IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 18-3105

JAMES PORTER;
MARILYNN SANKOWSKI

v.

CITY OF PHILADELPHIA;
BARBARA DEELEY, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS THE SHERIFF OF THE CITY AND COUNTY OF PHILA.;
DARYLL STEWART, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY IN THE CITY AND COUNTY OF PHILADELPHIA;
ED CHEW, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNSEL IN THE CITY AND COUNTY OF PHILADELPHIA;
WILLIAM BENGOCHEA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A SHERIFF IN THE CITY AND COUNTY OF PHILADELPHIA; GUERINO BUSILLLO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A SHERRIFF IN THE CITY AND COUNTY OF PHILADELPHIA; JAMES MCCARRIE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A SHERIFF IN THE CITY AND COUNTY OF PHILADELPHIA; ANGELLINEL BROWN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A SHERIFF IN THE CITY AND COUNTY OF PHILADELPHIA; PARIS WASHINGTON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A SHERIFF IN THE CITY AND COUNTY OF PHILADELPHIA

City of Philadelphia,
Appellant

BRIEF FOR APPELLANT CITY OF PHILADELPHIA AND APPENDIX VOLUME I OF IV (JA1-JA57)

Appeal from the Order of Baylson, J., entered August 31, 2018, in the United States District Court for the Eastern District of Pennsylvania, at No. 13-CV-02008, Denying the Motion of Defendant The City of Philadelphia for Judgment as a Matter of Law or, in the Alternative, for a New Trial or to Alter or Amend the Judgment or, in the Alternative, for Remittitur

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Dated: January 24, 2019

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a final judgment entered on August 31, 2018, which denied the post-trial motion of Defendant The City of Philadelphia (the "City").

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. This Court has jurisdiction over this appeal -- which was timely filed on September 21, 2018 -- under 28 U.S.C. § 1291.

STANDARD OF REVIEW

A Court should grant judgment as a matter of law "if there is no legally sufficient basis for a reasonable jury to find for a party on that issue." Fed. R. Civ. P. 50(a). Although the trial court must view the evidence in the light most favorable to the non-moving party, the court should enter judgment as a matter of law if, upon review of the record, the verdict is not supported by legally sufficient evidence. Marinelli v. Erie, 216 F.3d 354, 359 (3d Cir. 2000). This Court's review of the District Court's denial of our request for judgment is plenary. Id.

A "new trial may be granted to all or any of the parties and on all or part of the issues." Fed. R. Civ. P. 59(a). Although the decision to grant a new trial is reviewed for abuse of discretion (unless the trial court's error is based upon an application of a legal precept), a new trial is still warranted, among other reasons, if the jury instruction is erroneous, Harvey v. Plains Twp., 635 F.3d 606, 612 (3d Cir. 2011), or if the verdict would constitute a miscarriage of justice, Am. Bearing v. Litton, 729 F.2d 943, 952 (3d Cir. 1984).

QUESTIONS PRESENTED

Where Plaintiff James Porter ("Plaintiff" or "Mr. Porter") wanted to make an announcement about his property at a mortgage foreclosure sheriff's sale, but the City prevented Plaintiff from doing so pursuant to the City's no-comment policy at such sales:

(1) Did the District Court err in declining to enter judgment in the City's favor on Plaintiff's free-speech claim where the no-comment policy is reasonably tailored to allow for the orderly disposition of hundreds of property sales; does not limit citizens' ability to object to or comment on these property sales in other ways and in other fora; and is a blanket prohibition that is not viewpoint based?

Raised: Post-Trial Memorandum (Docket 105) at 4-5.

Ruling: Post-trial Opinion ("Opinion") at 30-32.

(2) Alternatively, did the District Court err in declining to enter judgment for the City on damages, where Plaintiff failed to prove any (let alone $750,000 worth of) damages, in that: Plaintiff's damages theory (i.e., that deputy sheriffs violently attacked him to silence his announcements) was utterly inconsistent with a prior conviction against Plaintiff (i.e., a resisting-arrest conviction where the Court found that Plaintiff first attacked the deputy sheriffs); and, in any event, not a shred of evidence suggested the City had a policy of using violent force to implement the no-comment policy?

Raised: Joint Appendix ("JA") 867; Post-Trial Memorandum (Docket 105) at 14-16; Post-Trial Motion (Docket 94) at 5.

Ruling: JA948; Opinion at 33.

(3) Alternatively, did the District Court err in declining to grant a new trial, where: the Court erroneously directed a verdict against the City; the Court prejudicially induced the City to decline to offer policy evidence; and the verdict was infected with non-cognizable recovery.

Raised: Post-Trial Memorandum (Docket 105) at 8-14;

Ruling: Opinion at 22-24; 33-38; 44-45.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are four related cases: (1) Porter v. Terra, Philadelphia Common Pleas, July Term 2006, No. 1487; (2) Commerce Bank v. Porterra, Philadelphia Common Pleas, February Term 2007, No. 3257, aff'd, Commerce Bank v. Porterra, Pa. Super. No. 713 EDA 2011 (April 10, 2012); (3) Porter v. TD Bank, E.D. Pa. 10-2013, aff'd, 519 F. App'x 109 (3d Cir. 2013); and (4) Commonwealth v. Porter, Philadelphia Common Pleas, CP-51-CR-0001611-2011, aff'd, Commonwealth v. Porter, 2016 WL 5845787 (Pa. Super. Ct. Aug. 2, 2016), allocatur denied, 165 A.3d 888 (Pa. 2017).

We discuss these case in more detail below.

STATEMENT OF THE CASE

I. Introduction

On January 4, 2011, the Sheriff of the City of Philadelphia was conducting its monthly mortgage foreclosure sheriff's sale, which typically exposes hundreds of properties to auction monthly. Plaintiff's property, 1039-55 Frankford Avenue (the "Property"), was one of the properties listed for sale. During the sale, Mr. Porter wanted to interrupt the orderly bidding on his Property to make an announcement informing prospective purchasers that Mr. Porter's wife, Debra Porter ("Ms. Porter"), was pursuing litigation attempting to establish an alleged priority mortgage interest in the Property. The City prevented Plaintiff from making this announcement on his wife's behalf, much like it prevents everybody from commenting at sheriff's sales (we refer to this policy as the "no-comment" policy).

A violent scuffle ensued with the deputy sheriffs, Mr. Porter was removed from the auction, and he was eventually convicted of resisting arrest, and that conviction remains intact. He subsequently sued the City here for a free-speech violation, and the jury awarded him $750,000 in physical and emotional damages arising from the violence. The District Court upheld the damages award against the City under the logic that the deputy sheriffs were acting pursuant to City policy when they employed violent physical force in silencing him.

The primary issues in this appeal are: whether the City violated the First Amendment rights of Mr. Porter when it stopped Mr. Porter from making an

announcement at the sheriff's sale; and, even if it did, whether the Sheriff's policy caused Mr. Porter physical and emotional damage in stopping his announcement.

As we explain below, the City is entitled to judgment on the First Amendment claim because its blanket no-comment policy is a reasonable and viewpoint-neutral time, place, and manner restriction that allows for an orderly sheriff's sale process while granting individuals other opportunities to speak.

In the alternative, we are entitled to judgment because Plaintiff did not prove that the City caused him damage. Notably, his claim that the deputy sheriffs attacked him here is flatly inconsistent with, and therefore precluded by, his criminal conviction for resisting arrest.

Moreover, Plaintiff offered no evidence whatsoever that any such attacks occurred pursuant to an alleged municipal policy of using violent force to enforce the no-comment policy. Even though we do not reach this point until the latter half of the brief as a logical matter, we nonetheless emphasize the outrageousness of the District Court's ruling. The District Court essentially found, without any evidence, that we have a policy of violence. We do not. This Court should reverse and enter judgment for this reason alone.

At a minimum, we are entitled to a new trial; the Court erroneously directed a verdict against us, prejudicially induced the City to decline to offer policy evidence, and allowed non-cognizable recovery to infect the verdict.

II. Sheriff's sales in general

When a property owner is unable to pay a defaulted mortgage, the mortgage holder can initiate a foreclosure action, and obtain a judgment in foreclosure. A

writ of execution submitted by the defaulting mortgage holder then directs the Sheriff to sell the property at a public auction.

In Philadelphia, mortgage foreclosure sheriff's sales take place the first Tuesday of the month at 3801 Market Street, and typically expose hundreds of properties for auction. JA504 (Ed Chew, Sheriff's counsel). The auction room is four times the size of a courtroom, JA267 (Plaintiff's mother), and seats about 700 people, J426 (Plaintiff's brother).

Although the auction room is bigger than a courtroom, it maintains the "decorum" of a courtroom, both out of practicality to allow for the orderly processing of hundreds of properties and to prevent "chaos," and because the Sheriff, in enforcing the writ of execution, is "acting [as] the court's arm [in] selling this property." JA504 (Chew); JA390 (Sheriff Barbara Deeley: "a sheriff's sale is like a courtroom").[1]

To maintain this decorum and allow for orderly sales, the City instituted a no-comment policy, where it prohibits all non-bidders from making comments about the properties. JA504-505 (Chew); JA390 (Deeley); see also JA339 (Richard Tyer, sheriff's office clerk); JA549 (Mr. Darryl Stewart, supervisor of the sheriff's office real estate department); JA793 (Deputy Sheriff William Bengochea). The City, of course, allows interruptions where a Court orders a

[1] The Sheriff also conducts approximately three tax sales per month under the Municipal Claims and Tax Liens Act (MCTLA), P.L. 207, March 16, 1923, as amended, 53 P.S. §§ 7101-7505. There, the City is the plaintiff, and the same rules of decorum apply.

postponement of the sale, or where a party files a bankruptcy petition (triggering an automatic stay). JA396 (Deeley); JA490, 502, 505 (Chew); JA551 (Stewart). The sheriff's office usually receives such stay orders prior to the sale. JA502.

The Sheriff sets the policies for the Philadelphia Sheriff's Office. JA383-384 (Deeley); cf. Lennox v. Clark, 93 A.2d 834 (Pa. 1953).

III. Events Leading Up To The Sheriff's Sale Of January 4, 2011 -- Two Courts Determined That Ms. Porter Did Not Have A First Priority Mortgage On The Property

By way of background, on July 20, 2005, Plaintiff's wife received a mortgage on the Property securing a note for $2.8 million, but the title company never recorded the mortgage. On August 25, 2005, Commerce Bank, N.A. ("Commerce Bank," which was succeeded by TD Bank, N.A), provided a $5.86 million construction loan for the Property, and secured its loan by recording a mortgage on the Property. Opinion at 1-2.

On July 17, 2006, Plaintiff and Ms. Porter sued in state court to have Ms. Porter's mortgage retroactively recorded so she would have priority over Commerce Bank, or alternatively, to receive money damages for the deprivation of her security interest in the Property. Porter v. Terra, Philadelphia Common Pleas, July Term 2006, No. 1487. On January 20, 2010, the Court (the Honorable Howland W. Abramson) awarded damages but did not order that the mortgage be retroactively recorded. Although Mr. Porter and his wife appealed certain aspects of that case, see Porter v. Terra, Pa. Super. Ct. No. 2109 EDA 2009 (July 8, 2010), neither appealed the recordation determination, so the determination that Ms.

Porter's mortgage was not recorded was final, and Commerce Bank's previously recorded mortgage had first priority.

On February 28, 2007, Commerce Bank initiated a foreclosure action with respect to the Property. Commerce Bank v. Porterra, Philadelphia Common Pleas, February Term 2007, No. 3257. It is this foreclosure action that ultimately led to the sheriff's sale at issue in the current appeal. On June 9, 2009, the Court (Judge Abramson) entered judgment in foreclosure on the Property. The sheriff's sale was scheduled for January 4, 2011. On December 14, 2010, Ms. Porter moved to postpone the sale, claiming her mortgage held first priority. The next day, the Court denied the motion.

Ms. Porter then immediately filed an emergency motion for reconsideration, which the Court denied on collateral estoppel grounds on December 29, 2010.[2]

Thus, at the time of the January 4, 2011 sheriff's sale, Plaintiff and his wife had twice tried to stop the sheriff's sale, claiming that she had a first-priority mortgage, but Common Pleas twice held she had insufficient interest to impact the sale. The Superior Court eventually affirmed. Commerce Bank v. Porterra, Pa. Super. No. 713 EDA 2011 (April 10, 2012).

IV. The Sheriff's Sale Of January 4, 2011

Given that Ms. Porter could not convince a court to recognize an interest in the Property sufficient to stop the sale, Plaintiff took it upon himself to try to

[2] Ms. Porter also filed a subsequent motion in the foreclosure action to set aside the sale, again claiming she had first priority, but Common Pleas denied that as well on February 10, 2011.

impact the sale. When the auctioneer announced that Plaintiff's Property was up for bid during the January 4, 2011 sheriff's sale, Plaintiff, upon the advice of counsel, JA364, 367, started to make an announcement regarding his wife's potential mortgage interest, hoping to inform prospective purchasers that his wife was pursuing a federal action seeking a declaration that her mortgage actually held priority over Commerce Bank. JA635, 645.[3]

Mr. Porter did not reference the fact that two state courts had already ruled that she did not have a first-priority mortgage. Regardless, pursuant to the Sheriff's no-comment policy, and because Plaintiff had no court order postponing the sheriff's sale, the City attempted to stop Plaintiff from completing his announcement.

Notably, the parties offer vastly different versions regarding how the City attempted to stop his announcement. According to Plaintiff: he was innocently trying to give his announcement; without warning, the deputy sheriffs violently attacked him to prevent him from doing so; and he was eventually arrested. According to the City: the deputy sheriffs politely asked him to stop interrupting the auction; he repeatedly refused to do; the deputy sheriffs tried to gently escort him from the auction; he violently resisted several deputy sheriffs for several

[3] Unsatisfied with her state-court progress, Ms. Porter had also filed a complaint in federal court on December 14, 2010, seeking a declaration that she had priority over Commerce Bank's mortgage. Porter v. TD Bank, E.D. Pa. 10-2013. Her federal court efforts ultimately proved equally unsuccessful. Porter v. TD Bank, 2012 WL 3704817 (E.D. Pa. Aug. 27, 2012), aff'd, Porter v. TD Bank N.A., 519 F. App'x 109 (3d Cir. 2013).

minutes, injuring at least one of the deputy sheriffs; he unlawfully resisted arrest; and he was eventually arrested and convicted.

We believe that, under Heck v. Humphrey, 512 U.S. 477 (1994), the Court is constrained to accept our version, and we argue that version below in the Heck section. Nonetheless, because the Court should reverse even accepting Plaintiff's version (and because Plaintiff was the verdict winner), we now describe the facts most favorably to Plaintiff.

When Plaintiff spoke, Defendant Ed Chew ("Mr. Chew," who was Sheriff's counsel on January 4, 2011), yelled at Plaintiff and grabbed him by the arm. JA645 (Plaintiff). Mr. Chew, along with Defendant Darryl Stewart ("Mr. Stewart," who was supervisor of the sheriff's office real estate department on January 4, 2011), then summoned the deputy sheriffs. JA650, JA663 (Plaintiff). As the District Court found, the deputy sheriffs then "pulled [Plaintiff] by the collar, put [Plaintiff] in a chokehold, placed him in handcuffs, hit him with a stun gun, and eventually dragged him from the room." Opinion at 2 (citing JA276 (Sankowski); JA645-649 (Plaintiff)).

The deputy sheriffs attempted to handcuff Mr. Porter, but he resisted. JA677 (Plaintiff). Ultimately, the deputy sheriffs did handcuff him. JA680 (Plaintiff). The police subsequently arrived and placed him under arrest. JA591 (Police Officer Gerald Harris). Mr. Porter was later convicted of resisting arrest.

Pardes Group, Inc. ("Pardes") ultimately purchased the Property for $1.25 million.

V. The Current Free-Speech Litigation

In December 2012, Plaintiff filed this civil-rights action in state court, against the following Defendants: the City; former Sheriff Barbara Deeley ("Sheriff Deeley," who was the City's Sheriff on January 4, 2011); Mr. Stewart; and Mr. Chew.

Mr. Porter also sued Deputy Sheriff William Bengochea ("Deputy Bengochea"); retired Lieutenant Guerino Busillo ("Lieutenant Busillo," who was a Sergeant on January 4, 2011); Deputy Sheriff James McCarrie ("Deputy Bengochea"); Sergeant Angellinel Brown ("Sergeant Brown," who was a Deputy Sheriff on January 4, 2011); and Inspector Paris Washington ("Inspector Washington," who was a Sergeant on January 4, 2011), but Plaintiff voluntarily dismissed his case against defendants Bengochea, Busillo, McCarrie, Brown, and Washington. JA69.

Mr. Porter alleged that Defendants abridged Mr. Porter's right to free speech, committed excessive force, committed civil conspiracy, and violated Plaintiffs' rights to equal protection, and committed various state-law violations (he later withdrew his state-law claims, JA937). He also alleged that the Sheriff had an unconstitutional policy that violated his First Amendment rights under Monell v. New York, 436 U.S. 658 (1978). Plaintiff Marilyn Sankowski ("Ms. Sankowski"), Plaintiff's mother, was co-Plaintiff; she claimed that Mr. Chew committed excessive force against her.

On April 16, 2013, Defendants removed to federal Court. The case was placed in suspense pending the related criminal action against Mr. Porter. On

August 2, 2016, the Superior Court upheld the resisting-arrest conviction, holding that Plaintiff's "announcement during the sheriff sale caused a major disruption to the normally orderly event," that Plaintiff "failed to comply with multiple requests to stop his announcement and leave the sale by both Mr. Chew and multiple sheriffs," that when one of the sheriffs "attempted to escort [Plaintiff] out of the sale by placing his hand on [Plaintiff's] elbow, [Plaintiff] elbowed [the deputy sheriff] with such force that he fell to the floor," and that Plaintiff "then engaged in a struggle with [several] sheriffs." Porter, 2016 WL 5845787, at *8.

On February 8, 2017, Plaintiff's then-attorney, Brian Zeiger, moved to remove the case from civil suspense, and moved to withdraw as counsel, claiming that Mr. Porter threatened him. JA65. The Court granted both motions on March 28, 2017. Thereafter, Plaintiff was pro se and Mr. Zeiger represented only Ms. Sankowski.

After two extensive pretrial conferences, one on September 25, 2017, JA1084, and one on October 10, 2017, JA1087, the Court detailed the remaining discovery procedures, and clarified that Plaintiff's remaining claims were against the individual Defendants for excessive force, denial of free speech by retaliation, and civil conspiracy.

At trial, on March 29, 2018, the Court found that Plaintiff waived his First Amendment Monell claim, because he did not pursue it during discovery or reference it during the extensive pretrial conferences. JA64. The Court informed the jury that the City was not a defendant. JA78.

On April 2, 2018, Mr. Porter asked the Court to reconsider. On April 3, 2018, after all of Plaintiff's witnesses had testified -- many of whom would have been highly relevant to the City's Monell defense -- the Court reinstated the Monell claim, reasoning the City could not show prejudice because the Monell claim had only been temporarily removed from the case for a few days. JA577; JA700; JA1091. Plaintiff also dismissed his claim against Sheriff Deeley in her individual capacity. JA700.[4]

Thus, the remaining Defendants in Mr. Porter's case were the City, Mr. Chew, and Mr. Stewart (and Ms. Sankowski continued her case against Mr. Chew).

After testimony concluded on April 4, 2018, the Court conducted its charge conference, JA872-873, and then informed the jury that the City was back in the case, consistent with the Court's Monell ruling. JA887. Next, the jury heard closing argument. JA910. Finally, the Court rejected our argument that Heck barred Plaintiff's First Amendment claim. JA948.

The next day, April 5, 2018, the Court instructed the jury. JA958-1015. Over our objection, the Court informed the jury that, if the jury found that Defendants halted Plaintiff's planned announcement, then the jury must automatically find that Defendants necessarily violated Plaintiff's First Amendment rights. JA972.

[4] The Court initially allowed the claim to proceed against Sheriff Deeley in her official capacity, JA700; but, recognizing that a claim against the Sheriff in her official capacity was the same thing as a Monell claim against the City, see Hafer v. Melo, 502 U.S. 21, 25 (1991), the Court ultimately dismissed Sheriff Deeley entirely. JA864; JA1091.

That same day, the jury concluded that: Mr. Chew was liable to Ms. Sankowski $7,963 for excessive force; neither Mr. Chew nor Mr. Stewart committed excessive force against Mr. Porter; Mr. Stewart did not retaliate against Mr. Porter for his First Amendment speech; Mr. Chew did retaliate against Mr. Porter for Mr. Porter's First Amendment speech, did commit civil conspiracy, and was liable for $7500; Mr. Chew was not liable for punitive damages; the City's no-comment policy deprived Mr. Porter of his First Amendment rights; and such policy caused Mr. Porter $750,000 in harm. JA6-7.

The jury also found, however, that neither Mr. Stewart's actions nor Mr. Chew's actions caused any harm to Mr. Porter, JA7, meaning the jury concluded that no individual acting on behalf of the Sheriff actually harmed Plaintiff. Nonetheless, the Court entered judgment against the City and Mr. Chew that same day. JA10.

Mr. Chew paid the $7,963 judgment against Ms. Sankowski and negotiated a release of her claim for fees, thereby ending Ms. Sankowski's claim.

The City and Mr. Chew filed post-trial motions against Mr. Porter. On August 31, 2018, this Court denied the City's motion, upholding the jury's $750,000 verdict against the City, but granted Mr. Chew's motion because the jury found that Mr. Chew's actions did not cause any harm to Plaintiff. Opinion at 44.

VI. The District Court's Post-Trial Ruling

The Court addressed the First Amendment question of whether the City was permitted to prohibit speech at sheriff's sales. Applying the Supreme Court's forum analysis, the Court held that a sheriff's sale constituted a limited public

forum, meaning that the City could restrict speech if the restriction was a reasonable time, place, and manner limitation, and if it was viewpoint-neutral. Opinion at 26.

The Court held that we failed both criteria. As for whether the restriction constituted a reasonable time, place, and manner limitation, the Court held that it did not, both because there were no ample alternatives for Mr. Porter to communicate his message to potential purchasers regarding Ms. Porter's mortgage-priority litigation, and because the City allegedly did not attempt to show that the no-comment policy was narrowly tailored. Opinion at 31-32. The Court did not consider the other avenues available to Mr. Porter to communicate his message, and it did not consider whether the Sheriff's no-comment policy was narrowly designed to promote order at sheriff's sales.

The Court also held that our restriction was viewpoint-discriminatory, in that Mr. Chew testified that he would prohibit announcements that would decrease the value of the property. Opinion at 31. The District Court never cited any proof that Mr. Chew spoke for the Sheriff, and the Court did not explain why value-decreasing speech even constituted a viewpoint in the first place, particularly in a forum whose purpose was to sell properties.

The Court also rejected our argument that Plaintiff failed to prove that the Sheriff's no-comment policy caused damage. Remarkably, the Court concluded that the Sheriff's policy, in addition to a prohibition upon speech, also included the violent enforcement of that prohibition whenever an individual started speaking. "The affirmative link between the policy and its brutal implementation through

physical force is obvious: the jury apparently believed that the policy was enforced through physical force applied in immediate retaliation for Porter's exercise of his First Amendment rights." Opinion at 33. The Court cited no proof in support of such an alleged policy of municipal brutality, either in the form of testimony from a policymaker or in the form of past incidents of violent enforcement.

The Court also rejected our new trial requests. Specifically, in response to our argument that the Court erroneously directed a viewpoint-discrimination verdict (insofar as the Court instructed the jury that it was required to find that the Sheriff's no-comment policy violated the First Amendment), the Court held that its instruction was nonetheless proper. Opinion at 35-41. The Court never explained, however, why it did not permit the jury to evaluate if there was viewpoint discrimination.

In response to our argument that the Court prejudicially induced the City to decline to offer evidence regarding municipal viewpoint discrimination (insofar as the Court dismissed the Monell claim at the start of trial and then only reinstated the claim after Plaintiff introduced his witnesses), the Court explained that there was no prejudice because we "admitted" that "the Sheriff's Department had a specific policy not to allow any announcements to be made at sheriff's sale." Opinion at 21. The Court did not address, however, whether we were prejudiced by our inability to respond to a claim of municipal viewpoint discrimination.

The Court deferred ruling on Plaintiff's fee request. This appeal by the City followed. Plaintiff is represented on appeal by David C. Gibbs, III.

SUMMARY OF ARGUMENT

We seek judgment for two independent reasons.

First, Plaintiff failed to prove a First Amendment violation, as the City's restriction is narrowly tailored, provides for ample alternatives and is viewpoint neutral. The no-comment policy -- designed to allow the orderly disposition of hundreds of properties -- is narrowly tailored, as speech from non-bidders would be inherently disruptive to those many sales. Given that the Sheriff exposes hundreds of properties to auction monthly, it is inherently reasonable to preclude all non-bid comments during an auction (unless the speaker has a court order allowing interruption of the sale).

Further, there are ample alternatives. Plaintiff wanted to speak at the sheriff's sale in order to protect his wife's potential first-priority mortgage and apprise prospective purchasers of that mortgage. He had several options available to protect his wife's interests. Primarily, he should have obtained a court order that stayed the sale or that recognized her alleged primary priority (he tried to do so but failed). He also could have spoken to other bidders before the auction commenced (he did so), quietly carried signs outside the auction, or posted the Property.

Finally, the no-comment policy is viewpoint-neutral; the District Court's contrary conclusion was flawed because the evidence that the Court used -- a quote from Mr. Chew that he excluded speech that would have "a chilling effect on the sale itself," JA500 -- did not demonstrate a City policy of viewpoint discrimination. Even if Plaintiff proved that the City only precluded value-damaging speech, but permitted value-enhancing speech (and Plaintiff did not

make this showing), we do not see how making a decision based upon whether speech limits or promotes sales constitutes making a decision around a viewpoint. At all events, there was no proof that Mr. Chew, a non-policymaking employee, spoke for the City.

Second, even if Plaintiff proved a First Amendment violation (he did not), the Court should enter judgment because Plaintiff's theory of damages (i.e., our deputy sheriffs allegedly attacked him without provocation when enforcing the no-comment policy) is unsupported, for two independent reasons. First, Plaintiff's damages theory is barred by Heck because it is completely irreconcilable with the findings supporting his criminal conviction for resisting arrest; namely, that Plaintiff attacked the deputy sheriffs, not the other way around. Not surprisingly, even the jury concluded that no individual actors actually harmed Plaintiff, supporting the conclusion that the deputy sheriffs did not physically harm Plaintiff.

Additionally, assuming somehow the deputy sheriffs actually attacked Plaintiff here (they did not), Plaintiff's damages claim also fails because there is no evidence whatsoever establishing a policy of violent enforcement; the only policy evidence demonstrates that it was the City's typical practice to peacefully ask disruptive speakers to stop talking and leave the room, and that the present case represents, at worst, a unique anomaly. Importantly, even though we do not reach this point until the latter half of the brief as a logical matter, we nonetheless emphasize the outrageousness of the Court's ruling here. The Court in essence held that we have a policy of violence. Without an iota of evidence to support this

conclusion, and with overwhelming evidence to the contrary, this Court should affirmatively reverse for this straightforward reason alone.

Alternatively, we seek a new trial for three independent reasons.

First, when the Court instructed the jury that it was required to find that the City's no-comment policy violated the First Amendment, the Court erroneously directed a viewpoint-discrimination verdict; at a minimum, there was conflicting evidence.

Second, when the Court dismissed the Monell claim at the start of trial and then only reinstated the claim after Plaintiff introduced most of his witnesses, the Court prejudiced the City because we had no idea during the testimony of these witnesses that we had to rebut the existence of an unconstitutional policy.

Finally, the Court, in instructing the jury that it could award damages for lost wages, infected the verdict, because Plaintiff's only basis for claiming lost wages flowed from his resisting-arrest conviction, not from any no-comment policy.

ARGUMENT

We accept that the jury found, pursuant to the City's no-comment policy, that the City stopped Plaintiff from completing his announcement. Nonetheless, the Court should enter judgment for the City. First, the Sheriff's prohibition upon comments at sheriff's sales is constitutional, as it is narrowly tailored, leaves open ample alternatives for communication, and is viewpoint-neutral. Second, assuming arguendo that the no-comment policy is unconstitutional (it is constitutional), the Court should still enter judgment because Plaintiff failed to prove that the City's no-comment policy caused him any damage.

Alternatively, we are entitled to a new trial, because the Court erroneously directed a viewpoint-discrimination verdict, the Court prejudicially induced the City to decline to offer evidence, and the verdict was infected with non-cognizable recovery.

I. The Court Should Enter Judgment For The City Because Plaintiff Failed To Prove That Our No-Comment Policy Was Either Unreasonable Or Viewpoint-Discriminatory

The District Court analyzed this case under the Supreme Court's "forum analysis," first holding that a "sheriff's sale is not a court proceeding." Opinion at 21. Assuming arguendo forum analysis applies at all, the Court should still enter judgment for the City.[5]

[5] We question whether forum analysis applies at all. As Sheriff Deeley explained: "Your Honor, a sheriff's sale … is just like this. I'm sure, if one of the ladies or gentlemen were to get up right now and say something of a sort, Your Honor would either tell them to either sit down and be quiet…. [A] sheriff's sale is like a courtroom. It's a court proceeding." JA390; see also JA723 (Brown: "it is considered a court proceeding"); JA336 (Tyer: same); JA761 (McCarrie: same);

Briefly, there are three types of fora, traditional public fora (such as streets and parks), designated public fora (which the government intentionally opens for use by the public), and limited public fora. CLS v. Martinez, 561 U.S. 661, 679 n.11 (2010).[6]

Assuming arguendo forum analysis applies at all, we accept that the sheriff's sale here constitutes a limited public forum, which is "a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." Galena v. Leone, 638 F.3d 186, 198 (3d Cir. 2011).

The government may restrict the time, place and manner of speech in a limited public forum, as long as those restrictions are reasonable and serve the purpose for which the government created the limited public forum. Pleasant Grove v. Summum, 555 U.S. 460, 467 (2009). In other words, a time, place, and manner restriction in a limited public forum is permissible if it: (1) is narrowly tailored to serve an important governmental interest, and (2) leaves open ample alternatives for communication of information. Galena, 638 F.3d at 197.

Moreover, "even if a limitation on speech is a reasonable time, place, and manner restriction, there is a First Amendment violation if the defendant applied

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JA793 (Bengochea: "It's just like being in a courtroom."); see also Northwest v. Knapp, 149 A.3d 95, 99 (Pa. Super. 2016) (explaining that a "judicial sale" is "a sale under judicial authority, by an officer legally authorized for the purpose, such as a sheriff's sale"). Accordingly, the City was entitled to prohibit speech at the Court-like proceeding, and the Court should enter judgment for this reason alone.

[6] This Court has explained that, "recently, the [Supreme] Court has used the term 'limited public forum' interchangeably with 'nonpublic forum.'" Galena, 638 F.3d at 197 n. 8.

the restriction because of the speaker's viewpoint." Id. In other words, although this Court has clarified that, "in a limited public forum, … content-based restraints are permitted," the restriction will fail if it is viewpoint-based. Galena, 638 F.3d at 199 (quoting Eichenlaub v. Indiana, 385 F.3d 274, 280 (3d Cir.2004)).

The District Court ruled against the City on these two alternative bases. First, the Court held that our total-prohibition policy was unconstitutional as an unreasonable time, place, and manner restriction. Opinion at 22. More specifically, the Court ruled that we failed to meet the traditional time, place, and manner analysis because our prohibition upon speech at sheriff's sales was not narrowly tailored, Opinion at 32, and because it did not leave open ample alternative channels, Opinion at 30-31.

Second, the District Court ruled against us because, even if the City's total-prohibition policy was a reasonable time, place, and manner restriction, "[Mr.] Chew's implementation of the policy was viewpoint-discriminatory," Opinion at 31.

The District Court's analysis is erroneous. The no-comment policy -- designed to allow the orderly disposition of hundreds of properties -- is narrowly tailored, as speech from non-bidders would be inherently disruptive. Further, there were ample alternatives for Plaintiff to engage in speech designed to protect his wife's potential property interests. Most importantly, he should have obtained a court order that stayed the sale or that recognized her alleged primary priority (he tried to do so several times but failed every time). Additionally, he could have

quietly talked to other bidders before the auction commenced (he did so), quietly carried signs outside the auction, or posted the Property.

Finally, the no-comment policy is viewpoint-neutral, and Plaintiff certainly did not demonstrate a City policy of viewpoint discrimination.

A. The City's Restriction Upon Speech At Sheriff's Sales Is A Reasonable Time, Place, and Manner Limitation

The District Court held that we failed to meet either the narrow-tailoring or ample-alternatives prongs of the time, place, and manner test. We met both.

At the outset, we note that Courts routinely and consistently uphold restrictions on speech at public meetings where the speech itself disrupts the orderly progress of the meeting (except, of course, where the speech restriction is linked to viewpoint). See, e.g., Galena, 638 F.3d at 212 (upholding speech restriction at city council hearing); Eichenlaub, 385 F.3d at 281 (township board of supervisors); see also Olasz v. Welsh, 301 F. App'x 142, 146 (3d Cir. 2008) (borough council); Steinburg v. Chesterfield, 527 F.3d 377, 387 (4th Cir. 2008) (county planning commission); Kindt v. Santa Monica, 67 F.3d 266 (9th Cir. 1995) (rent control board); Jones v. Heyman, 888 F.2d 1328, 1329 (11th Cir. 1989) (city commission).

Moreover, the City's restriction upon speech at sheriff's sales is narrowly tailored and permits ample alternative channels.

1. Narrow-Tailoring

The means adopted by the government need not be the least-intrusive or least-restrictive means to satisfy this prong of the analysis. Kreimer v.

Morristown, 958 F.2d 1242, 1264 (3d Cir. 1992). Instead, "the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). The analysis does not hinge on the "judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." Id.

Here, the City's restriction -- designed to promote orderly sheriff's sales -- easily satisfies this standard. As noted, a sheriff's sale is a busy proceeding with hundreds of properties to be sold. JA504 (Chew). Speech from outsiders would be inherently disruptive to that sale, because such speech would interrupt the flow of the sheriff's sale. Indeed, allowing outside speech "would impinge on the First Amendment rights of others," Eichenlaub v. Indiana, 385 F.3d 274, 281 (3d Cir. 2004); see also White v. Norwalk, 900 F.2d 1421, 1426 (9th Cir. 1990), here, the participants in the sheriff's sale auction.

As this Court noted in Galena, which upheld the government's prohibition upon speech from the public: "the interruption of the order of business is itself the disturbance." 638 F.3d at 212. Put differently, restricting speech is necessarily narrowly tailored to the goal of allowing sheriff's sales to proceed, because the speech itself would disrupt the sale.

Plaintiff hoped to give an announcement regarding his wife's potential mortgage interests, desiring to inform prospective purchasers that his wife was

pursuing a federal action seeking a declaration that her mortgage actually held priority over Commerce Bank.

It was entirely reasonable for the Sheriff to deny this speech. Otherwise, we would have to allow speech from anyone claiming an (unverified) interest in property. Given that we sell hundreds of properties at each sale, this would grind the sheriff's sale process to a halt. Instead, we require potential speakers to provide either a court order impacting the sale, or a bankruptcy petition. JA396 (Deeley); JA490, 502, 505 (Chew); JA551 (Stewart).

Without such an order, the sale must continue, uninterrupted. Cf. GMAC v. Buchanan, 929 A.2d 1164, 1168 (Pa. Super. 2007) ("Appellant has not cited to any case law, statutory provision, statewide procedural rule or local rule that would either permit or require a sheriff to remove a property scheduled for sheriff's sale from the sale list when no automatic stay in bankruptcy actually exists.").

Plaintiff understood as much and pursued such an order affecting the sale, both in Porter v. Terra, where Plaintiff and his wife asked the Court to retroactively record her mortgage, and in Commerce Bank v. Porterra, where Ms. Porter attempted to stay the sale (and then sought to retroactively set aside the sale). But Plaintiff and his wife failed. If we allowed Plaintiff to speak -- where two courts conclusively decided that neither he nor his wife had a right to impact the sale -- it would be virtually impossible to complete our sheriff's sales ever.

Therefore, the City's no-comment policy was narrowly tailored.[7]

[7] Oddly, the District Court reasoned that we made "no attempt whatsoever to argue that the policy was narrowly tailored to that interest." Opinion at 32. However, not only is the connection self-evident – speech will necessarily disrupt the sale –

2. Alternative Channels of Communication

The Galena Court explained that "an alternative means of communication [must] provide only a 'reasonable opportunity' for communication of the speaker's message." 638 F.3d at 203 (quoting Renton v. Playtime Theatres, 475 U.S. 41, 54 (1986)). Courts "generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of [a] particular community or setting." Galena, 683 F.3d at 203.

A "speaker is not entitled to his or her favored or most cost-effective mode of communication." Johnson v. Philadelphia, 665 F.3d 486, 494 (3d Cir. 2011). "The Constitution requires only that [the city] leave open an alternative channel of communication, not the alternative channel of communication [plaintiff] desires." CAMP v. Atlanta, 451 F.3d 1257, 1282 (11th Cir. 2006) (emphasis in original); see also Startzell v. Philadelphia, 533 F.3d 183, 202 (3d Cir. 2008) (holding that alternative channels were ample, even though the potential audience was reduced).

Here, as noted, Plaintiff wanted to speak at the sheriff's sale in order to protect his wife's speculative first-priority mortgage and apprise prospective purchasers of that mortgage.

Again, though, the proper way to protect his wife's interests was to get a court order staying the sale or definitively identifying her mortgage as first priority, not to disrupt the actual sheriff's sale by identifying a speculative, unproven

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we also specifically argued that "[a]llowing public comment or discussion of a property would undoubtedly bog down a sale and cause chaos." Post-Trial Memorandum at 5.

interest. Moreover, Ms. Porter's own pre-sale action to file an emergency motion in state court -- which resulted in adverse judicial determination on the only relevant foreclosure issues -- indicates that Plaintiff and his counsel knew precisely the appropriate legal options to protect Ms. Porter's alleged property interest. Not only that, but Ms. Porter then exhausted the appropriate state court remedy after the auction by filing a motion to set aside, but that effort also failed. Therefore, Plaintiff had -- and used -- ample avenues to protect his wife's interest that did not include disrupting sheriff's sales.

The District Court held that obtaining a court order was insufficient because Plaintiff "was trying to warn potential buyers that that buyer would be purchasing the property subject to litigation" and "there was no other forum to communicate that information." Opinion at 31.

However, as explained above, a court order staying the sale or prioritizing Ms. Porter's mortgage would have been sufficient to protect Ms. Porter's interest. If Ms. Porter's underlying claim had any legitimacy, the state court -- in an abundance of caution -- likely would have postponed the auction for at least one month when hearing the emergency motion to stay the sale. Of course, Plaintiff and Ms. Porter failed in their efforts to obtain such court orders, but such failure certainly cannot give them the right to interrupt the sheriff's sale. Therefore, Plaintiff had an adequate alternative in the form of seeking redress through court order. In fact, it is not clear that Plaintiff's proposed strategy -- i.e., warning potential buyers of Ms. Porter's federal action and possible first-priority mortgage

-- would protect Ms. Porter's interest anyway (without getting a corresponding, pre-sale court order).

In any event, even if Plaintiff had a sound basis to speak directly to prospective purchasers (he does not; his redress is through court order), he had ample alternatives to speak to the purchasers without interrupting the sale. For example, before the auction started, Plaintiff could have discretely informed potential bidders of his wife's (dubious) interest on the day of the sheriff's sale. Indeed, Plaintiff did this. Besides the bank (who obviously knew about Ms. Porter's potential mortgage on the property), there was one other bidder. JA298 (Phillip Kemmerer, a sheriff's office clerk). And Plaintiff informed that bidder at the sheriff's sale what was "going on." JA683 (Plaintiff); see also JA442 (Plaintiff's brother).

Moreover, potential purchasers of the Property could very well learn of the wife's possible interest simply by performing their own due diligence on the Property, researching any potential litigation about the Property.

Additionally, Plaintiff could have posted the Property with the relevant information regarding his wife's potential interest. Plaintiff could have carried signs outside the sheriff's sale. Plaintiff, immediately after the sheriff's sale, and outside the auction room, could have informed the actual buyer of the property that Plaintiff's wife had a potential interest in the property. Plaintiff chose instead to interrupt the sheriff's sale itself.

B. The City's Restriction Upon Speech At Sheriff's Sales Was Viewpoint-Neutral

In addition to holding that the City's prohibition upon all speech was an unreasonable time, place, and manner restriction, the Court held that "there was also testimony that the organizers of the sheriff's sale tolerated announcements, suggesting that [Mr.] Chew's implementation of the policy was viewpoint-discriminatory." Opinion at 31. Specifically, the District Court focused upon Mr. Chew's testimony that whether Mr. Chew would allow an individual's announcement at a sheriff's sale would "depend[] on what [the individual] wanted to say," and that Mr. Chew would be concerned about allowing speech that would "have a chilling effect on the sale itself." JA500. The District Court stated that "[Mr.] Chew thus essentially conceded that the policy, or at least his application of it, was not content-neutral, and discriminated on the basis of Plaintiff's viewpoint." Opinion at 31.

Thus, the District Court concluded that, because Mr. Chew testified that he precluded value-damaging speech, the City engaged in viewpoint discrimination. This conclusion was thrice flawed. First, Mr. Chew's testimony did not demonstrate viewpoint discrimination: the City banned all announcements; and, even if Mr. Chew allowed value-promotion speech (he did not), such a distinction is not discrimination around a viewpoint because the entire purpose of the forum is to promote sales. Finally, any viewpoint-discrimination by Mr. Chew did not prove City discrimination.

At a minimum, we are entitled to a new viewpoint-discrimination trial.

1. Plaintiff Failed To Demonstrate Any Viewpoint Discrimination

Although this Court must draw all reasonable inferences in Plaintiff's favor, "a scintilla of evidence supporting a conclusion that [Mr. Chew] had an improper motivation when having [Plaintiff] removed is not sufficient. Rather, there must be enough evidence upon which the jury could properly find a verdict for [Plaintiff]." Galena, 638 F.3d at 206.

Mr. Chew's statement -- that he would listen to what the individual wanted to say, and then would preclude speech that chilled the sale -- does not constitute viewpoint discrimination, for two reasons.

First, Mr. Chew's statement that he would preclude speech that impaired value did not prove that he would allow the opposite viewpoint, i.e., that he would allow speech that promoted value. Indeed, there was abundant testimony that the City would not allow any speech because allowing any speech (value-damaging or value-enhancing) was harmful to the orderly procession of sheriff's sales.

Mr. Chew, after explaining that the "policy" of the Sheriff is that "you cannot make announcements," explained his point in detail:

> We feel that we need to be fair and also to maintain decorum in a room. I mean, we're talking about hundreds of properties that are sold every first Tuesday of the month. Can you imagine if everyone -- if someone stood up and made an announcement for every one of those properties? It would be chaos. So we just did not allow people to make announcements.

JA504-505 (Chew); see also JA390 (Deeley).

In short, the trial testimony supports the point that the City limits all speech, not just value-damaging speech that conceivably could deter third party bidders who might have otherwise purchased the property being auctioned.

Of course, as explained, the City allows speech where the speaker could produce a court order from a separate proceeding that would directly affect the conduct of the sheriff's sale, most notably orders postponing the sale (or a bankruptcy petition, which also postpones the sale):

> Now, people sometimes did make an announcement, and that would be if, for example, say, that morning, someone got a bankruptcy, and so they come in, we're in the middle of sales, when their property comes up, they announce that they have a bankruptcy. Well, yes, they have a bankruptcy and they also have a document that I can look at.

JA505; see also JA502 (Mr. Chew stated that he would allow speech during a sale where there was "paperwork … from a court saying to stay the sale…. Those are the things I operate on.").

Indeed, if Ms. Porter had been successful in her motions to stay the sheriff's sale, Plaintiff would have been allowed to speak here. Allowing such speech -- where ordered by a court -- hardly proves viewpoint discrimination.

Second, even if Plaintiff proved that the City only precluded value-damaging speech, but also permitted value-enhancing speech (and Plaintiff did not make this showing), we do not see how making a decision based upon whether speech limits or promotes sales constitutes making a decision around a viewpoint. Indeed, if the City did only allow speech promoting property values at sheriff's sales, such a distinction would be constitutional because the Sheriff's job in

conducting sheriff's sales is to sell the property. GMAC v. Buchanan, 929 A.2d 1164, 1168 (Pa. Super. 2007) (purpose of sheriff's sale is to satisfy debt that is due creditor).

As Mr. Chew explained, "we are selling this property at the demand of the court. We are acting [as] the court's arm selling this property." JA504. He continued, "we try to get as much money for the property as possible so that the person that's losing the property gets as much value out of it as they can." JA500.

Accordingly, it would be viewpoint-neutral for the Sheriff to exclusively promote values when conducting its sheriff's sales.

2. Alternatively, Plaintiff Failed To Demonstrate Viewpoint Discrimination By The City

Assuming arguendo that Plaintiff proved that Mr. Chew allows value-enhancing announcements but prohibits value-damaging announcements (he did not so prove), and assuming arguendo that such a distinction constitutes viewpoint discrimination at a forum designed to sell property (it does not), Plaintiff still did not prove that Mr. Chew's alleged viewpoint discrimination constitutes City viewpoint discrimination.

As this Court is well-aware, under Monell, a municipality is not responsible for its employees' unconstitutional conduct merely because it employs them. A municipality can only be responsible for unconstitutional conduct when a municipal "policy or custom" has caused an employee to commit a constitutional violation. See Bryan County v. Brown, 520 U.S. 397, 404 (1997).

Assuming Mr. Chew engaged in viewpoint discrimination (he did not), Plaintiff failed to prove that Mr. Chew determined or acted pursuant to City policy. Mr. Chew was an employee of the Sheriff's Department, its counsel. JA222. He was not a sworn Deputy Sheriff. JA405 (Deeley). The actual policymaker, by contrast, was Sheriff Deeley, who was appointed by Governor Rendell. JA383-384. Her testimony was that the City had a "policy" forbidding announcements at sheriff's sales. JA389-390. She did not mention any exceptions for announcements that enhanced property value. See also JA339 (Tyer: "When the conditions of sale are read by the auctioneer prior to the sale, it's in … their instructions to the audience that you're to remain silent. There is no talking."); JA793 (Bengochea: "no one was supposed to speak during a sheriff's sale"); JA833 (Sadd (a witness to this and other sales): same).

Thus, even if Mr. Chew may have engaged in viewpoint-discrimination by allegedly favoring value-enhancing speech over value-deflating speech (he did not), that does not mean that the City engaged in viewpoint discrimination. Even the District Court appeared to understand this distinction. Opinion at 31 ("[Mr.] Chew thus essentially conceded that the policy, or at least his application of it, was not content-neutral, and discriminated on the basis of Plaintiff's viewpoint.") (emphasis added).

In fact, the District Court acknowledged that there was "uncontradicted evidence that the Sheriff had a policy that [didn't] allow announcements at sheriff's sales." JA578 (emphasis added); see also Opinion at 21 (explaining that "the Sheriff's Department had a specific policy not to allow any announcements to

be made at Sheriff's sale"); JA1091 (same). Thus, the only testimony relating to City policy is that the Sheriff prohibited all speech, regardless of viewpoint. If there was any case-specific viewpoint discrimination, it was against the Sheriff's policy. For this simple reason alone, Plaintiff's verdict fails.[8]

3. At Minimum, The City Is Entitled To A New Trial On Viewpoint Discrimination

Alternatively, the Court should order a new trial on whether the City acted with viewpoint discrimination.

This is true for two independent reasons. First, when the Court instructed the jury that it was required to find that the City's no-comment policy violated the First Amendment, the Court erroneously directed a viewpoint-discrimination verdict; at a minimum, there was conflicting evidence.

Second, when the Court dismissed the Monell claim at the start of trial and then only reinstated the claim after Plaintiff introduced most of his witnesses, the Court prejudiced the City because we had no idea during the testimony of these

[8] In support of viewpoint discrimination, the District Court also cited the testimony of Phillip Kemmerer, who testified that he had seen some people make announcements without interference. Opinion at 31. This testimony does not demonstrate a municipal policy of viewpoint discrimination. Mr. Kemmerer admitted that, although he had been working at the sheriff's office for five months prior to January 4, 2011, JA290, he had not seen any individuals make announcements at sheriff's sales prior to Mr. Porter's announcement. JA314. Therefore, if anything, Mr. Kemmerer's testimony supported the conclusion that, at the time of the sheriff's sale here, the Sheriff had a no-comment policy. In any event, Mr. Kemmerer did not specify which announcements were (subsequently) allowed; as noted above, the City allows speech where the speaker could produce a court order from a separate proceeding that would directly affect the conduct of the sheriff's sale, such as a stay order or a bankruptcy petition. Finally, we note that Mr. Kemmerer is a clerk and not a policymaker.

witnesses that we could be held responsible for value-enhancement viewpoint discrimination.

a. The City Is Entitled To A New Trial On Viewpoint Discrimination Because The Court Refused To Let The Jury Decide That Issue

First, even if there were record evidence from which a jury could infer that there was viewpoint discrimination by the City (there is not), there was certainly evidence from which the jury could also conclude that there was not viewpoint discrimination by the City (as just explained, we believe this is the only reasonable inference, but it is certainly a reasonable inference). Even the District Court recognized there was room for disagreement, holding merely that there was "potentially viewpoint-discriminatory implementation" of the City's policy, Opinion at 37 (emphasis added), not that there was viewpoint-discriminatory implementation.

Nonetheless, the Court's instruction essentially directed a verdict against the City on viewpoint discrimination, depriving the jury of the opportunity to weigh the evidence.[9]

[9] There can be no doubt that we properly objected to the lack of a viewpoint-neutrality instruction. E.g., JA883-884 ("MS. ZABEL: [T]he jury has to decide … whether the policy is … viewpoint neutral. THE COURT: All right. So you don't think I should instruct[] them that it would be a violation? MS. ZABEL: No, your Honor. I don't."). The Court nonetheless criticized us for our proposed jury instructions, claiming that the proposed instructions were unfocused. Opinion at 37. However, we submitted the instructions on March 26, 2018, just before trial. At that point in time, even the District Court was unaware of the exact nature of Plaintiff's claims, as we explain in the next section. If the Court failed to realize, for example, that Plaintiff was pursuing Monell at that time, then certainly it is understandable that we failed to offer Monell instructions. Moreover, we fail to

The District Court, repeatedly and erroneously, mandated that the jury find a First Amendment violation without any factual findings on viewpoint discrimination. This was a fundamental error, Galena, 638 F.3d at 203, requiring a new trial.

The Court commenced its instruction with an acceptable explanation of First Amendment law. The Court first explained that there were three types of fora; that the sheriff's sale constituted a limited public forum; that the government could restrict the time, place, and manner of speech in a limited public forum if the restriction was narrowly tailored and left open ample alternative avenues; and that even an otherwise reasonable time, place, and manner restriction would be unconstitutional if it were viewpoint-discriminatory. JA970-972.

Inexplicably, however, the Court then simply directed a verdict for Plaintiff, usurping from the jury the chance to weigh competing evidence:

> I instruct you that Mrs. Sankowski and Mr. Porter had a constitutionally-protected right to speak at the sheriff's sale in order to make the announcement that had been discussed with their attorney. In other words, no person employed by the sheriff's office, whether a law enforcement officer or not, had any right to interfere with their making such an announcement.

JA972 (emphasis added).

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see how the quality of our proposed instructions affects our ability to clearly object to the Court's erroneous instructions.

Immediately thereafter, the Court continued:

> You have heard testimony that the sheriff's office had a policy against announcements. I instruct[] you that this policy, as applied to the plaintiffs at the hearing, was in violation of their constitutional right to freedom of speech and to petition. Plaintiff's attempt to speak was in furtherance of their constitutional right to speak and to petition.

JA973 (emphasis added). The Court then stopped instructing on the First Amendment and moved on to excessive force. Thus, to the extent there is a fact question as to viewpoint neutrality, this Court must at least order a new trial. [10]

b. Alternatively, The City Is Entitled To A New Trial On Viewpoint Discrimination Because The Court Prejudicially Induced The City To Decline To Offer Evidence As To The City's Viewpoint Neutrality

In addition to failing give the jury the opportunity to weigh competing evidence on viewpoint discrimination, the District Court further compounded its error by prejudicially inducing the City to decline to offer further evidence related to the lack of viewpoint discrimination. It did this by initially dismissing Plaintiff's Monell claim against the City at the start of trial, and then only reinstating the Monell claim after all of the City's viewpoint discrimination witnesses had already testified.

[10] We recognize that, after additional colloquy with counsel, the Court subsequently offered a clarifying instruction related to the jury's role in resolving certain aspects of the First Amendment inquiry. But this clarifying instruction only informed the jury that they would be resolving the threshold factual question of whether, on the one hand, Mr. Porter's speech was actually abridged, or whether, on the other hand, he was instead given the opportunity to speak. Obviously, if he was given the opportunity to speak, there could be no First Amendment violation. However, this was the only question presented to the jury for First Amendment purposes. Opinion at 35-41; see also JA1010-1011 (instructions).

By way of procedural background, Mr. Porter pled a First Amendment Monell claim in the underlying complaint in this case, as well as claims against the individual defendants. JA1039. Nonetheless, over the course of discovery and during various pretrial conferences, both the District Court and the City concluded that Plaintiff abandoned his Monell claim.

Specifically, as noted above, the Court held two lengthy pretrial conferences in the fall of 2017, but Mr. Porter "had not referred to [his Monell] claim or advocated any discovery related to the Monell claim in any of the pretrial proceedings." Opinion at 5-6; see also JA1084 (Order of September 25, 2017); JA1087 (Order of October 10, 2017).

Thus, after the extensive pretrial conferences, the Court and the City assumed that Plaintiff was not pursuing Monell but was only pursuing claims against the individual Defendants for excessive force, denial of free speech by retaliation, and civil conspiracy. Defendants' proposed jury instructions and pretrial memorandum reflected our understanding that Plaintiff was only pursuing claims against the individuals.

On the first day of trial, when conducting routine housekeeping regarding which claims were still in the case, the Court unilaterally dismissed Plaintiff's Monell claim: "I'm going to note that … although the complaint had a Monell claim in count 2, I'm going to mark that as dismissed because it hasn't been pursued in the discovery or Mr. Porter's pretrial memorandum." JA63-64. The Court clarified that, although Mr. Porter mentioned Monell in his pretrial memorandum, "he mentioned it without any factual support." JA580. In fact, the

Court explained, there were "numerous pretrial conferences," but Plaintiff "never said anything about Monell." JA158; JA160. The Court informed the jury that the City was not a defendant. JA78.

Therefore, we litigated the case as if there were no Monell claim, relying upon the Court's definitive pronouncement. We had no idea that the City's policies were on trial; most notably, we had no idea that we had to defend against an allegation that the City's policy of prohibiting all announcements would actually be deemed to a policy of viewpoint discrimination.

It was not until the close of Plaintiff's case at the end of the third day of trial -- after fourteen witnesses testified, including Sheriff Deeley, Mr. Stewart, and Mr. Chew -- that the District Court changed the entire case and informed us that we could be liable under Monell. JA699. The District Court did not inform the jury that the City was a party in the case until after the close of all of the evidence. JA887. This was an abuse of discretion, and this Court must at least order a new trial on whether the City has a viewpoint-discriminatory policy.

The District Court concluded that its vacillations did not prejudice us because, essentially, our speech policy was so clear and undisputed that it was irrelevant whether we knew we were at risk for Monell exposure. The City "admitted" that "the Sheriff's Department had a specific policy not to allow any announcements to be made at sheriff's sale," so the policy evidence, according to the District Court, would have been the same even had we known that Monell was in the case. Opinion at 21.

The District Court's reasoning misses the point. Of course, we do not dispute that the no-comment policy would not have changed -- we agree that, under all scenarios, the City had a neutral policy of excluding all announcements (except, as noted above, those announcements ordered by a different court). Therefore, we suffered no prejudice on that front.

We were highly prejudiced, however, by our inability to defend against the District Court's additional finding, i.e., that the City's policy was actually viewpoint discriminatory because we allegedly allowed value-enhancing speech but not value-damaging speech. At a minimum, we should be able to offer testimony emphasizing that we also preclude value-enhancing speech.

We recognize that, after the District Court decided to re-insert Plaintiff's Monell claim into the case after the relevant witnesses had already testified, the District Court did attempt to retroactively cure its prejudice by offering us the opportunity to recall prior witnesses or to "bring in [new witnesses] tomorrow." JA701.

Respectfully, this offer was insufficient. As for bringing in new witnesses "tomorrow," the Court issued its offer at 4:30 pm on April 3, 2018, and expected these new witnesses to be available by 9:00 am the next day. This was unfair, particularly given that the relevant event took place in January 2011, or more than seven years earlier.

And requiring us to recall prior witnesses was also prejudicial. The mere act of recalling a witness -- in order to rehabilitate that witness's previously offered testimony (which was innocuously offered under the previously correct

understanding that the City was not a party) -- is itself prejudicial, as the jury would wonder why the witness was appearing a second time in order to contradict and correct himself. Indeed, Mr. Chew, who had already testified twice, would have been required to testify a third time. Further, the primary policy witness (Deeley) plus the other Defendants (Chew and Stewart) were no longer City employees at the time of trial.

In short, the trial court's procedure -- dismissing Monell, followed by allowing the relevant witnesses to testify, followed by re-instating Monell -- was inherently prejudicial, mandating a new trial.

II. In The Alternative, The Court Should Enter Judgment For The City Because Plaintiff Failed To Prove Any Damages

Assuming arguendo Plaintiff proved a free-speech violation (he did not), the Court should still enter judgment for the City because Plaintiff failed to prove that the City's no-comment policy caused any damage.

At the outset, it is important to clarify what damages are not even allegedly part of this case. Notably, the Court clarified that any loss of value of the property was off limits: "You're not permitted to allege as damages, in this case, anything dealing with the loss of the property. I made that clear from the beginning of the case." JA854; JA208. This conclusion makes perfect sense, too; if Plaintiff suffered cognizable damage through the sale of the property, he could vindicate such losses in the state-court foreclosure proceedings (which Ms. Porter tried to do, but failed).

Plaintiff's theory of damage recovery flows from the alleged method of stopping his speech. In particular, Plaintiff claims that, not only did we cut off his announcement (we accept that we did cut off his announcement), but that we did so violently, and that this violent attack caused him physical and emotional harm. For example, Plaintiff testified that, within three seconds of when Plaintiff started his announcement, Mr. Chew came "running down the aisle" at him, and Mr. Stewart started "grabbing the back of [his] coat and pulling [Plaintiff] back as hard as he could." JA645. Shortly thereafter, he "got hit with a stun gun," JA655, got punched in the jaw, JA648, and then choked so that he could not breathe, JA649.

Out of this violence, Plaintiff claims, he suffered $750,000 in physical and emotional damages. This is the only potential source of harm at issue here. The Court instructed the jury that they could award damages for physical and emotional harm, JA985, and the Court held that the "testimony regarding the more immediate effects of the implementation of the policy, which caused [Mr. Porter] physical injury and humiliation, are more than sufficient to support a jury verdict." Opinion at 33; see also id. ("the harm suffered by Porter in the form of physical injuries … and emotional harm were sufficient to support an award of compensatory damages").

However, there are two independent reasons why Plaintiff failed to prove any, let alone $750,000 in, damage stemming from an alleged municipal policy of enforcing silence through violence.

First, Plaintiff's claim that the deputy sheriffs attacked him is flatly inconsistent with the findings related to Plaintiff's criminal conviction, which

demonstrate that Plaintiff attacked the deputy sheriffs. Therefore, Heck bars Plaintiff's claim. Second, Plaintiff's damages claim fails because he could not offer even a shred of evidence that any violent attack stemmed from municipal policy. Again, although we do not reach this point until the latter half of the brief as a logical matter, it is a straightforward point that, standing alone, requires reversal and entry of judgment for the City.

A. Plaintiff's Damages Claim Is Flatly Inconsistent With His Criminal Conviction And Is Therefore Barred By *Heck*

The parties offer two different versions of the underlying facts. As noted, Plaintiff claims that the deputy sheriffs violently attacked him as soon as he started innocently making his announcement. The City, by contrast, paints a much different picture, claiming that the deputy sheriffs calmly asked, pursuant to the Sheriff's no-comment policy, that Plaintiff stop talking, and that Plaintiff responded belligerently.

If Plaintiff's version were correct, he might theoretically be entitled to damages flowing from the violence. Under the City's version, however, he would not be entitled to any damages. Normally, we would accept Plaintiff's facts. However, given Plaintiffs' prior conviction for resisting arrest, this Court is constrained to accept our version, because Plaintiff's version would undermine his resisting-arrest conviction.

Under Heck, a section 1983 action that impugns the validity of the plaintiff's underlying conviction cannot be maintained. This Court looks to whether the

second case "could result in a conflicting resolution arising from the same conduct." Gilles v. Davis, 427 F.3d 197, 209 (3d Cir. 2005).

Here, Plaintiff's theory that we attacked him impugns his resisting-arrest conviction, so Plaintiff's theory is precluded by Heck.

A person commits resisting arrest if, "with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance." 18 Pa. C.S. § 5104.

Thus, a resisting-arrest conviction depends upon (1) the existence of probable cause to arrest, Commonwealth v. Jackson, 924 A.2d 618, 620 (Pa. 2007), and (2) the intentional prevention of the lawful arrest through the creation of a substantial risk of bodily harm to the public servant or by requiring the public servant to use substantial force, Commonwealth v. Thompson, 922 A.2d 926, 928 (Pa. Super. 2007).

For Mr. Porter's criminal case, the Superior Court (which adopted the trial court's opinion) described the facts that supported both elements. Regarding probable cause (to arrest for the crime of disorderly conduct), the Court explained:

> [Mr. Porter's] announcement during the sheriff sale caused a major disruption to the normally orderly event. Because of [Mr. Porter's] outburst, Mr. Chew was forced to stop the sale and instruct the defendant to sit down and cease his announcement. The defendant failed to comply with multiple requests to stop his announcement and leave the sale by both Mr. Chew and multiple sheriffs. The sheriffs were then instructed to remove the defendant from the room… As the sheriffs have arrest powers, they clearly had probable cause to arrest the defendant for Disorderly Conduct.

Porter, 2016 WL 5845787, at *8.

Regarding evidence that Mr. Porter intended to prevent the arrest through the creation of a substantial risk of injury, the Court explained:

> When Deputy McCarrie attempted to escort the defendant out of the sale by placing his hand on [Mr. Porter's] elbow, [Mr. Porter] elbowed Sheriff McCarrie with such force that he fell to the floor. [Mr. Porter] then engaged in a struggle with the sheriffs that lasted over two minutes. It took five sheriffs to restrain [Mr. Porter], who failed, for over two minutes, to heed their instructions to stop resisting. Finally, Deputy McCarrie suffered a sprained shoulder which caused him to miss multiple days of work. [Mr. Porter] not only created a substantial risk of bodily injury to multiple public servants, he caused bodily injury to Deputy McCarrie. This evidence is sufficient to support [Mr. Porter's] conviction for Resisting Arrest.

Id.[11]

Thus, according to the Superior Court, the deputy sheriffs did not attack Plaintiff. Instead, Mr. Porter had an "outburst," then Mr. Chew and the deputy sheriffs asked him several times to sit down, then he refused, then the deputy sheriffs tried escort him out of the room, then Plaintiff elbowed Deputy McCarrie, then several deputy sheriffs tried for two minutes to restrain Plaintiff. Therefore, Plaintiff attacked the deputy sheriffs, and Plaintiff's theory that the deputy sheriffs attacked him impugns the resisting-arrest conviction.

The District Court disagreed, concluding that the jury could have found that the deputy sheriffs attacked Plaintiff first, and that he resisted arrest after the deputy sheriffs attacked him without provocation. JA870; JA982.

[11] The Superior Court's findings are amply supported by the record here. E.g., JA747-749 (Busillo: Plaintiff repeatedly refused to sit down, and threatened violence); JA767 (McCarrie: Plaintiff struck and injured Deputy McCarrie); JA788 (Bengochea: several deputies tried to restrain Plaintiff)

However, this reasoning -- that Plaintiff only resisted arrest after the deputy sheriffs attacked him without provocation -- impugns the conviction. Initially, it would directly contradict the Superior Court's findings. Moreover, if that story were correct -- and all Plaintiff did was calmly speak for a few second before the deputy sheriffs attacked him -- then there would be no probable cause for the disorderly-conduct arrest in the first place, which is an element of the resisting-arrest conviction.

As noted, Plaintiff can only be found guilty of resisting arrest if there was probable cause to arrest him in the first place. Jackson, 924 A.2d at 620. The Superior Court found that there was probable cause to arrest Plaintiff for disorderly conduct because Plaintiff started misbehaving. If Plaintiff were only responding to our attacks – as the District Court suggested – then there would have been no probable cause to arrest for disorderly conduct (55 Pa. C.S. § 5503).

But since the conviction required that there be probable cause for disorderly conduct, it was necessarily the case that Plaintiff started the disturbance. Therefore, Plaintiff's claim that the deputy sheriffs attacked him first impugns the conviction and violates Heck. See also Ashton v. Uniontown, 459 F. App'x 185, 188 (3d Cir. 2012).

Indeed, the jury itself recognized at some level that Defendants did not harm Plaintiff. Specifically, the jury exonerated all individual Defendants from claims of excessive force, JA6, and no individuals actually harmed Plaintiff, including Mr. Chew, JA7. As such, the Court should enter judgment for the City because the

jury concluded that no individual City actor inflicted harm upon Plaintiff. Given that no individual caused harm, the City itself could not have inflicted harm.

B. Plaintiff Failed To Offer Any Evidence Whatsoever That The City Endorsed Enforcement Of Its No-Comment Policy Through Violence

Assuming arguendo the deputy officers attacked Plaintiff first without provocation (they did not), Plaintiff's claim still fails because he did not offer a shred of evidence that these attacks occurred pursuant to policy.

The District Court held, surprisingly, that the Sheriff always enforced its no-comment policy through violence. Its entire reasoning was as follows: "The affirmative link between the policy and its brutal implementation through physical force is obvious: the jury apparently believed that the policy was enforced through physical force applied in immediate retaliation for [Mr.] Porter's exercise of his First Amendment rights." Opinion 33.

Again, even though we do not reach this point until the latter stages of our brief as a logical matter, we cannot overemphasize the Court's error here. In short, he held that we have a policy of violence. This finding cannot stand.

There is no absolutely no support for this remarkable and disappointing holding, and the Court should reverse for this very simple reason alone. No policymaker testified that the City implemented its no-comment policy through force; and no evidence suggested that there were repeated (or any) past instances of enforcement through violence. Instead, the Sheriff's straightforward goal was to "maintain decorum in the room." JA504 (Chew).

If anything, the evidence proves that any violence that occurred here was novel, not the custom. JA314 (Kemmerer: only instance of violence he could recall was with Mr. Porter). According to Richard Tyer, a sheriff's office clerk who had witnessed over 600 sales, if someone attempted to make an announcement, that person would be "told to sit down." JA336; JA549 (Stewart). If the person did not listen, the person would "be escorted out." JA336. And according to Michael Riverso, another sheriff's office clerk, who had witnessed dozens of sales over the years, Mr. Chew's actions were "out of character of the normal conduct of business," and something that he "never saw … before." JA468.

Even Plaintiff's brother testified that Mr. Chew acted "like he was on drugs or something. That's how weird it was." JA444. Therefore, Plaintiff did not demonstrate that the City's policy caused his physical harm. See also JA901 (Plaintiff's closing: "it was completely out of their conduct, their behavior to be running towards me").

Accordingly, any actual violence was not pursuant to policy but was, at most, an aberrant event in this case. Accordingly, Plaintiff did not show that the City's policy caused him any harm, let alone $750,000 worth. Therefore, the Court should enter judgment for the City. Notably, Plaintiff expressly disclaimed a theory of nominal damages. JA943.

Candidly, the District Court's contrary conclusion -- that any individual thuggery was not a rogue act but was actually the result of municipally-sanctioned

violent enforcement -- is borderline offensive. But with no evidence to support a municipal policy of violence (not to mention Plaintiff's criminal conviction precluding the inference that there was any violence in this case at all, and the jury itself concluding that no individual actors caused Plaintiff any harm), the District Court's damages holding must be reversed.

III. Alternatively, The Court Should Order A New Trial Because The Damages Verdict Was Infected With Non-Cognizable Damages

As explained above, the Court invited the jury to award damages to Plaintiff for physical harm and emotional harm. Moreover, even if Plaintiff had proved that the Sheriff's policy caused such physical or emotional harm (he did not), the Court's instructions further infected the verdict. In addition to instructing the jury that it could award damages for physical and emotional harm, the Court also instructed the jury that it could award damages "for loss of past and future earnings." JA985; see also Opinion at 33. This was error.

Plaintiff's only basis for claiming lost earnings flowed from his resisting-arrest conviction, not from any no-comment policy. As Plaintiff explained:

> I tried to work, couldn't get a job, I have an Ivy League degree, I made six figures, easily, before all this stuff happened, and couldn't get a little $15 an hour job, $12 and hour job, because of this "criminal charge," whatever, or these outstanding charges.

JA660.

Plaintiff's wife agreed: "he's an Ivy League graduate, and they didn't give him the job because they said that he had a record." JA615; see also JA906 (Plaintiff's closing: "The loss of wages. I'm an Ivy League graduate, all right.").

Thus, the only evidence of lost wages flows entirely from the resisting-arrest charge and conviction.

But the City did not cause Plaintiff to intentionally commit the resisting-arrest crime. Even the District Court recognized that the "link" between the "unconstitutional policy" and the "difficulty of finding a job due to outstanding criminal charges" was "attenuated." Opinion at 33.

Nonetheless, the District Court expressly invited the jury to award lost earnings, even though the record only demonstrated that the resisting-arrest conviction caused the lost wages, not the City's policy.

Therefore, because the trial court invited the jury to award damages based upon lost wages, the verdict was infected and we are entitled to a new trial.

CONCLUSION

We respectfully request that the Court:

(1) reverse and enter final judgment for the City;

(2) alternatively, reverse and order a new trial; or

(3) alternatively, remit the damages award.

Dated: January 24, 2019

Respectfully submitted,

CITY OF PHILA. LAW DEPARTMENT
Marcel S. Pratt, City Solicitor

/s/ Craig Gottlieb
Craig Gottlieb, Senior Attorney
City of Philadelphia Law Department

Attorney for Appellant The City of Philadelphia

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I hereby certify that I am a member of the bar of this Court.

Date: January 24, 2019

/s Craig Gottlieb
Craig Gottlieb

CERTIFICATION OF COMPLIANCE WITH RULE 32(a) AND REQUIREMENTS FOR ELECTRONIC FILING

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,744 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

4. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using McAfee VirusScan Enterprise 8.7.0i, and that no virus was detected.

Date: January 24, 2019

/s Craig Gottlieb
Craig Gottlieb

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving this Brief and Appendix upon the following person by electronic filing and by U.S. mail:

David C. Gibbs, III, Esq.
Kimberly Y. Smith-Rivera, Esq.
Gibbs Law Firm
2648 FM 407 Suite 240
Bartonville, TX 76226

Dated: January 24, 2019

/s Craig Gottlieb
Craig Gottlieb, Senior Attorney
City of Philadelphia Law Department

Attorney for Appellant The City of Philadelphia

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES PORTER and MARILYN SANKOWSKI	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, et. al.	:	NO. 13-2008
Defendants.	:	

NOTICE OF APPEAL

Notice is hereby given under Fed. R. App. P. 4 that the defendant The City of Philadelphia appeals to the United States Court of Appeals for the Third Circuit from the final order of District Court Judge Michael M. Baylson, entered August 31, 2018, denying the motion of Defendant The City of Philadelphia for Judgment as a Matter of Law or, in the alternative, for a New Trial or to Alter or Amend the Judgment or, in the Alternative, for Remittitur (attached hereto).

In addition, the City of Philadelphia's appeal includes, but is not limited to, the following underlying interlocutory orders of Judge Baylson: (1) the Court's entry of judgment of April 5, 2018 (attached hereto), and (2) all preceding interlocutory orders.

CITY OF PHILADELPHIA LAW DEPT.
Marcel S. Pratt, City Solicitor

September 21, 2018

/s/ Craig Gottlieb
BY: Craig Gottlieb
Senior Attorney
1515 Arch Street – 17th Floor
Philadelphia PA 19102-1595
(215) 683 – 5015
fax (215) 683 – 5296

Attorney for Defendant-Appellant, The City of Philadelphia

CERTIFICATE OF SERVICE

I hereby certify that The City of Philadelphia's Notice of Appeal was served via the Court's ECF filing system on September 21, 2018.

/s/ Craig Gottlieb
Craig Gottlieb
Attorney for Defendant-Appellant
The City of Philadelphia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES PORTER and MARILYNN SANKOWSKI **v.** **CITY OF PHILADELPHIA, et al.**	**CIVIL ACTION** **NO. 13-2008**

ORDER

AND NOW, this 30th day of August, 2018, for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that:

1. Judgment notwithstanding the verdict is **GRANTED** in favor of Defendant Chew as to the jury verdict of $7500 in favor of Plaintiff;
2. Motion of Defendant City of Philadelphia for Judgment as a Matter of Law or, in the Alternative, for a New Trial or to Alter or Amend the Judgment, or in the Alternative for Remittitur (ECF # 94) is **DENIED**; and
3. Any motions for attorney's fees shall be filed within 14 days.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.

Dated: 8/30/18

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES PORTER and MARILYNN SANKOWSKI **v.** **CITY OF PHILADELPHIA, et al.**	**CIVIL ACTION** **NO. 13-2008**

CIVIL JUDGMENT

Before the Honorable Michael M. Baylson:

AND NOW, this 5th day of April, 2018, in accordance with the verdict of the jury,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of:

Plaintiff Marilynn Sankowksi and against Defendant Edward Chew in the amount of $7,963.00.

Plaintiff James Porter and against Defendant Edward Chew in the amount of $7,500.00 and against Defendant City of Philadelphia in the amount of $750,000.00.

It is further ORDERED that judgment is entered in favor of Defendant Daryll Stewart and against Plaintiff James Porter.

The Clerk shall close this case.

BY THE COURT

/s/ Lori K DiSanti

ATTEST: _____

Lori DiSanti
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES PORTER, et al. **v.** **CITY OF PHILADELPHIA, et al.**	**CIVIL ACTION NO. 13-2008**

JURY INTERROGATORIES

I. EXCESSIVE FORCE AS TO MARILYNN SANKOWSKI

A. Do you find, by a preponderance of the evidence, that Defendant Edward Chew used excessive force against plaintiff Marilynn Sankowski?

Edward Chew **YES** X **NO** _____

If you answered "yes" to the question above, proceed to Question IB. If you have answered "no," you have completed your verdict as to Marilynn Sankowski.

B. Do you find, by a preponderance of the evidence, that the actions of Edward Chew were a factual cause of any harm to plaintiff, Marilynn Sankowski?

YES X **NO** _____

If you answered "yes," proceed to Question VII. If you have answered "no," you have completed your verdict as to Marilynn Sankowski.

II. EXCESSIVE FORCE AS TO JAMES PORTER

A. Do you find, by a preponderance of the evidence, that the defendants identified below used excessive force against plaintiff James Porter?

Edward Chew **YES** _____ **NO** X

Daryll Stewart **YES** _____ **NO** X

III. FIRST AMENDMENT RETALIATION AS TO JAMES PORTER

A. Do you find, by a preponderance of the evidence, the defendants identified below retaliated against plaintiff James Porter for his speech protected by the First Amendment?

Edward Chew **YES** X **NO** _____

Daryll Stewart **YES** _____ **NO** X

IV. CIVIL CONSPIRACY AS TO JAMES PORTER

A. Do you find, by a preponderance of the evidence, that defendants engaged in a conspiracy to deprive plaintiff James Porter of his constitutional rights?

Edward Chew	**YES** X	**NO** _____
Daryll Stewart	**YES** _____	**NO** X

If you answered "yes" as to either of the defendants above, proceed to Question V. Otherwise, proceed to Question VI.

V. CAUSATION

A. Do you find, by a preponderance of the evidence, that the defendants' actions as outlined in the preceding questions were a factual cause of any harm to plaintiff, James Porter?

Edward Chew	**YES** _____	**NO** X
Daryll Stewart	**YES** _____	**NO** X

VI. CLAIM AGAINST THE CITY OF PHILADELPHIA

A. Do you find, by a preponderance of the evidence, that the policy of the Sheriff's Office of the City of Philadelphia deprived Plaintiff James Porter of his constitutional rights to freedom of speech under the First Amendment?

City of Philadelphia	**YES** X	**NO** _____

If you answered "yes" above, proceed to Question VB.

B. Do you find, by a preponderance of the evidence, that the City of Philadelphia's actions as outlined in the preceding question were a factual cause of any harm to plaintiff, James Porter?

YES X **NO** _____

If you answered "yes" to the above questions, proceed to VIII. If you answered "no," to V and VI, you have completed your verdict as to James Porter.

VII. DAMAGES AS TO MARILYNN SANKOWSKI

A. What amount of money, in accordance with the Court's instructions, will reasonably compensate plaintiff Marilynn Sankowski?

$ 7,963 00/xx

B. Did Defendant Edward Chew act maliciously, wantonly, or with callous disregard in violating Plaintiff Marilynn Sankowski's rights?

Edward Chew **YES** _____ **NO** X

If you answered "yes" as to Defendant Chew, proceed to the next question.

C. Do you award punitive damages against Defendant Edward Chew?

YES _____ **NO** X

If yes, in what amount?

$_____

VIII. DAMAGES AS TO JAMES PORTER

If you answered "yes" to the prior questions as to James Porter, proceed. Otherwise, STOP and return to the COURTROOM. You have completed your verdict.

A. As to any defendant you have found liable to James Porter, what amount of compensatory damages, in accordance with the Court's instructions, will reasonably compensate plaintiff James Porter?

Edward Chew $ $7,500 jointly and severally

Daryll Stewart $ Ø

City of Philadelphia $ $750,000 jointly and severally

B. Did any defendant identified below act maliciously, wantonly, or with callous disregard in violating Plaintiff James Porter's rights.

Edward Chew **YES** _____ **NO** X

Daryll Stewart **YES** _____ **NO** X

If you answered "yes" as to any of the defendants above, proceed to the next question.

C. Do you award punitive damages against Edward Chew?

YES _____ **NO** _____

If yes, in what amount?

$_____

D. Do you award punitive damages against Darryl Stewart?

YES _____ **NO** _____

If yes, in what amount?

$_____

Please have the jury foreperson sign and date this form and return to the Courtroom.

Date: 4-5-2018 **BY:** _____
Foreperson

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES PORTER and MARILYNN SANKOWSKI **v.** **CITY OF PHILADELPHIA, et al.**	**CIVIL ACTION** **NO. 13-2008**

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It is further ORDERED that judgment is entered in favor of Defendant Daryll Stewart and against Plaintiff James Porter.

The Clerk shall close this case.

BY THE COURT

/s/ Lori K DiSanti

ATTEST: _____

Lori DiSanti
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES PORTER and MARILYNN SANKOWSKI **v.** **CITY OF PHILADELPHIA, et al.**	**CIVIL ACTION** **NO. 13-2008**

MEMORANDUM RE: POST-TRIAL MOTIONS

Baylson, J. **August 31, 2018**

I. Introduction

This case involves a most egregious violation of First Amendment rights, in the context of a sheriff's sale. After a jury verdict in favor of Plaintiffs, the Defendants, City of Philadelphia and Edward Chew, moved for judgment as a matter of law, a new trial, or remittitur, asserting errors in the Court's jury instructions and in allowing a Monell claim to proceed at trial.

II. Factual Background

The Court reviews the facts introduced at trial in the light most favorable to Plaintiffs. Through Porterra, LLC, Plaintiff James Porter owned a property at 1039-55 Frankford Avenue in Philadelphia, which was subject to foreclosure and scheduled to be sold at a sheriff's sale on January 4, 2011. (N.T. 4/3/18 183:19-184:1, ECF 98; N.T. 4/4/18 114:3, ECF 99). Porter and various members of his family attended the sale on that date, which was held in a large ballroom in West Philadelphia. Porter's wife, Debra, had a $2.8 million mortgage on the property, and Debra had filed a declaratory judgment action in the U.S. District Court for the Eastern District of Pennsylvania regarding this mortgage, Docket No. 10-7243. (Id. 183:24-25; 220:24-25). Prior to the sheriff's sale, Porter had gone to the Sheriff's office on several occasions, trying to prevent the sheriff's sale of the property proceeding, and alternatively attempting to ensure that whoever bought the property at the sheriff's sale was aware of the pending declaratory judgment

action. On the afternoon before the sale, Porter's attorney, Alan Nochumson, e-mailed the attorney for the bank holding the mortgage to ensure that there would be an announcement of the existence of the pending federal lawsuit. (N.T. 4/2/18 198:5-24, ECF 97). Nochumson subsequently e-mailed Porter the following:

> Jim, I'm just confirming what I told you to do today if the bank does not announce Deborah's lawsuit at the sale. You are to say that Deb has filed a federal lawsuit claiming she has an unrecorded mortgage which would survive the sheriff's sale. While you're at it, you might as well also mention that you and Deborah have a billboard easement on the property.

(Id. 199:16-22).

When the attorney for the bank did not arrive, and the sale of the property was announced by the representative of the Sheriff's office conducting the sale, Porter stood up and began reading the e-mail from Nochumson. (N.T. 4/3/18 229:6-9). Within a very short period of time, which various witnesses have estimated as between three and thirty seconds of Porter beginning to read the announcement, Defendant Ed Chew, an attorney for the Sheriff's department, along with Defendant Deputy Sherriff Daryll Stewart, ran at Porter, yelling, and motioned to several sheriff's deputies, who pulled Porter by the collar, put Porter in a chokehold, placed him in handcuffs, hit him with a stun gun, and eventually dragged him from the room. (N.T. 4/2/18 111:6; 147:2-6; N.T. 4/3/18, 229:11-233:23). Porter later sought medical attention, as did at least one of the deputies. (N.T. 4/3/18 236:25-237:1; 263:2-3).

Chew also grabbed Porter's mother, Marilynn Sankowski, who sustained bruises from the encounter. (N.T. 4/2/18 72:21-73:3; 74:17-20).

Porter was jailed and later charged criminally in state court. After a jury trial, at which he represented himself, he was convicted of resisting arrest. (Id. 117:21).

III. Procedural History

A detailed record of the events leading up to the trial will be helpful in setting the context for the trial itself, and for assessing the Defendants' post-trial assertions of error.

In December 2012, Plaintiffs Porter and Sankowski filed this action in the Philadelphia Court of Common Pleas, which alleged eleven counts of civil rights violations, including one claim of Monell liability,[1] against Defendants City of Philadelphia; Barbara Deeley; Daryll Stewart; Ed Chew; William Bengochea; Guerino Busillo; James McCarrie; Angellinel Brown; and Paris Washington. (Compl., ECF 1). On April 16, 2013, Defendants removed to this Court. (Notice of Removal, ECF 1).

[1] In many civil rights cases, plaintiffs assert claims against individuals under 42 U.S.C. § 1983, and claims for liability against a municipality or a supervisor/manager under the theories developed in the landmark Supreme Court case, Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978), which concerned policies of New York City agencies requiring pregnant employees to take leaves of absence before such leaves were medically necessary. The Supreme Court held that "[l]ocal governing bodies…can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where… the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Id. at 690. The Supreme Court held that a policy or custom was a requirement for establishing municipal or supervisory liability: "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort…a municipality cannot be held liable solely because it employs a tortfeasor… in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Id. at 691. Monell remains good law, and plaintiffs must show the existence of a policy or custom to establish municipal liability. See, e.g., Lesende v. Borrero, 752 F.3d 324, 336 (3d Cir. 2014) (jury made a finding that liability stemmed from unconstitutional policy or custom). By contrast, the elements of proof for § 1983 claims against individuals acting under color of state law are less onerous.

The Court's frequent reference to the "Monell claim" in this Memorandum refers to the doctrine described above. In this case, as detailed infra., Porter appeared during all the pretrial proceedings to be focusing his facts and legal arguments on the liability of the individual defendants, and had not made any specific discovery requests to support his Monell claim, at least that the Court is aware of.

This case was placed in suspense on April 22, 2013 because of the underlying criminal matter for which Porter was being prosecuted. (Order, ECF 2). Defendants filed their answer on December 23, 2013. (Answer, ECF 5).

A. Pretrial Proceedings

No progress was made in this litigation until early 2017, by which time the criminal case had been concluded. Porter's then-attorney, Brian Zeiger, moved to withdraw as counsel on February 8, 2017, and moved to remove the case from suspense that same day. (Mot. to Withdraw, ECF 10; Mot. to Remove from Suspense, ECF 11). The Court granted both motions allowing Zeiger to withdraw as counsel for Porter and removing the case from suspense on March 28, 2017. (Order, ECF 16). Thereafter, Zeiger continued to represent Sankowski but Porter represented himself pro se.

The Court recognized that Porter, as a pro se litigant, was unfamiliar with court procedures, but extremely tenacious in pursuing his case. His consistent factual assertions also demonstrated that if his version of events was credible, he suffered a most serious civil rights violation. Despite the case management challenges of Porter continually trying to make this case more complex than necessary, and to introduce irrelevant facts and legal theories, the Court closely supervised the pretrial proceedings so that Porter could receive a fair trial of the "kernel" of his complaint that he suffered substantial loss of his constitutional rights, plus physical injury as a result of his attempting to speak at a sheriff's sale regarding a property in which he had a very substantial financial interest.

At this point in the litigation, with the case out of suspense and Porter now representing himself, Porter was insistent on amending his complaint. However, his motion was defective for a number of reasons. Porter wanted to add additional defendants, and additional grounds, which the Court concluded were unnecessary, untimely or legally improper. Most fundamentally,

Porter wanted to re-litigate issues as to the bank's conduct leading up to the foreclosure sale, asserting that his rights had been violated. All of these issues had been determined against Porter in state court litigation. See Commerce Bank, N.A. v. Porterra, LLC, Court of Common Pleas Philadelphia County, February Term 2007, No. 03257. The Court held a number of pretrial hearings, many more than in most cases, and issued various orders after most, if not all, of these all conferences. By Order dated September 11, 2017 (ECF 27), the Court summarized the procedural situation existing at that time, including reasons why the Court decided not to allow Porter to file an amended complaint to add additional defendants and irrelevant facts. The Court noted that Porter had previously been given leave to file an amended complaint but had failed to do so. See id.

On September 25, 2017, the Court held an extensive pretrial conference with Porter, and the counsel for his mother and co-plaintiff, Marilynn Sankowski, and defense counsel. A number of issues pertaining to discovery had arisen. The Court went into great detail about the conduct of Mr. Porter as a pro se plaintiff. The Court's Order resulting from this conference likewise went into great detail regarding how discovery should be conducted, and set deadlines for discovery, dispositive motions, and a trial pool date of January 15, 2018. (Order, ECF 30).

Another hearing was held on October 10, 2017 in which the Court reviewed the procedural status at that time and ruled that Porter's efforts to add an expansive conspiracy count to the Complaint was not appropriate. In the Order issued subsequent to that hearing (ECF 41), the Court stated, "this Court has determined that Mr. Porter is entitled to fair discovery on his claims of excessive force and denial of free speech, and he may pursue his claim of civil conspiracy limited to what happened on the day of the Sheriff's sale." Id. ¶ 4. The Court denied Porter's request for extensive discovery into what had happened prior to the Sheriff's sale.

This Order then went on with further details about what discovery would take place on specific dates, in much more detail than usual in a case where both parties are represented by counsel. The Court noted in paragraph 6 that Mr. Porter had never served a Rule 34 request for documents on counsel for the City but agreed to treat Porter's request at the hearing for documents as a Rule 34 request although coming late in the litigation. The Court therefore ordered that the "City produce documents in the custody of the Sheriff's Department or the Police Department relating to the incidents involving Plaintiff on January 4, 2011 leading up to [Porter's] arrest." Id. ¶ 6.

Lastly, the Court indicated that if Porter were able to subpoena persons who were not currently employed by the City, the Court would extend the discovery period until after their depositions. Id. ¶ 7.

Porter said nothing at any of these hearings about discovery on his Monell claim. The original Complaint in the case had included a Monell claim, but Porter had not referred to that claim or advocated any discovery relating to the Monell claim in any of the pretrial proceedings.

Two days later, on October 12, 2017, the Court denied a Motion for Reconsideration filed by Porter that he be allowed to amend the Complaint, which also sought to add three attorneys as defendants. (ECF 42.)

On November 7, 2017, the Court granted in part Porter's Motion for Order to Enforce Outstanding Discovery Orders, and specifically ordered that defense counsel "shall produce any requested City of Philadelphia witnesses [for deposition] between November 13, 2017 and November 22, 2017" and extending fact discovery to December 15, 2017, but noting "No further extensions will be granted." (ECF 48).

On January 25, 2018, the Court held a final pretrial conference and issued a number of Orders designed to provide for orderly presentation of issues prior to the start of the trial. The jury trial was scheduled to begin with jury selection on March 29, 2018 and the start of testimony on April 2, 2018. (Order ¶ 2, ECF 51).

The parties submitted proposed jury instructions on March 26, 2018. (ECF 72, 74). Porter's proposed jury instructions included instructions on First Amendment, conspiracy, and municipal liability under Monell for violating his First Amendment rights, in addition to numerous standard instructions. (Pl.'s Proposed Jury Instructions at 8-12, ECF 72). Defendants' proposed jury instructions did not include the Monell claim, or proposed conspiracy charge, but included proposed instructions as "First Amendment Rights Are Not Absolute"; "First Amendment – Preservation of the Peace" and "First Amendment – Retaliation Under Section 1983." (Defs.' Proposed Jury Instructions at 5-8, ECF 74).

B. Trial Testimony – Summary

Witnesses for Plaintiffs in order of their testimony[2]

Marilynn Sankowski

Plaintiff Marilynn Sankowski, Porter's mother, testified about her own injuries in the course of her own case, which were caused by Chew. Her testimony corroborated other plaintiff witnesses' testimony that Chew had come running at Porter soon after he began making the announcement. Porter did not recall Sankowski to the stand.

Phillip Kemmerer

Phillip Kemmerer, one of the clerks in the sheriff's department who worked the day of the sale, was an eyewitness to the incident. He testified that he saw Porter start to "read something,"

[2] In the course of her case, Sankowski called her doctor, Edward Sing, but his testimony is not relevant to the post-trial motions as to Porter.

whereupon Defendants Chew and Stewart ran toward Porter and motioned to sheriff's deputies, who surrounded Porter within approximately ten seconds and wrestled him to the ground.

Richard Tyer

Richard Tyer, also a clerk in the sheriff's department, testified that he worked the day of the sheriff's sale but did not view the events in question because he was looking down at his work. He testified that the sheriff's department had a policy of not allowing announcements at sales, and that if someone made an announcement, he would be told to sit down and if he did not comply, he would be escorted out.

Alan Nochumson

Alan Nochumson, attorney for Porter's wife in the foreclosure action, testified to writing the emails to Porter seeking to ensure that the pending declaratory judgment action was announced at the sale, and suggesting to Porter that he make the announcement if the bank's attorney did not attend the sale.

Marquet Parsons

Marquet Parsons, who had worked as security at the office of the sheriff's department at the time of the events in question, testified that he had not been present at the sheriff's sale.

Barbara Deeley

Barbara Deeley, who had assumed the post of Philadelphia Sheriff on January 1, 2011, testified that she was not present at the sheriff's sale on January 4, 2011 but that the sheriff's department had a policy of prohibiting announcements at sheriff's sales.

David Porter

Plaintiff Porter's brother David Porter, who had attended the sale, testified that Porter had informed Chew prior to the sale of his intention to make an announcement. David Porter

testified that when Porter began reading the announcement, Chew ran at Porter within five seconds of Porter beginning to speak, shouting that Porter could not speak. According to David Porter, another man pulled Porter backwards by the jacket and Porter was then surrounded by deputies. David Porter was later recalled as a rebuttal witness to contradict Tricia Sadd's testimony that he had held a video camera, which he denied.

Michael Riverso

Michael Riverso, a clerk in the sheriff's department who witnessed the sale, testified that Chew, Stewart, and four or five plainclothes deputies approached Porter within thirty seconds of his beginning to make the announcement. He observed an "altercation," and heard Porter "moaning that [he] couldn't breathe." He also testified that at other sheriff's sales he had attended, individuals making announcements were told to sit down.

Ed Chew

Defendant Ed Chew, a lawyer at the sheriff's department, testified that he informed Porter prior to the sale that announcements were not allowed at sheriff's sales. He testified that deputies told Porter to sit down, he did not recall approaching Porter, and that he had thought Porter had completed his announcement when he was told to stop speaking. Chew testified that the deputies attempted to remove Porter from the room. The jury's verdict requires the Court to consider Chew's version of the facts was rejected by the jury.

Daryll Stewart

Defendant Daryll Stewart, supervisor of the real estate division at the sheriff's department, testified that he was in charge of the auction on the day of the sheriff's sale. He denied running toward Porter, touching him in any way, or hitting him with a stun gun. He testified that he was

far away from the altercation, and that Porter became "violent." Stewart testified that no signs were posted stating that announcements were forbidden.

Gerald Harris

Gerald Harris was an officer with the Philadelphia Police Department who arrested Porter. He testified that he did not observe the incident with the deputies, but described Porter as "compliant" following arrest.

Debra Porter

Debra Porter, Plaintiff' Porter's wife, who had been present at the sale, described the $2.8 million mortgage on the property and the emails to Attorney Nochumson. She testified that five or six deputies surrounded the Porters within three seconds of his beginning the announcement, and asked them to leave, which she did immediately after the request. She described the negative effect of the events on January 4, 2011 on her husband.

James L. Porter

James L. Porter, Plaintiff Porter's father, who was not present at the sheriff's sale, described the effect of the events on January 4, 2011 on his son.

James E. Porter

Plaintiff James E. Porter described the interactions with Nochumson and testified that he had spoken to Chew prior to the sale, and told him that the bank's attorney was supposed to be making an announcement about the declaratory judgment action, which Porter testified Chew said was "fine." Porter testified that when he began reading the announcement, Chew running at him within three seconds. He then felt himself being pulled on the back of the jacket, and saw Stewart pulling him. Porter testified that Chew had grabbed his left arm and was pushing him. Some five to seven deputies surrounded Porter, placed him in a chokehold, and hit him with a

stun gun. While he was in a chokehold, which caused him difficulty breathing, he was handcuffed. He was later jailed, and eventually convicted in state court of resisting arrest.

Witnesses for Defendants

Angellinel Brown

Angellinel Brown, one of the deputies who subdued Porter, testified that she was alerted to a disturbance at the sheriff's sale. She testified that Porter was "flailing" his arms and described him as combative before he was handcuffed.

Guerino Busillo

Guerino Busillo, a sergeant in the sheriff's department, testified that he had spoken to Porter prior to the sale, and that Tricia Sadd had told him that she had been threatened by Porter. Busillo testified that Porter's announcement lasted about a minute, and eventually Chew and Stewart wanted him to stop speaking, so they asked security to ask him to sit down. Busillo testified that he approached Porter and asked him several times to sit down. Thereafter, other deputies approached the scene, and tried to subdue Porter. Busillo testified that Porter tried to hit one of the other deputies, James McCarrie, knocking McCarrie to the ground, and that he himself was hit in the face. Busillo testified that Chew was not near the site of the altercation.

James McCarrie

James McCarrie, one of the deputies who subdued Porter, testified that he was backup security on the day of the sheriff's sale, and was called in to respond to Porter. He corroborated Busillo's account, and testified that Porter had struck him in the chest and knocked him to the ground, which resulted in a sprained shoulder.

William Bengochea

William Bengochea, another deputy, described observing Busillo repeatedly asking Porter to sit down, and Porter resisting and "flaring his hands up." He testified that McCarrie was struck in the chest and fell down. He testified that Porter was placed in handcuffs while lying on his stomach. Bengochea did not see either Stewart or Chew.

Tricia Sadd

The testimony of Tricia Sadd, attorney for the receiver appointed to take care of the property, from Porter's criminal trial was read into the record. Sadd testified that the deputies asked Porter repeatedly to sit down, and that a "tussle" then ensued, although she was not close enough to observe any "blows thrown." She also testified that Plaintiff's brother, David Porter, attempted to make a bid on the property while the altercation ensued and that he had held a video camera.

C. Trial – Monell Claim

On Thursday, March 29, 2018, the day of jury selection, the Court held a discussion with counsel and Porter at which Porter asserted that he was not proceeding with his case with respect to all of the Defendants originally named (which included multiple sheriff's deputies), but rather sought to pursue claims only against Defendants Philadelphia Sheriff Barbara Deeley; Ed Chew, counsel for the Sheriff's Department; and Deputy Sheriff Daryll Stewart. (N.T. 3/29/18 12:8-11, ECF 96). The Court found that Porter had not pursued his Monell claim in discovery and stated that it was "going to consider it waived." (Id. 7:15). Porter protested that he had submitted a proposed jury instruction on Monell, and in his pretrial memorandum, he had mentioned Count 2 of his Complaint, in which he had alleged a "policy/custom" of the Philadelphia Sheriff's Department but had not mentioned Monell specifically. (Id. 66-68). Porter's pretrial memorandum did not contain any facts supporting a Monell claim. The Court, which repeatedly mentioned Porter's failure to pursue the Monell claim in discovery and to mention it in the many

pretrial conferences Porter had attended, declined to change its ruling that the trial would proceed as if there was "no Monell claim in this case." (Id. 66:19-24; 68:25).

On the morning of April 2, 2018, Porter docketed an "Emergency Motion for Reconsideration to Include Count II Monell Claim," (ECF 79), a paper copy of which he handed up to the Court at the end of the day's proceedings. Counsel and Porter discussed the reconsideration motion with the Court starting mid-day the following day and after testimony had concluded on Wednesday, April 3, 2018, by which time all of Plaintiffs' witnesses had testified. There was extensive discussion at this point about Porter's desire to proceed on the Monell claim. As noted above, the Complaint had contained a Monell claim, and Porter's pretrial memorandum had repeated the existence of the Monell claim, and Porter had requested a jury instruction on First Amendment Monell liability. However, these documents had contained no factual support for any Monell claim.

During this discussion, the Court noted that Sheriff Barbara Deeley, who had testified by that point, had admitted that the Sheriff's Department had a "policy" of forbidding announcements at Sheriff's sales, and the witnesses had given "uncontradicted evidence" of such a policy, which was apparently not in writing. (N.T. 4/2/18, 224:19-225:9, N.T. 4/3/18, 162:19). In the Court's recollection of the pretrial proceedings, corroborated to some extent by the absence of any discussion of Monell in any of the pretrial orders, Porter had not made any request for discovery, or any assertions about the City's refusal to produce Monell type evidence, as having such a policy. This was a major reason why the Court determined, at the beginning of the trial, that Porter had waived his Monell claim because the Court, as of that date, had not seen any evidence to support it.

Because the Court had only ruled the Monell claim waived a few days before, but had not dismissed the City of Philadelphia from the case, and presumed defense counsel had known of the existence of this policy throughout the litigation, the Court stated that "the prejudice that you've had has really been from Thursday until today." (N.T. 4/3/18, 161:15-16). Summarizing the evidence thus far, the Court opined, "if the jury believes Mr. Porter…I think he has stated … a Monell claim." (Id. 163:4-5). The Court concluded the midday colloquy undecided as to whether to allow the Monell claim, but made clear to defense counsel that they would have wide latitude to "call some witnesses who you may not have thought about calling" and recall witnesses who had already testified. (Id. 164:25-165:1, 169:10).

The Court decided to allow Porter's Monell claim to proceed. (N.T. 4/3/2018 284:5-8). The Court decided to allow a claim against Sheriff Barbara Deeley in her official capacity, which was "basically going to be a Monell claim," and grant a direct verdict against her in her individual capacity. (Id.). Regarding Defendants' assertion of prejudice, the Court stated as follows:

> I reject the Defendant's position that they're gonna be prejudiced. First of all, I can't imagine any discovery that would be half relevant or helpful in this case. The testimony of the Defendants is not clear that this policy is in writing. I have yet to see a document which states this policy, but the witnesses said it was clearly the policy of the Sheriff not to allow announcements, and that's what they told Mr. Porter.

(Id. 284:9-16).

The following day, upon "[f]urther reflection," the Court stated its intention to have the Monell claim proceed against the City—which it again noted was still a party to the case—because it would be "clear and more fair to everybody" to allow the Monell claim to proceed against the city, and the verdict sheet would be with the city as the defendant, on the Monell

claim only." (N.T. 4/4/18 150:24-151:6).[3] Testimony concluded on April 4, 2018, and a charge conference was held that afternoon prior to closing arguments. (Id. 161-62). After the jury returned to hear closing arguments, the Court instructed the jury that its earlier comment that the City was not a defendant was incorrect, and "there [was] a claim against the City of Philadelphia…pending… I just want to make that correction." (Id. 175:19-23).

D. Trial – Verdict and Post-trial Motions

On the morning of Friday, April 5, 2018, the Court instructed the jury and the jury left to deliberate. (N.T. 4/5/18 8-65, ECF 100). That afternoon, the jury returned a verdict of $7,963 for Sankowski against Ed Chew. (ECF 89). The jury found that Ed Chew, but not Daryll Stewart, had retaliated against Porter for exercise of his First Amendment rights and conspired to deprive Porter of his First Amendment rights; however, the jury decided neither Chew nor Stewart had actually caused harm to Porter. Nevertheless, the jury awarded Porter $7,500 against Chew. Finally, the jury awarded Porter $750,000 against the City on Porter's Monell claim for violation of Porter's First Amendment rights. The jury did not award punitive damages.

Following trial, Defendants moved for judgment as a matter of law, a new trial, or remittitur on May 3, 2018. (ECF 94). Defendants filed their opening memorandum of law, which raised legal issues relating only to Porter's claims, on June 7, 2018. (ECF 105). Porter, now represented by counsel, filed a memorandum in opposition on July 20, 2018. (ECF 109). Defendants filed a reply on August 6, 2018. (ECF 112).

[3] See Hafer v. Melo, 502 U.S. 21, 25 (1991)(holding that an official capacity against a supervisor was essentially equivalent to a Monell claim against a governmental entity.)

IV. Legal Standard

Defendants move for entry of judgment as a matter of law pursuant to Rule 50, for a new trial pursuant to Rule 59, or in the alternative, for remittitur. Each of these routes imposes a heavy burden on Defendants.

A post-trial motion for judgment as a matter of law under Rule 50(b) "may be granted 'only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability.'" Mancini v. Northampton Cty., 836 F.3d 308, 314 (3d Cir. 2016) (quoting Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993)). Where a jury returns a verdict in favor of the plaintiff, a court must "examine the record in a light most favorable to the plaintiff, giving her the benefit of all reasonable inferences, even though contrary inferences might reasonably be drawn." In re Lemington Home for the Aged, 777 F.3d 620, 626 (3d Cir. 2015) (quoting Dudley v. S. Jersey Metal, Inc., 555 F.2d 96, 101 (3d Cir.1977)).

"[E]ven when judgment as a matter of law is inappropriate," a district court may nevertheless grant a new trial. Wagner by Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1017 (3d Cir. 1995). Rule 59 allows a court, after conducting a jury trial, to grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). However, a court, "should do so only when "the great weight of the evidence cuts against the verdict and ... [ ] a miscarriage of justice would result if the verdict were to stand." Leonard v. Stemtech Int'l Inc, 834 F.3d 376, 386 (3d Cir. 2016) (quoting Springer v. Henry, 435 F.3d 268, 274 (3d Cir. 2006)) (alterations original).

Finally, remittitur is "a device employed when the trial judge finds that a decision of the jury is clearly unsupported and/or excessive." Cortez v. Trans Union, LLC, 617 F.3d 688, 715

(3d Cir. 2010) (quoting Spence v. Bd. of Educ. of Christina Sch. Dist., 806 F.2d 1198, 1201 (3d Cir.1986)). A court "may not vacate or reduce the award merely because it would have granted a lesser amount of damages." Evans v. Port Auth. of New York & New Jersey, 273 F.3d 346, 352 (3d Cir. 2001).

V. Summary of Parties' Arguments

A. First Amendment and First Amendment/Monell Jury Instructions

Defendants assert that the Sheriff's policy of not permitting announcements at auctions did not violate the First Amendment. (Defs.' Mem. in Support of Mot. for Judgment as a Matter of Law ("Defs.' Br.") at 3-5, ECF 105). Defendants, who rely on case law about city council meetings open to the public, appear to use different tests at various points in their brief and assert that not allowing announcements is a proper constitutional policy under the First Amendment because it is not-viewpoint based, is related to the purpose of effectuating the writ in an efficient manner, and there existed ample alternatives in which Porter could have contested the sale of the building. (Id.)

Defendants assert that the Court's jury instructions essentially "usurped" the jury's role and commanded the jury to find for Porter on the First Amendment retaliation claim.[4] (Id. at 7).

Porter responds that the Sheriff's policy violated the First Amendment because the Sherriff's policy was viewpoint-discriminatory—namely, that Chew singled him out to be silenced based on what Chew thought he was going to say about the sale. (Pl.'s Mot. in Opposition to Defs.'s Mot. for Judgment as a Matter of Law ("Porter Br.") at 4, ECF 109). Porter also disputes that ample alternatives existed for him to communicate his message;

[4] In their original post-trial motion, Defendants argued that Monell liability was unavailable where no individual defendant was found to have caused harm, see Mot. for Judgment as a Matter of Law (ECF 94), but abandon that argument in their subsequent memorandum.

according to Porter, his purpose in making the announcement was to communicate to a potential buyer that a federal lawsuit regarding the property was ongoing. (Id.)

Porter says extremely little about the jury instructions, but appears to argue that the Court's instructions were correct.

B. The Verdict against Chew: Lack of Causation and Qualified Immunity

In a footnote, Defendants assert that the jury verdict and damages award of $7,500 against Chew on the First Amendment retaliation cannot be allowed to stand for two reasons: Chew was entitled to qualified immunity because the Supreme Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause," Reichle v. Howards, 566 U.S. 658, 664–65 (2012). (Defs.' Br. at 7 n.1). Defendants also assert that the jury verdict must be vacated on the ground that the jury found that Chew was not the factual cause of harm to Porter. (Id. at 8).

Arguing very generally, Porter disputes that Chew was entitled to qualified immunity because the right to speak is a well-known, firmly established right. Again citing extremely general propositions, Porter asserts that the Court is obliged to reconcile an "inconsistent verdict," and asserts, without citation to case law, that "[a]lthough [the jury] checked a box finding no causation, they unanimously agreed to a damages number. It was the stated intent of the jury to award those damages, and the evidence supported them." (Porter Br. at 14.)

C. Rule 51 Issues

The parties dispute whether the Court erred in not providing counsel a full written copy of the jury instructions prior to the charge. Defendants complain that the Court inappropriately instructed the jury on physical harm, emotional harm, and loss of past and future earnings to Porter without mentioning those instructions at the charge conference.

D. Remittitur

The parties dispute whether evidence existed to support jury awards of $750,000 for First Amendment retaliation and civil conspiracy on the basis of the evidence presented. Defendants assert that Plaintiff showed no causal link between the alleged policy prohibiting announcements and the physical, emotional, or economic harm he suffered:

> None of the injuries or medical treatment described were at all related to the alleged Sheriff's Office policy of limiting speech at Sheriff's sales, but instead, as testified to by Plaintiff, occurred as a result of Plaintiff Porter's own intentional and aggressive conduct with Sheriff's deputies. With regards to emotional harm, Plaintiff's evidence was limited to describing the alleged emotional toll that his criminal trial and conviction took upon him…with regards to the alleged loss of past or future wages, there was no testimony at trial that such harm was caused by the Sheriff's Office policy. Plaintiff's evidence referenced his arrest, his criminal trial and his criminal conviction as the cause of his alleged wage loss and inability to obtain a job.

(Defs.' Br. at 15-17.)

Porter responds that the jury heard evidence that he was attacked by the deputies, and an award of damages for physical and emotional harm was appropriate. He also asserts that Defendants should not be entitled to remittitur because the jury award is not so high as to shock the conscience.

VI. Discussion

A. Monell claim was properly submitted to the jury

The parties trade accusations of prejudice based on the reintroduction of the Monell claim partway through trial. Defendants, who never mention the fact that the Monell claim was reintroduced after Porter filed a motion for reconsideration of the Court's ruling that the claim was waived, frame the proceedings as a trial court run amok. Porter responds that he was more seriously prejudiced by the reintroduction practically at the close of his case.

Defendants assert, without any citation to authority, that judgment should be entered for the City on the Monell claim because Defendants were "severely prejudiced" by having been given "mere hours to produce both evidence and a policymaker from the Sheriff's Office in 2011 in order to defend itself" and having been denied "the opportunity to find witnesses or develop documentary evidence from those who were familiar or well versed in the Sheriff's Office policies in effect seven years prior." (Defs.' Br. at 12). The City, again citing no precedent, also seeks a new trial to develop new evidence in defense of its policy.

Defendants seek to frame the trial proceedings as chaotic and prejudicial, but offer a highly selective account of proceedings. Rather than running as amok as Defendants seem to imply, the Court was simply giving Porter's reconsideration motion the consideration it was due.

In this Court's extensive experience in civil rights litigation, Monell claims are often alleged, but seldom proved. Most lawyers who have clients alleging civil rights claims in federal court name the individuals who, under color of state law, are alleged to have violated the plaintiff's rights. Monell claims are often included in the complaint, but plaintiffs have been generally unsuccessful in proving that the City of Philadelphia, particularly regarding the police department, has any policies or customs which violate constitutional rights and thus very few Monell claims against the City of Philadelphia Police Department are successful. The requirements of a Monell claim, as set forth in footnote #1 above, are very demanding. In this Court, there are frequent cases against Philadelphia police officers. The claims against police officers under §1983, for excessive force, etc., stand or fall on particular facts of the case. However, plaintiffs in recent years have been almost uniformly unsuccessful in showing that the City of Philadelphia Police Department has any policies or customs which are violative of constitutional rights or would satisfy the Monell standards. This is in large part due to extensive

policies and training programs which the Philadelphia Police Department has embraced and applied, at least in part, to show adherence to constitutional rights, and avoid liability for damage claims.

Civil rights claims against the Sheriff's Department, as in this case, are much less frequent. However, when the trial testimony in this case revealed, from the Sheriff herself, as well as other witnesses, that the Sheriff's Department had a specific "policy" not to allow any "announcements" to be made at Sheriff's sale – the Court learned, for the first time in this case, that such a policy existed. There is nothing in the record to show that Plaintiff was aware of this policy. Plaintiff certainly never mentioned it at any pretrial conference nor does the Court recall Plaintiff citing it in his pretrial memorandum or in his points for charge.

The admitted existence of a "policy," of course, satisfies a very crucial element of a Monell claim, that is, as noted above, frequently alleged but seldom proved. Here, the Plaintiff did not have to prove it because the Defendant Sheriff admitted it. Thus, the Court felt, in the interest of justice, Plaintiff having alleged a Monell claim in his Complaint, and having referred to it in his pretrial memorandum and in his requests for charge, it would be improper and unfair to Plaintiff, to refuse to allow Plaintiff to proceed on the Monell claim once the Defendant Sheriff at trial admitted, for the first time in the long history of this case, the existence of a policy forbidding announcements at Sheriff's sales.

It is, in this Court's experience, indeed rare for a municipal official to admit the existence of a policy which clearly infringes on constitutional rights, as discussed further in the following section. A Sheriff's sale is not a court proceeding, and is not a governmental hearing.[5] It is

[5] The concept of a Sheriff's sale goes back to colonial times, and existed at common law, to provide for orderly disposition of realty in which the debt of owner/debtor had been unable to honor the terms of a loan, where the realty was security for the loan. See George Lee Flint, Jr. &

basically a public auction of real property, carried out by a governmental entity, pursuant to a state statute providing for orderly and public opportunity to acquire properties that have been foreclosed upon for failure to pay outstanding mortgages.

In assessing the right of an individual to speak out at a Sheriff's sale, it falls under the concept of a "limited public forum," as that term has been defined by the Supreme Court and the Third Circuit.

This Court has found no existing precedent approving a total prohibition, i.e., a prior restraint, on an individual who has an interest in a property, however legally doubtful that interest may be, from making any kind of a statement during a Sheriff's sale. There is nothing sacrosanct about a Sheriff's sale that would justify a prior restraint on any kind of statement, particularly by a person with an interest in the property being auctioned. This is not to say that any individual can interrupt a Sheriff's sale to make irrelevant or disruptive comments for any private purpose. However, the facts of this case show no justification for the conduct that took place. The person conducting the sale has no right to forbid an individual with an interest in the property making a short statement as to the individual's interest in the property being offered for sale.

Moreover, the Supreme Court has stated that "[a] document filed *pro se* is 'to be liberally construed.'" Erickson v. Pardus, 551 U.S. 89, 94 (2007). It is unreasonable to expect a pro se litigant such as Porter to submit pleadings and other motions up to the standards of trained counsel. It is not necessarily reasonable for Porter to know the name of the Monell case, or to require him to cite it in his submissions or at pre-trial conferences, and it is likely that, as a non-

Marie Juliet Alfaro, Secured Transactions History: The Impact of Southern Staple Agriculture on the First Chattel Mortgage Acts in the Anglo-American World, 30 OHIO N.U. L. REV. 537, 546–48 (2004).

lawyer, Porter did not appreciate the importance of municipal policies to establishing municipal liability under the Monell doctrine.

Porter also rightly points out that, whatever prejudice Defendants may have suffered by the belated reintroduction of the Monell claim, the prejudice to Porter was arguably greater in terms of what evidence he developed: whether or not Defendants had to scramble to put on their case, Porter did not even know what he had to prove to pursue a Monell claim during most of his case in chief. As Defendants are quick to point out, numerous witnesses had testified by the time the Court even began considering Porter's motion for reconsideration, and no less than thirteen witnesses had testified by the time the Court actually decided to let Porter proceed on a Monell claim.

As the evidence developed, it became clear to this Court that reconsideration was appropriate—as the Court mentioned repeatedly, the uncontroverted evidence was clear that the Sheriff's Department had a policy of forbidding announcements at sales. The Third Circuit has long held that "[t]he purpose of a motion for reconsideration…is to correct manifest errors of law or fact or to present newly discovered evidence." Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). Both of these happened in this case. Although the Court had not been aware that Porter had any facts to pursue his Monell claim, the Court realized that Porter had indeed included a mention of the Monell claim in his pre-trial memo and submitted a Monell charge in his proposed jury instructions—and the evidence belatedly revealed that a policy of forbidding announcements existed. Thus, the grant of reconsideration was appropriate.

In addition, it was clear to this Court that there was no real prejudice to Defendants from the Court's reversing its prior erroneous ruling and allowing the Monell claim to proceed:

Defendants had been on notice since the very beginning of the case that Porter sought to proceed on a Monell claim. Defendants never stated, during discovery, that there was a policy prohibiting announcements. Defense counsel presumably knew of the policy, and knew that they were defending a Monell claim, at least until the Court's erroneous ruling on March 29, 2018. Thus, as the Court stated, "the prejudice that you've had has really been from Thursday until today." (N.T. 4/3/18 161:15-16). And as discussed further below, the Court issued a curative instruction and leave to call additional witnesses.

The Court's reversal of its erroneous ruling and reintroduction of the Monell claim was well within its discretion, and promoted an interest in allowing the jury to consider a legitimate fair trial policy of giving the jury the opportunity to consider the Defendants' outrageous conduct, in the context of the appropriate constitutional claim, in the event the jury believed that Porter as to what had taken place. As a general matter, district courts have "wide discretion in the management of their cases." United States v. Wecht, 484 F.3d 194, 217 (3d Cir. 2007), as amended (July 2, 2007). See also Yakowicz v. Com. of Pa., 683 F.2d 778, 784 (3d Cir. 1982) (district courts possess "broad powers" in the management of cases "as they proceed through the various stages before and during trial").

The delay that Defendants deem so prejudicial stemmed from giving Porter's reconsideration motion the consideration it was due. When ruling, the Court made clear to Defendants that they could recall witnesses or "call some witnesses who you may not have thought about calling," but Porter did not have that opportunity. (Id. 164:25-165:1, 169:10). In their post-trial submission, Defendants lament their lack of opportunity to develop evidence relating to their rationales for the policy, such as distinguishing bankruptcy proceedings—a subject on which there was actually some testimony. See Id. 89:3-8. However, in light of the

Court's curative instruction, any failure by Defendants to develop such evidence (or develop it further) was their tactical decision. Porter did not even have that choice. Accordingly, the Court's decision to grant reconsideration while allowing Defendants to revise their case does not warrant a new trial, much less judgment as a matter of law.

B. First Amendment

1. The evidence was sufficient to sustain the verdicts

The evidence introduced at trial was sufficient to sustain the jury verdicts both as to Chew for violating Porter's First Amendment rights and as to the City under a Monell theory.

a. First Amendment Principles

The Third Circuit has stated that "[t]hree considerations underlie any First Amendment analysis of a challenge that plaintiffs were excluded from an event: (1) whether the speech is protected by the First Amendment; (2) the nature of the forum; and (3) whether the government's justifications for exclusion from the relevant forum satisfy the requisite standard." Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183, 192 (3d Cir. 2008) (internal quotation marks omitted).[6]

Porter's speech was protected by the First Amendment. The Third Circuit has stated that "except for certain narrow categories deemed unworthy of full First Amendment protection–such as obscenity, 'fighting words' and libel–all speech is protected by the First Amendment." Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 282–83, 283 (3d Cir. 2004).

[6] In a recent opinion, the Third Circuit held that "'First Amendment retaliation claims are always individually actionable, even when relatively minor' and that the deterrence threshold to chill a plaintiff from exercising her First Amendment rights by reason of the defendant's conduct for such a claim is 'very low.'" Conard v. Pennsylvania State Police, ___ F. 3d ___ (3d Cir. 2018) (citing O'Connor v. City of Newark, 440 F.3d 125, 127-28 (3d Cir. 2006)).

The classification of the forum in which relevant speech occurs "determines the contours of the First Amendment rights that a court recognizes when reviewing the challenged governmental action." Galena v. Leone, 638 F.3d 186, 197 (3d Cir. 2011) (city council meeting qualified as a "limited public forum"). The Third Circuit has described the various types of fora as existing on a "spectrum" ranging from a "traditional public forum," which receives the greatest protection under the First Amendment, to a "limited public" or "nonpublic forum," which receive the least. Nat'l Ass'n for Advancement of Colored People v. City of Philadelphia, 834 F.3d 435, 441 (3d Cir. 2016) (holding that the burden of justifying a speech restriction in a limited public or nonpublic forum was on placed on the government). In this case, the parties evidently agree that the sheriff's sale was a limited public forum, which is a forum provided by the government "that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." Galena, 638 F.3d at 198. (See Porter Br. at 3; Defs.' Br. at 3).

In a limited public forum, "to avoid infringing on First Amendment rights, the governmental regulation of speech only need be viewpoint-neutral and 'reasonable in light of the purpose served by the forum.'" Galena, 638 F.3d at 198. Galena continued:

> [t]he reasonableness of a time, place or manner restriction on speech presents a question of law but the determination involves three subsidiary elements: the challenged restriction must be (1) content-neutral, (2) narrowly tailored to serve an important governmental interest, and (3) leave open ample alternatives for communication of information. The three subsidiary elements of the reasonableness question pursuant to which a court determines the validity of the restriction are questions of fact which should be submitted to the jury, except where the evidence applicable to a particular element entitles a party to judgment as a matter of law on that element.

638 F.3d at 202–03 (citation omitted) (emphasis added). Galena also stressed that "even if a limitation on speech is a reasonable time, place, and manner restriction, there is a First

Amendment violation if the defendant applied the restriction because of the speaker's viewpoint." Id. at 199.

b. Case law

Galena concerned a city council meeting, which as part of its agenda had time reserved for public comment. When the plaintiff attempted to address the council outside of that time, he was escorted out. Id. at 193. Applying the principles described above**,** the Third Circuit found that the city council meeting was a limited public forum, but no First Amendment violation had occurred. Id. at 203. The Third Circuit held that, on the record before it, "adequate alternative means" had existed for the plaintiff to communicate his message. Id.

Similarly, Eichenlaub v. Township of Indiana, 385 F.3d 274 (3d Cir. 2004) also concerned a city council meeting, and likewise held that "[a]ny restrictions on speech must be viewpoint neutral and must be reasonable in light of the purpose served by the forum." Id. at 280. In that case, a citizen was ejected when he engaged in "badgering, constant interruptions, and disregard for the rules of decorum" in attempting to speak on private matters. Id. at 281. The Third Circuit found the ejection not to be viewpoint-discriminatory where the plaintiff's silencing "served the function of confining the discussion to the purpose of the meeting." Id. at 281.

The parties dispute the significance of Kuerbitz v. Meisner, No. 16-12736, 2017 WL 4161111 (E.D. Mich. Sept. 20, 2017), aff'd on other grounds, No. 17-2284 (6th Cir. July 11, 2018), in which a Michigan man had sought to enter a public foreclosure sale of his property to object to the sale of his former property and conduct a citizen's arrest of officials conducting the sale, but was barred from doing so. On the defendants' motion to dismiss, the district court found that the plaintiff's "intention to enter the foreclosure sale to express his objection to the sale of

his former property" was "clearly a form of protected speech." Id at *6. Because the complaint did not allege that "the auction occurred at a place that by long tradition or by government declaration had been devoted to assembly and debate, or a place that the government 'opened up' for such a purpose," the Court found that the plaintiff's allegations, "at most, support[ed] a reasonable inference that the auction took place at limited public forum." Id. at *8. Ultimately, because the plaintiff had been barred from the foreclosure sale to prevent him from conducting the citizen's arrest and engaging in disruptive conduct, not to prohibit him from protesting the sale, the court ruled that his exclusion from the venue was content-neutral, the exclusion was constitutional, and that he had not stated a First Amendment claim. Id. at *9.

Courts have also frequently found First Amendment violations where a plaintiff was stopped from speaking within the confines of an open meeting or public comment period. For example, in Zapach v. Dismuke, 134 F. Supp. 2d 682 (E.D. Pa. 2001), this Court held that a the plaintiff's First Amendment rights were violated when the plaintiff sought to read a one-page statement at a zoning hearing board meeting, and the defendant, who was chair of the zoning board, requested that the plaintiff not mention the names of certain township supervisors, whereupon the defendant asked the plaintiff to sit down. Id. at 686. The defendant then got up, "approached Plaintiff, put his hand on Plaintiff's arm, tried to grab the paper on which the speech was printed from Plaintiff's hand, and guided him away from the microphone as Plaintiff attempted to continue to read his prepared text." Id. This Court found that this amounted to a First Amendment violation, but granted summary judgment to the defendant had both qualified immunity and absolute quasi-judicial immunity.

Similarly, another district court, following a jury trial finding a First Amendment violation, denied the post-trial motion for judgment as a matter of law or a new trial as to a

defendant city councilman who had banged his gavel three times to stop the plaintiff from reading his prepared remarks, which accused the city council chair of bias against Italian-Americans, and a defendant city council chair who had told the plaintiff to stop speaking. Anello v. Anderson, 191 F. Supp. 3d 262 (W.D.N.Y. 2016). The plaintiff, who continued speaking despite the gaveling, was repeatedly asked by a police officer to stop speaking, and when the plaintiff protested that he "had the floor," he was forcibly escorted out in handcuffs, and later charged with resisting arrest and disorderly conduct. Id. at 271. After the jury found for the plaintiff on his First Amendment claims, the court granted the post-trial motion for judgment as a matter of law as to a defendant who had stopped the microphone from recording—which had not affected the sound amplification or the plaintiff's ability to speak—but the court denied the motions as to the council member who had gaveled the plaintiff down and the city council chair who had told the plaintiff to stop speaking. Id. at 275. The court found sufficient evidence to support the jury's verdict of a First Amendment violation. The court further denied qualified immunity as to these two defendants. Id. at 275-77.

c. Monell

As discussed above, under Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978), "[l]ocal governing bodies…can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where…the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." In the Third Circuit, plaintiffs must "demonstrate a plausible nexus or affirmative link between" the policy and "the specific deprivation of constitutional rights at issue." Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010). This is exactly what the Court instructed the jury. (See N.T. 4/5/18 31:6-10). See also Kneipp v.

Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996) (reversing grant of summary judgment to defendant under same standard). Thus, to establish liability against the City, Porter needed to establish the existence of a policy or custom, as well as the requisite plausible nexus or affirmative link.

d. The evidence was sufficient to support a jury verdict

Porter's evidence established that, although he was attempting to read only a three-sentence announcement, he was stopped within three and thirty seconds of his beginning to speak. This was apparently at the request of Chew, who signaled to the deputies to stop Porter from speaking—and not only silenced Porter, but tackled him, put him in a chokehold, and dragged him out of the venue. Porter testified that he was physically pulled, thrown to the ground, hit, choked, could not breathe, and was hit with a stun gun. (N.T. 4/3/18, 231:15-233:23.) Porter's brother, David, testified to hearing Porter saying that he could not breathe and seeing Porter being "kneed in the temple." (Id. 20:13; 48:3-5). Porter testified that he found the altercation "embarrass[ing]" and "humiliat[ing]." (Id. 244:18-22). Porter marshalled a large number of witnesses, who corroborated this account. Numerous witnesses for both Porter and Defendants confirmed the existence of a policy ostensibly forbidding announcements at sheriff's sales.

Under the relevant First Amendment standards for limited public fora, this evidence was sufficient to support a verdict against both Chew and the City.

As a threshold matter, there was no evidence that ample alternatives for Porter to communicate his message existed—in contrast to Galena, where the city council meeting included time for public comment. Defendants construe Porter's announcement regarding the pending litigation as simply yet another attempt to stop the sale, and list the many possibilities of which he availed himself in order to do so. (Id. at 5-6). However, as Porter argues, that was not

his message: he was trying to warn potential buyer that that buyer would be purchasing the property subject to litigation. There was no other forum for Porter to communicate that information. (Porter Br. at 5). Thus, the "ample alternatives for communication of information" required by Galena and other cases regarding limited public fora simply did not exist.

There was also testimony that the organizers of the sheriff's sale tolerated announcements, suggesting that Chew's implementation of the policy was viewpoint-discriminatory. Phillip Kemmerer, a clerk in the real estate office at the sheriff's office who had worked in the sheriff's office on the day of the sale, that, since the date of Porter's incident he had seen people make announcements at sheriff's sales, and "nothing" had happened in response to "most" announcements, although protesters would be escorted out. (N.T. 4/2/18, 149:3-11, ECF 97.) Defendant Chew testified as follows:

> Mr. Porter had told me that he wanted to make an announcement, and he told me what the announcement was, and I told him two things; number one, we don't allow announcements like that, and number two, I also told him, again, that this is not the end of the world as far as his property is concerned, that whatever you wanna say to the public now, can be raised later on and perhaps the sale is overturned.

(N.T. 4/3/18, 75:10-16.) Chew also explained, regarding the announcement, "It depends on what he wanted to say, and the reason why I'm concerned, and I've always been concerned about people making an announcement is, at the sale is, because sometimes the announcement have a chilling effect on the sale itself." (Id. 84:9-12) (emphasis added). Chew thus essentially conceded that the policy, or at least his application of it, was not content-neutral, and discriminated on the basis of Plaintiff's viewpoint, which does not satisfy the requirements for a limited public forum under Eichenlaub. Moreover, if the sheriff's employees interrupted Porter very soon after beginning his brief announcement, as the jury apparently found, they would

necessarily have found that he was silenced because of what the sheriff's deputies thought he was going to say.

In their brief, Defendants argue that the policy forbidding announcements "serves the important governmental purpose … of insuring that those who hold valid judgments against property owners can collect their judgments" but make no attempt whatsoever to argue that the policy was narrowly tailored to that interest, which is a requirement for time, place, and manner restrictions to be valid under Galena. (See Defs.' Br. at 5).

The Third Circuit's cases regarding limited public fora require all of criteria to be met for a time, place, and manner restriction to be deemed acceptable under the First Amendment. Galena nevertheless allowed a judge, at trial, upon hearing the evidence and finding one or more of the elements of the reasonableness of a time, place, and manner restriction on speech in a limited public forum, to decide that that element was not met. See 638 F.3d at 203. It was clear that, if Porter's evidence was to be believed, the sheriff's department, both in its overbroad policy and its viewpoint-discriminatory implementation, violated Porter's First Amendment rights in silencing his brief announcement.

Although Porter's witnesses and Defendants' differed sharply on the events of January 4, 2011—with Defendants' witnesses asserting that Porter had been politely asked to sit down before an ensuing scuffle and Porter's witnesses describing swift and violent reprisal by the deputies, at Chew's behest—the evidence was uncontroverted that he was silenced for attempting, however briefly, to speak. An attack on Porter intended to silence him would have violated Porter's First Amendment rights, and the jury apparently believed Porter's account.

There was also sufficient evidence to support a jury verdict against the City under Monell. The evidence Porter presented showed the requisite "plausible nexus or affirmative

link" between the policy of the Sheriff's Department prohibiting announcements—whose existence Defendants do not contest—and the harm he suffered. The affirmative link between the policy and its brutal implementation through physical force is obvious: the jury apparently believed that the policy was enforced through physical force applied in immediate retaliation for Porter's exercise of his First Amendment rights. Pursuant to the policy forbidding announcements, Chew apparently asked for such a response.

Furthermore, the harm suffered by Porter in the form of physical injuries—which, as he testified, required medical treatment—and emotional harm were sufficient to support an award of compensatory damages. With respect to damages, the Court gave relatively standard instructions on "physical harm to plaintiffs during and after the events at issue," "emotional and mental harm to the plaintiffs during and after the events at issue" and "loss of past and future earnings" as to Porter. (N.T. 4/5/18, 35:6-20).

In an attempt to vacate the damage award, Defendants cite portions of testimony with a much more attenuated link to the Sheriff's unconstitutional policy, or the deputies' apparently violent enforcement of it, such as his testimony regarding the difficulty of finding a job due to outstanding criminal charges, or going on food stamps as a result. (See Defs.' Br. at 17). However, Porter's and other witnesses' testimony regarding the more immediate effects of the implementation of the policy, which caused him physical injury and humiliation, are more than sufficient to support a jury verdict and an award of damages.

2. Remittitur is not warranted

Defendants awarded Porter $750,000 in damages against the City and $7,500 against Chew. Defendants, who again cite no case law in support of their position, consider this award inappropriate because whatever types of harm Porter may have experienced were not "causally

connected" to the Sheriff's office policy of prohibiting speech at Sheriff's sales. Porter again asks that the verdict be allowed to stand.

The Third Circuit has explained that courts reduce damages awards in one of two circumstances, which are often colloquially referred to as "remittitur": when a court reduces an award to satisfy constitutional due process concerns as unconstitutionally excessive or legally unsupported, and when it considers an award unreasonable on the facts of the case at hand. Cortez v. Trans Union, LLC, 617 F.3d 688, 715-16 (3d Cir. 2010) (affirming award of compensatory damages in Fair Credit Reporting Act case). A jury's award of compensatory damages "will not be upset so long as there exists sufficient evidence on the record, which if accepted by the jury, would sustain the award." Id. at 718. An award of compensatory damages will be upheld unless it is "so grossly excessive as to shock the judicial conscience." Id. In this "exceedingly narrow" review, the Court views the facts in the light most favorable to Porter, the non-movant. Id.

Neither a constitutional nor a discretionary reduction is warranted on the facts of this case. As noted above, a damage award is not against the weight of the evidence, and is supported by Porter's testimony regarding physical and emotional harm. This Court cannot say that an award of $750,000 is grossly excessive or shock the judicial consciences—much less violates the City's due process rights. Furthermore, the Court declines to order a discretionary remittitur because the award is not unreasonable on these facts.

What cases Defendants cite are limited to the issue of emotional distress damages—and are all distinguishable. Delli Santi v. CNA Ins. Companies, 88 F.3d 192, 205 (3d Cir. 1996) affirmed the district court's remittitur of emotional distress damages but reinstated the jury's award of front pay in a case tried under New Jersey employment discrimination law; the passage

quoted by Defendants actually refers to the reluctance of New Jersey courts to award emotional distress damages when considering their state anti-discrimination law. Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108 (3d Cir. 1988) was also an employment discrimination case, and held that insufficient evidence of emotional distress supported an award of damages where a black plaintiff who had been passed over for a promotion testified that he "had been done wrong"; "had been treated unfairly"; planned "to contest [the successful applicant's] qualifications"; and was described by another witness as "very upset." Id. at 1120. Gunby went on to distinguish other cases in which courts had allowed awards of emotional distress damages where, as in this case, there was "direct and substantial evidence of humiliation or emotional injury." Id. at 1121. Finally, Spence v. Bd. of Educ. of Christina Sch. Dist., 806 F.2d 1198 (3d Cir. 1986), was a First Amendment retaliation case in which a jury found that the plaintiff art teacher was transferred from her job at a high school to another elementary school. The Third Circuit affirmed the district court's grant of remittitur where the only evidence of emotional distress was "plaintiff's own testimony that she was depressed and humiliated by the transfer and that she had lost her motive to be creative." Id. at 1201 (finding this evidence too "speculative" to support jury award). As discussed above, the record is much more robust here, and is not limited to emotional distress damages alone.

3. Jury Instructions

In its charge to the jury, the Court instructed the jury at length on the First Amendment, including the concept of a limited public forum. Much of the Court's charge was taken, verbatim, from the lead cases cited above. The Court instructed the jury as follows:

> A limited public forum is created when the government opens a space not traditionally used for speech but limits the expressive activity to certain kinds of speakers or to the discussion of certain kinds of subjects.

> In a limited public forum, content-based restraints are permitted so long as they are to designed to confine the forum to the limited and legitimate purposes for which it was created. The government may not regulate speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.
>
> In a limited public forum, the government, however, may restrict the time, place, and manner of speech as long as those restrictions are reasonable and serve the purpose for which the government created the limited public forum. A time, place and manner restriction on speech is reasonable if it is: first, content neutral; second, narrowly tailored to serve an important governmental interest; and, three, opens – leaves open ample alternatives for communication of information. However, even if a limitation on speak is reasonable time, place and manner -- is a reasonable time, place and manner restriction, there may be a First-Amendment violation if the defendant applied the restriction because of the speaker's viewpoint.

(N.T. 4/5/18, 21:12-22:9.)

Defendants take issue with the following jury instructions:

> I instruct you that Mrs. Sankowski and Mr. Porter had a constitutionally-protected right to speak at the sheriff's sale in order to make the announcement that had been discussed with their attorney. In other words, no person employed by the sheriff's office, whether a law enforcement officer or not, had any right to interfere with their making such an announcement.
>
> You have heard testimony that the sheriff's office had a policy against announcements. <u>I instruction [sic] you that this policy, as applied to the plaintiffs at the hearing, was in violation of their constitutional right to freedom of speech and to petition</u>. Plaintiff's attempt to speak was in furtherance of their constitutional right to speak and to petition.

(<u>Id.</u> 22:20-23:7) (emphasis added).

After additional colloquy with the attorneys, the Court added the caveat that if the jury were to find that Porter was seized "very prompt[ly] after he started to speak," it could "find that his interruption was in retaliation for his trying to exercise his First Amendment rights." (<u>Id.</u> 60:6-8). The Court stressed that the jury should find for Porter only if it believed his account, but if they found that Porter has "failed to prove that Mr. Chew and Mr. Stewart did any act that was in retaliation for [Porter's] getting up to speak, exercise his First-Amendment right, then you

should find for the defendants." (Id. 60:16-19). This is in no way a directed verdict for Porter, as Defendants appear to imply.

Defendants rely principally on Galena to argue that the Court "usurped" the jury's role in determining whether the First Amendment was violated. However, Galena left open the possibility that the criteria for reasonableness of a time, place, and manner restriction in a limited public forum might not be a jury issue "where the evidence applicable to a particular element entitles a party to judgment as a matter of law on that element." 638 F.3d at 203. Galena also held that "even if a limitation on speech is a reasonable time, place, and manner restriction, there is a First Amendment violation if the defendant applied the restriction because of the speaker's viewpoint." Id. at 199.[7] Porter's evidence was remarkably consistent and, if accepted, established a total lack of alternative means of communication through the policy forbidding announcements and a potentially viewpoint-discriminatory implementation by Chew and the deputies.

Defendants' vigorous post-trial objections to the jury instructions ring somewhat hollow given the poor quality of their proposed jury instructions they submitted to the Court, which were unhelpful, unfocused, incomplete and, in many cases, entirely erroneous. For example, Defendants' proposed instruction on First Amendment retaliation stated, "To constitute protected speech, the speech must relate to matters of public concern." (Defs.' Proposed Jury Instructions at 8). This is a completely inaccurate statement of the law, as the Third Circuit has stated—in a

[7] This case is analogous to a Court properly instructing a jury in an automobile accident that if the jury believes that the defendant violated a motor vehicle code, negligence was established. See Mihalic v. Texaco, Inc., 377 F.2d 978, 981 (3d Cir. 1967); see also Thompson v. Austin, 272 F. App'x 188, 192-93 (3d Cir. 2008). In Thompson, the Third Circuit found error in the District Court's failure to give a negligence per se instruction to the jury in a car accident case, holding that "[w]hile the jury was free to find that Austin did not violate the motor vehicle code, it was required to find he was negligent *per se* if it found that he did violate the code." Id.

case on which Defendants now rely—that "except for certain narrow categories deemed unworthy of full First Amendment protection–such as obscenity, 'fighting words' and libel–all speech is protected by the First Amendment," protection which "includes private expression not related to matters of public concern." Eichenlaub v, 385 F.3d at 282–83, 283. Defendants proposed a charge to the effect that "[r]egulations designed to preserve the peace and to maintain public safety do not violate the First Amendment guarantees of free speech, press and the exercise of religion," a statement suggesting that any regulation of speech intended to preserve public order is necessarily immune from constitutional attack. (Defs.' Proposed Jury Instructions at 7). Moreover, Defendants' proposed jury instructions did not address what type of forum the sheriff's sale was—an issue also inadequately explored in their briefs—and what types of restrictions on speech would therefore be permissible. Defendants did not request instructions on whether the restrictions on speech were content-neutral, narrowly tailored, or left open ample alternatives for communication. Defendants thus did not even seek to ask for the jury's findings on questions that they now complain should have been left to the jury—and, in so doing, caused the Court to expend much time and effort during trial on legal research that counsel evidently did not do.

Thus, the Court properly instructed the jury that if it accepted Porter's account of events, the sheriff's policy of prohibiting announcements was unconstitutional because if the jury made such a finding, it would necessarily have found that the policy did not meet the criteria under Galena, Eichenlaub, and other cases.

4. Defendants' exceptions to the jury charge did not require altering the instructions

Rule 51(c)(1) requires a party who is objecting to a jury instruction to "do so on the record, stating distinctly the matter objected to and the grounds for the objection." Fed. R. Civ. P. 51(c)(1). Under Rule 51(d)(1), a party must "properly object[]" in order to preserve a claim of error in jury instructions; otherwise, courts "review for 'plain error in the instructions affecting substantial rights.'" Franklin Prescriptions, Inc. v. New York Times Co., 424 F.3d 336, 339 (3d Cir. 2005) (quoting Fed. R. Civ. P. 51(d)(2)). Objections to jury instructions "must be both cogent and specific to the alleged error." Lesende v. Borrero, 752 F.3d 324, 335 (3d Cir. 2014). Thus, where an objection was "difficult to understand because of its convoluted grammar" and "did not specify the authority upon which it was based," the Third Circuit has found objections to jury instructions not to have been properly preserved, as in Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 89 F.3d 976, 993 (3d Cir. 1996).

Such was the case here. Defendants attempted to object on several occasions, in vague terms, to assert that whether the sheriff's policy was unconstitutional was a question for the jury. At the charge conference, defense counsel stated:

> MS. ZABEL: [T]he jury has to decide whether they think it's unconstitutional. I mean, that's the problem we're at right now. They have to decide whether the policy is, first, gets the first amendment retaliation, whether it's time, place, manner, whether it's viewpoint, neutral –
>
> THE COURT: All right. So you don't think I should instruct them that it would be a violation?
>
> MS. ZABEL: No, Your Honor. I don't –
>
> THE COURT: All right. Let me, I will think about that.
>
> MS. ZABEL: Okay.
>
> THE COURT: You may be right about that.

(N.T. 4/4/18 171:23-172:10, ECF 99).

Defendants raised the issue of wanting the issue of whether the policy was a reasonable restriction on speech again during a discussion of the verdict form:

> MS. ZABEL: But, Your Honor, if that's -- this is something we talked about before, that, when it became a limited public forum –
>
> THE COURT: Yeah.
>
> MS. ZABEL: -- then the jury has to decide whether time, place, manner, reason –
>
> THE COURT: Well, I'm going to give a charge on that. I'm going to charge on that what I think is correct.
>
> MS. ZABEL: Well, when you charge on it, that's when they're deciding whether the speech is protected, if they think the restriction's reasonable at the time they –
>
> THE COURT: I'm -- in my view, if they accept his version of the facts, I'm instructing them that the speech was protected. That's a –
>
> MS. ZABEL: Will the jury charge say it's in dispute or no?
>
> THE COURT: Well, you'll listen to the charge. Okay?
>
> MS. ZABEL: Okay.
>
> THE COURT: I'm not going to change this. All right. You all -- you all have an exception.

(N.T. 4/5/18, 5:22-6:2, ECF 100.)

The most detailed discussion, which took place after the initial charge, was as follows:

> THE COURT: I said that this policy, as applied to the plaintiffs at the hearing, was in violation of their constitutional right to speak and to hear. Okay?
>
> …
>
> MS. ZABEL: That's what I object to, because it's the jury's function to decide whether the policy was unconstitutional –
>
> THE COURT: Okay.
>
> MS. ZABEL: -- and whether it was the moving -- you know, it's their -- it's their –
>
> THE COURT: Well, I said, "as applied to the plaintiffs."
>
> MS. ZABEL: "As applied to the plaintiffs." I mean, that's –
>
> THE COURT: Well, that –
>
> MS. ZABEL: That's what the jury has to do, decide if, as applied to the plaintiffs, this violation –
>
> THE COURT: Okay. I –
>
> MS. ZABEL: -- or this policy was wrong.
>
> THE COURT: All right. You have an exception as to that.
>
> MS. ZABEL: Okay.
>
> THE COURT: But I also said at another point, though, that, if the jury finds that the plaintiffs have failed to prove by preponderance of the evidence their claims, then they should -- then they must return a verdict for the defendants.

MS. ZABEL: I understand that but the fact that you're telling them that the -- that is a violation, I mean –

THE COURT: As applied to the plaintiff. It's my holding that -- well, let me put it this way: There are wide variations in the testimony about what happened. Okay? But I think the plaintiffs are entitled to an instruction that the Sheriff's Office -- no one from the Sheriff's -- neither Mr. Chew or Mr. Stewart had a right to prevent Mr. Porter from speaking. But they denied it. So they asserted -- they testified they didn't touch him and that's important. If the jury finds that the plaintiffs have failed to prove their facts, then the defendants are entitled to a verdict. And I think I said that very clearly. But I –

MS. ZABEL: It was, Your Honor.

THE COURT: The plaintiff -- you know, we have to put this in context. I have to -- I have to charge the jury as to the legal significance of the plaintiffs' claims. So the plaintiffs' claims -- Mr. Porter claimed and there were other witnesses who supported him but not every witness -- but there was some testimony that, very shortly after he got up to speak -- somewhere between 3 and 30 seconds depending on different testimony -- he was interfered with. And I think I have a duty to tell the jury that, if they accept that testimony, that was in violation of the First Amendment. I think -- that's -- that is not for the jury. If they accept Mr. Porter's testimony, I think -- now, if you want me to elucidate that a little more, in more detail, I'll consider doing that. Is that what you're saying? And I'll make it clear that, if they believe that he was interrupted very quickly, then I'm telling them, as a matter of law, that was a violation. But, if they find that, from other testimony, that he got to give his speech and then he refused to sit down, then they may find for the defendants.

MS. ZABEL: Yes, Your Honor. We would ask that you just draw that out a little bit.

(N.T. 4/5/18, 43:22-46:9, ECF 100.)

Defense counsel's objections were consistently vague and garbled, and counsel never cited any authority for its position that the issue of "whether the policy was unconstitutional" was for the jury, and never broke down its argument on any of the issues. In addition, the Court, towards the end of the colloquy, asked for clarification of what counsel was actually arguing. This is not the sort of "cogent and specific" objection that the Third Circuit has required.

No exception that Defendants lodged gave this Court any reason to change its instructions to the jury, particularly where counsel was unable to cite applicable case law to the Court.

C. The Verdict against Chew: Qualified Immunity and Causation

1. Qualified Immunity

"[Q]ualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). See also Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015) (stating that "[q]ualified 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"). The doctrine of qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). Qualified immunity is therefore a "two-pronged inquiry" in which courts must inquire whether a government official's conduct violated a right belonging to the plaintiff and whether that right was "'clearly established at the time of the violation." Tolan v. Cotton, 134 S. Ct. 1861, 1865, 1866 (2014).

The Supreme Court has further warned courts "not to define clearly established law at a high level of generality"; rather, the dispositive question is whether the violative nature of *particular* conduct is clearly established," an inquiry that should not be made "as a broad general proposition." Mullenix v. Luna, 136 S. Ct. 305, 308 (2015). When determining whether a right was clearly established, courts should "look first for applicable Supreme Court precedent," but if no such precedent exists, it may nonetheless "be possible that a 'robust consensus of cases of persuasive authority' in the Court of Appeals could clearly establish a right

for purposes of qualified immunity." Mammaro v. New Jersey Div. of Child Prot. & Permanency, 814 F.3d 164, 169 (3d Cir.), as amended (Mar. 21, 2016).

Plaintiff argues in such broad general propositions in asserting that "[f]ew rights are better known than the right of free speech, and any reasonable person would have known that Porter had that right." (Pl.'s Br. at 6). For their part, Defendants blur the boundaries of what the Court identified as separate issues—namely, Chew's and the deputies' silencing Porter and, subsequently, Porter's arrest—when Defendants argue, relying on Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012), that the Supreme Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause."

The Court found at trial and continues to find that Porter's First Amendment rights were violated. But because qualified immunity is a two-pronged inquiry, the Court's analysis does not end there—it remains to be determined whether the right was clearly established at the time of the events in question. Thus, the proper inquiry in this case is whether, on January 4, 2011, it was clearly established law that Chew violated Porter's First Amendment rights by interrupting his announcement at a sheriff's sale, and whether Porter therefore had a right to be free from retaliation for exercise of his First Amendment rights at the sheriff's sale.

The Supreme Court first articulated the concept of a "limited public forum" in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983)("The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.") In Monteiro v. City of Elizabeth, 436 F.3d 397, 400 (3d Cir. 2006), a member of the Elizabeth, New Jersey City Council was ejected from an annual budget council meeting by the council president after speaking against the proposed budget. The District Court denied the council president's motion for summary

judgment, finding that "whether she was entitled to qualified immunity depended on the disputed question of her motivation for ejecting Monteiro from the meeting." Id. at 402. The Third Circuit affirmed, finding that "[i]t is clearly established that when a public official excludes a[n] elected representative or a citizen from a public meeting, she must conform her conduct to the requirements of the First Amendment." Id. at 404. As in Monteiro, Porter's First Amendment rights were clearly established. Accordingly, Chew is not entitled to qualified immunity.

2. Causation

The award of damages must be vacated on the alternative ground that in the section of the jury form entitled "Causation," the jury marked that Chew did not actually cause harm to Porter. The Supreme Court has stated that "the basic purpose of § 1983 damages is to *compensate persons for injuries* that are caused by the deprivation of constitutional rights." Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) (emphasis original) (citation omitted). Compensatory damages under 42 U.S.C. § 1983 "are governed by general tort-law compensation theory." Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) (citing Carey v. Piphus, 435 U.S. 247, 255 (1978)). Thus, "damages are available under [§ 1983] for actions found ... to have been violative of ... constitutional rights and to have caused compensable injury." Allah, 226 F.3d at 250 (quoting Carey, 435 U.S. at 255) (ellipses and alteration original). Without Chew's having caused the constitutional violation, he cannot be made to compensate Porter for the violation of Porter's rights under the First Amendment. We will grant judgment as a matter of law in favor of Chew on this point.

D. Rule 51

Defendants further argue that a new trial is warranted based on the Court's purported violations of Rule 51(b)(2); Defendants argue that they were "further prejudiced by the fact that

the jury instructions were never made available to defense counsel prior to final jury arguments." (Defs.' Br. at 13.) In particular, Defendants assert that they were prejudiced by the fact that they did not know how the Court would instruct the jury on damages, especially with respect to what types of harm Porter could recover. Porter, citing case law interpreting a former version of Rule 51, argues that this Court complied with the terms of the Rule. (Pl.'s Br. at 9 (citing Taylor v. Allis-Chalmers Mfg. Co., 320 F. Supp. 1381 (E.D. Pa. 1969)).

Rule 51(b) requires courts to "inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments" and to "give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered." Fed. R. Civ. P. 51(b).

Notably, Defendants fail to cite a single case in this portion of their brief, much less one in which the Third Circuit ordered a new trial. And as this Court has stated, "[t]he Third Circuit has provided little instruction on the standards governing Rule 51(b)(2)." Guynup v. Lancaster Cty., No. CIV.A. 06-4315, 2009 WL 541533, at *7 (E.D. Pa. Mar. 3, 2009) (Baylson, J.). The Third Circuit has never held in any published case that Rule 51(b) requires district courts to share with counsel a full written copy of the anticipated charge. At least one Circuit has explicitly held that Rule 51 does not require judges to provide counsel with a written copy of the jury charge. DeCaro v. Hasbro, Inc., 580 F.3d 55, 65 (1st Cir. 2009) ("Fed.R.Civ.P. 51(b)(1)…does not require the trial judge to supply the parties with a written copy of the instructions before charging the jury").

Defendants also fail to note that the Court held a lengthy colloquy on the afternoon before the Court read the charge to the jury. At that time, the Court explained at length its proposed instructions regarding the First Amendment and Monell. (See N.T. 4/4/18 161-62

(explaining proposed First Amendment and Monell charges)). Although Defendants complain in their post-trial motions that they did not know the substance of the First Amendment and Monell charges that the court ultimately decided to give before they delivered their closing argument, Rule 51(b) does not require a court to notify counsel of its final decision on how it has decided to instruct the jury. By its terms, Rule 51(b) requires a court to inform counsel of its "proposed instructions" and give counsel an "opportunity to object" (emphases added). That the Court did at the charge conference, satisfying Rule 51(b).

Admittedly, the Court did not discuss precisely what types of harm Porter could recover for, although the parties clearly anticipated an instruction on compensatory damages, which was discussed in the context of whether to charge on nominal damages. (N.T. 4/4/18 145:19-148:2). The following day, the Court instructed the jury that Porter could recover for physical harm, emotional harm, and loss of past and future earnings as to James Porter. A review of the transcript shows that the Court essentially read these portions of the Third Circuit model jury instructions, which Defendants had actually requested in their proposed jury instructions prior to trial. (See Defs.' Proposed Jury Instructions at 2, ECF 74). Such an omission cannot merit a new trial, when defense counsel requested the charge.

VII. Conclusion

For the reasons stated above, Defendant City of Philadelphia's motion for judgment as a matter of law, a new trial, or remittitur is **DENIED**, and Defendant Chew's motion for judgment notwithstanding the verdict is **GRANTED** in favor of Defendant Chew as to the jury verdict of $7,500 in favor of Plaintiff. An appropriate order follows.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES PORTER and MARILYNN SANKOWSKI **v.** **CITY OF PHILADELPHIA, et al.**	**CIVIL ACTION** **NO. 13-2008**

ORDER

AND NOW, this 30th day of August, 2018, for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that:

1. Judgment notwithstanding the verdict is **GRANTED** in favor of Defendant Chew as to the jury verdict of $7500 in favor of Plaintiff;
2. Motion of Defendant City of Philadelphia for Judgment as a Matter of Law or, in the Alternative, for a New Trial or to Alter or Amend the Judgment, or in the Alternative for Remittitur (ECF # 94) is **DENIED**; and
3. Any motions for attorney's fees shall be filed within 14 days.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.

Dated: 8/30/18

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