App'x 861, 873-74 (11th Cir. 2019) (describing officers' response to a call as "classic police activity").

In arguing otherwise, Dewitt suggests Defendants must have acted outside of their discretionary authority because their conduct violated the law. *See* ECF No. 68

at 3-5 (arguing Defendants "did not have probable cause"); *see also* ECF No. 58 at 6; ECF No. 61 at 6. But this misunderstands the issue. "The inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act." *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1282 (11th Cir. 1998). What matters is "the general nature of the defendant's action," without regard to whether that action "may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004). And "the general nature" of the actions alleged here was within the Defendants' discretionary authority.

This means the burden shifts to Dewitt to show qualified immunity is inappropriate. *Ingram*, 30 F.4th at 1250 (citing *Piazza*). At the motion-to-dismiss stage, he must allege facts showing the violation of a clearly established right. *Id.* He has not shown that.

First, I note that Dewitt must offer sufficient precision as to the constitutional right allegedly violated. The Supreme Court has repeatedly cautioned that "the crucial question [is] whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). Thus, the question is not whether Dewitt had a generalized or abstract right to conduct so-called "First Amendment audits." Dewitt himself recognizes that. ECF

No. 68 at 6. The question instead is whether Dewitt had a clearly established right to record video in a probation office's lobby without the office's permission.

Dewitt must show that his right was clearly established in one of three ways: (1) citing a "materially similar case" from the Supreme Court, Eleventh Circuit, or Florida Supreme Court; (2) showing a "broad statement of principle within the Constitution" clearly established the right; or (3) pointing to conduct "so egregious" that a constitutional violation is obvious, even without similar controlling case law. *Id.* at 661 (citations omitted). He has not satisfied any of those methods.

As to path one, Dewitt cites no "materially similar case." He principally relies on *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).[3] While *Smith* held citizens have a First Amendment right to photograph or film police conduct subject to reasonable time, place, and manner restrictions, *id.* at 1333, it did *not* hold the officers in that case unreasonably restricted plaintiffs' speech. *Id. Smith* is also scant on fact discussion, but its "allusion to [time, place, and manner] restrictions indicates that the plaintiffs there attempted to film police activity while in a public forum of some sort." *Crocker v. Beatty*, 995 F.3d 1232, 1240-41 (11th Cir. 2021). Dewitt cites no controlling case law (and the court is aware of none) holding that a lobby like

[3] He also heavily relies on *Dunn v. City of Fort Valley*, 464 F. Supp. 3d 1347 (M.D. Ga. 2020). ECF No. 68 at 6-8. But because that is a district court case, it cannot clearly establish the law. *See Wilson*, 54 F.4th at 661.

IDAO's should be treated similarly. Indeed, privacy-sensitive IDAO matters suggest its lobby is not the conventional public forum. *See* ECF No. 51 at 7-8 at 6; ECF No. 55 at 13-14. "The dearth of detail about the contours of the right announced in *Smith* undermines any claim that it provides officers 'fair warning' under other circumstances" such as these. *Crocker*, 995 F.3d at 1241.

As to path two of clearly establishing the law, for the same reasons as above, "it is decidedly *not* 'obvious' that *Smith*'s 'general rule applies to the specific situation in question.'" *Id.* 1240-41 (11th Cir. 2021) (quoting *Youmans v. Gagnon*, 626 F.3d 557, 563 (11th Cir. 2010)). Nor is this a path-three case with conduct "so egregious" to make a constitutional violation obvious. *See Loftus v. Clark-Moore*, 690 F.3d 1200, 1205 (11th Cir. 2012) (describing path three as a "narrow" one only encompassing conduct that "lies so obviously at the very core" of the constitutional provision (quoting *Terrell v. Smith*, 668 F.3d 1244, 1257 (11th Cir. 2012)).

Because it is plain here that Dewitt's allegedly absolute right to film in the probation-office lobby was not clearly established, Defendants are entitled to qualified immunity from Dewitt's § 1983 damages claim. That makes it unnecessary to decide whether the complaint plausibly alleges a constitutional violation. *Wilson v. Sec'y, Dep't of Corr.*, 54 F.4th 652, 660 (11th Cir. 2022) (citing *Pearson v. Callahan*, 555 U.S. 223, 236-67 (2009) (holding that courts may "exercise their

sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first")).

Moreover, the court lacks jurisdiction over Dewitt's claims for injunctive and declaratory relief. His complaint only alleges a past harm—meaning no Article III case or controversy exists as to prospective relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-05 (1983); *Emory v. Peeler*, 756 F.2d 1547, 1551-52 (11th Cir. 1985) ("[Plaintiff] alleges that he has been injured by [the defendant's] past conduct . . . . [Plaintiff] makes no factual allegation, however, that such conduct has continued or will be repeated in the future.").

Dewitt's motion to file amended objections (ECF No. 67) is GRANTED. Dewitt's amended objections (ECF No. 68) are accepted as filed and are OVERRULED. Defendants' objections (ECF Nos. 64. 65) are SUSTAINED. The report and recommendation (ECF No. 62) accepted to the extent it recommends dismissal based on qualified immunity. It is rejected to the extent it recommends concluding that there was a constitutional violation alleged.

The motions to dismiss (ECF Nos. 51, 55) are GRANTED. The third amended complaint (ECF No. 45) is DISMISSED. The clerk will enter a judgment that says "This case was resolved on a motion to dismiss. Plaintiff's § 1983 damages claim is dismissed because of qualified immunity. His § 1983 claim for declaratory and

injunctive relief is dismissed for lack of subject-matter jurisdiction." The clerk will then close the file.

SO ORDERED on March 31, 2023.

s/ *Allen Winsor*
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

STEVEN R. DEWITT,

Plaintiff,

v. **Case No. 4:21-cv-340-AW-MAF**

CERESSA HANEY, et al.,

Defendants.

_____/

JUDGMENT

This case was resolved on a motion to dismiss. Plaintiff's § 1983 damages claim is dismissed because of qualified immunity. His § 1983 claim for declaratory and injunctive relief is dismissed for lack of subject-matter jurisdiction.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

March 31, 2023
Date

s/ TiAnn Stark
Deputy Clerk: TiAnn Stark

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3
No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.