Case No. 21-3290

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Anthony Novak
Plaintiff-Appellant

v.

City of Parma, Ohio, et al.
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Ohio
Eastern Division
Case No. 1:17-cv-02148

APPELLANT ANTHONY NOVAK'S MERIT BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Anthony Novak respectfully requests oral argument because this appeal presents multiple, significant, far-reaching issues about the intersection of police power and individuals' First Amendment free-speech rights. Oral argument would ensure all the panel members' concerns about the factual record and law can be addressed, minimizing the risk of error in a case this Court has already reviewed at the motion-to-dismiss stage.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §1331 because Novak made claims arising under federal law. This Court has jurisdiction over this appeal under 28 U.S.C. §1291 because the district court's February 24, 2021 order (R.129) was a final order and because Novak timely appealed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. **Probable cause:** Protected speech, standing alone, cannot provide probable cause. Appellees initiated criminal charges and had Novak arrested, searched, jailed, and prosecuted based solely on Novak's speech on Facebook. The district court held that the officers could base probable cause on Novak's speech without first examining whether the speech was constitutionally protected. Did the district court err in concluding, based on Novak's speech alone and before assessing whether such speech was protected, that Appellees had probable cause (and in granting Appellees' motions for summary judgment, and denying Novak's cross-motion, on the issue)?

2. **Heckler's veto:** Police cannot effectuate a "heckler's veto" by criminalizing speech based on how others react to it. Appellees claimed Novak criminally disrupted public services because, at most, 15 people contacted Parma to

discuss his speech. Did the district court err in finding that Appellees could criminally punish Novak because of how others reacted to his speech?

3. **Applying statutes constitutionally:** Police officers must apply and enforce criminal statutes in a manner that does not violate suspects' constitutional rights. The district court held that Appellees were entitled to apply Ohio Rev. Code §2909.04(B)—a statute that does not, on its face, criminalize speech—to Novak's speech with no obligation to consider Novak's First Amendment rights. Did the district court err?

4. **Summary-judgment standard:** When deciding a summary-judgment motion, courts must construe the facts, particularly those involving motive, in the light most favorable to the nonmovant and refrain from making credibility determinations. Did the district court err in accepting Appellees' self-serving testimony about their purported good-faith motivations and in disregarding Novak's testimony about his intent?

5. **Qualified immunity:** Officers are not immune for violating a suspect's clearly established constitutional rights. In 2016, the law was clearly established that all speech is protected (subject to discrete exceptions) and that parody, satire, and mocking police are protected. The law was also clearly established that criminalizing speech based on others' reactions is unconstitutional. Appellees admit that Novak's speech fell into no First Amendment exceptions and dispute that Novak's speech was parody. Did the district court err in giving the officers immunity?

6. **Obvious parody:** By definition, a parody is a writing that would not be believable to a reasonable reader upon reflection. Sometimes a writing's character as parody is so obvious that the court can decide the question as a matter of law. No reasonable reader would believe, for example, that Novak's posts about Parma police performing abortions or hosting pedophile-reform events stated actual facts—a conclusion with which two out of three Appellees agree. And few if any actual readers did believe it. Is there a question for the jury to decide?

7. **Municipal liability—inadequate training:** Municipalities are required to train police officers about suspects' constitutional rights. Parma failed to train officers that pure speech cannot be criminal unless it falls into a specific exception to First Amendment protection. The district court found that police work does not "regularly involve First Amendment issues" and

held that Parma was not required to provide this training. Did the district court err in granting Parma summary judgment

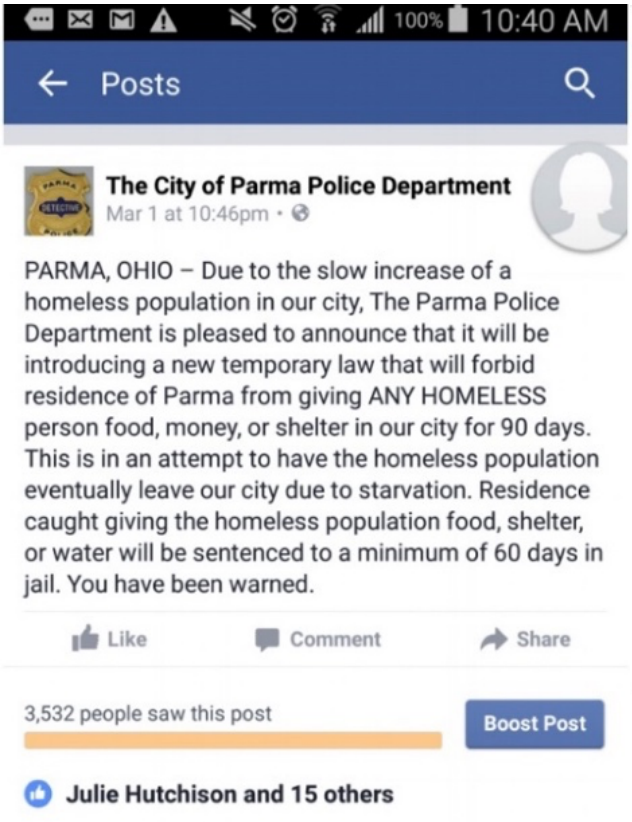
8. **Municipal liability—policymaker's decision:** A municipality is liable for violating an individual's constitutional rights if a legal policymaker "counseled and authorized" police action. Dobeck, Parma's elected Director of Law and chief legal officer, counseled Connor and authorized him to take criminal action against Novak for pure speech that fell into no exception to First Amendment protection. Did the district court err in granting Parma summary judgment?

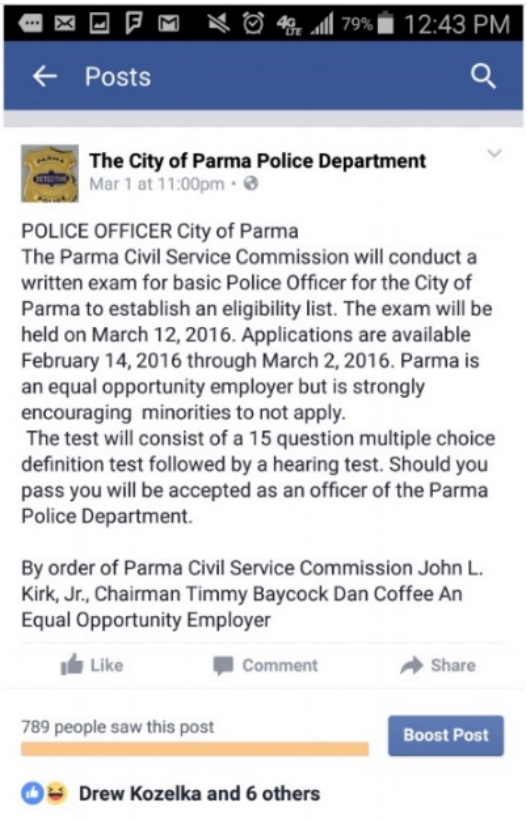
STATEMENT OF THE CASE

Facts

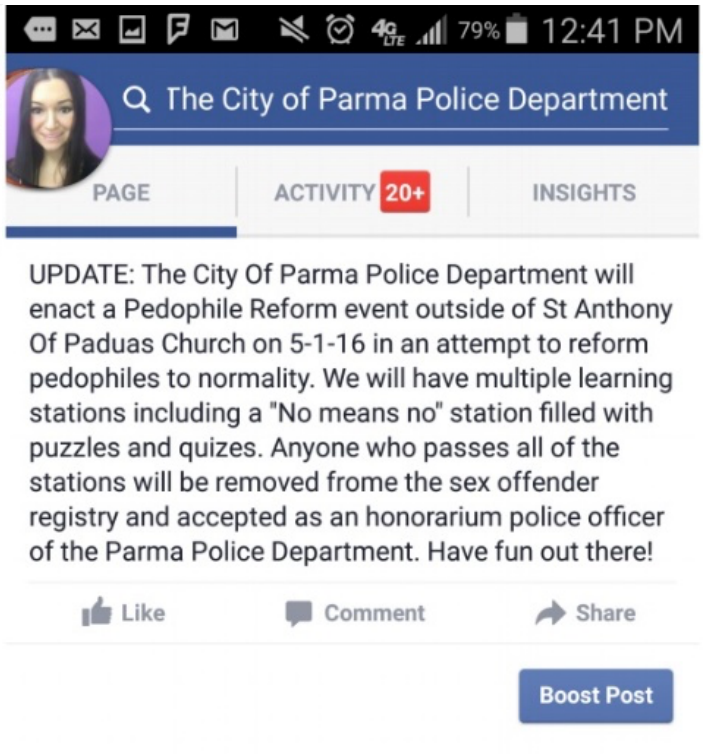
I. Appellant Anthony Novak published a Facebook page ridiculing and criticizing the Parma Police Department.

On late March 1 and early 2, 2016, Anthony Novak published a parody Facebook page mocking the Parma Police Department's Facebook page. The parody included the following posts:


10:40 AM
Posts
The City of Parma Police Department
Mar 1 at 10:46pm
PARMA, OHIO – Due to the slow increase of a homeless population in our city, The Parma Police Department is pleased to announce that it will be introducing a new temporary law that will forbid residence of Parma from giving ANY HOMELESS person food, money, or shelter in our city for 90 days. This is in an attempt to have the homeless population eventually leave our city due to starvation. Residence caught giving the homeless population food, shelter, or water will be sentenced to a minimum of 60 days in jail. You have been warned.
Like
Comment
Share
3,532 people saw this post
Boost Post
Julie Hutchison and 15 others


12:43 PM
Posts
The City of Parma Police Department
Mar 1 at 11:00pm
POLICE OFFICER City of Parma
The Parma Civil Service Commission will conduct a written exam for basic Police Officer for the City of Parma to establish an eligibility list. The exam will be held on March 12, 2016. Applications are available February 14, 2016 through March 2, 2016. Parma is an equal opportunity employer but is strongly encouraging minorities to not apply.
The test will consist of a 15 question multiple choice definition test followed by a hearing test. Should you pass you will be accepted as an officer of the Parma Police Department.
By order of Parma Civil Service Commission John L. Kirk, Jr., Chairman Timmy Baycock Dan Coffee An Equal Opportunity Employer
Like
Comment
Share
789 people saw this post
Boost Post
Drew Kozelka and 6 others


12:43 PM
Photos from The City of Pa...
The City of Parma Police Department
added 2 new photos.
12 hrs
We have forgotten to post that on September 30, 2015 at approximately 10:00am the Parma Subway Sandwich Shop located at 5890 Broadview Rd. was robbed at knife point. The white male offender got away with a small amount of money and did not harm the clerk. Moments after an unrelated African American women was seen loitering for over 20 minutes in front of the store despite their no loitering policy. If you have any information regarding this African American womans whereabouts please contact The City Of Parma Police Department so that she may be brought to justice.
This is the best still photo we have of the offender. Mentor Police and Middleburg Hts. Police have reported similar loitering offenses which may be the same female.
The Parma Police Department is seeking assistance identifying the individual in the picture.
Please contact Det. Joe Tremble.



R.124-1 (Facebook-Business-Record excerpts, Page 48, 45, 44, 36, 30, 19), PageID#24833-38; R.124-2 (Screenshots of Novak's posts), PageID#24839-44.

Novak's sixth post, of which no screenshot is available, read as follows:

> PARMA: Tuesday will be our official stay inside and catch up with the family day in Parma! The Parma Police Department has set this day to allow families to come together in an effort to reduce future crime by having children have well balanced communication with their families. Anyone's seen outside their home from the hours of 12 pm - 9 pm will be arrested. Thank you.

R.124-1 (Facebook-Business-Record excerpts at 19), PageID#24833.

II. Parma police begin a criminal investigation into Novak's speech.

The morning of March 2, 2016, Appellee Kevin Riley (then a Parma police lieutenant) assigned Appellee Thomas Connor (then a detective) to investigate

Novak's Facebook page because he heard that Parma's dispatch center had received calls about it. R.107-1 (Connor Dep. at 18:9-10), PageID#18853; R.105-1 (Riley Dep. at 30:2-23), PageID#9575; *see* R.102-3 (Ex. 2A to Novak's Mot. Summ J. and associated recordings), PageID#9328. After "actually reading each post," Connor realized Parma's page had not been hacked. R.107-1 (Connor Dep. at 18:9-13, 18:21-19:21, 177:15-24), PageID#18853-54, 19012.

At Riley's request, Connor sent correspondence to Facebook on department letterhead and from his police-email account asking Facebook to take down Novak's page. R.105-1 (Riley Dep. at 79:19-80:14), Page ID#9624-25; R.107-1 (Connor Dep. at 335:14-338:16), PageID#19170-73; R.124-5 (Email from Connor to Barry), PageID#24933; R.124-6 (Letter from Connor to Facebook: "**It is further requested that this account be taken down or suspended immediately**" (emphasis in original)), PageID#24948; R.6-1 (Criminal-trial trans. at 167:6-8 (Connor asked Facebook to take page down)), PageID#1470. Connor then served a search warrant on Facebook for its complete business records for Novak's parody page and his personal account. R.124-5 (Connor's email sending warrant) PageID#24934-37.

Seeing no apparent crime, Connor contacted Parma's elected law director and chief prosecutor, Timothy Dobeck, asking "What kind of case do we have here?" R.120-1 (Dobeck Dep. at 24:8-9), PageID#23217. Dobeck told Connor

"you can investigate it as a disruption of public service" under Ohio Rev. Code §2909.04(B), which provides: "[n]o person shall knowingly use any computer, computer system, computer network, telecommunications device, or other electronic device or system of the internet so as to disrupt, interrupt, or impair the functions of any police…operations." Ohio Rev. Code §2909.04(B). *Id*. at 25:1-3, Page ID#23218. *See also id*. at 47:5-15, PageID#23240; 50:3-7, PageID#23243; R.106-2 (Rule 30(b)(6) Dep. of Parma (Dobeck) at 12:10-17), PageID#12858.

Testimony on the extent to which Parma police officers rely on the law department to make decisions conflicts. The City claims that officers may seek advice from the law department and "are free to rely upon [it], but they are not bound to." R.106-2 (Rule 30(b)(6) Dep. of Parma (Dobeck) at 106:2-4, 99:2-3), PageID#12952, 12945; *see also* R.120-1 (Dobeck Dep. at 244:8-246:8), PageID#23437-39. But Connor says he acted in reliance on Dobeck's "advice." R.107-1 (Connor Dep. at 259:2-262:4,165:14-166:17, 168:18-169:5, 254:15-16), PageID#19094-97, 19000-01, 19003-04, 19089. Riley testified that officers routinely rely on the law department's advice, and he couldn't think of a situation where they wouldn't follow it. R.105-1 (Riley Dep. at 258:8-14), PageID#9803. Dobeck insisted that he merely "advised" the police and denied that officers customarily defer to his advice. But he could think of only one case in 21 years

when an officer had not deferred to him. R.120-1 (Dobeck Dep. at 47:23-25; 50:3-7; 153:17-154:17), PageID#23240, 23243, 23346-47.

III. The alleged "disruption"

Appellees claimed that Novak disrupted public services because, at most, 15 people called or emailed Parma through non-emergency channels. The purported "disruption" consisted of nine calls to dispatch from seven individuals, three calls to the law department, three calls to the safety department, and two emails to the City. R.106-2 (Parma Dep. (Dobeck) at 115:2-117:25), PageID#12961-63.

When he began investigating, Connor promptly obtained recordings of the nine calls to dispatch from only seven residents. R.107-1 (Connor Dep. at 212:6-24), PageID#19047. These people called the non-emergency dispatch line instead of 911, and the calls' total duration was only nine minutes and 42 seconds. R.102-3 (Dispatch-call recordings), PageID#9328; R.123-12 (Dispatch-call trans.), PageID##24643-56.

These calls represented less than 2% of the 473 total calls the dispatch center received on March 2, 2016 and less than 0.29% of the 3,116 calls the dispatch center received that week. R.106-3 (Parma Dep. (Samijlenko) at 19:7-9), PageID#12996; R.102-4 (Parma Dep. (Samijlenko) excerpts with Ex. 11), PageID#9339.

Connor thinks that, of the seven people who made the nine calls to dispatch, only *one* caller may have believed Novak's page was the genuine Parma page. R.107-1 (Connor Dep. at 211:1-212:9), PageID##19046-47; *see also* R.123-12 (call transcripts), PageID##24643-56. The rest of the few public calls, according to a summary-chart Connor created during while listening to each call during his deposition, either acknowledged Novak's page wasn't real—i.e., called to snitch—or called to confirm their belief the page wasn't real. R.107-12 (Connor Dep. Categorization-of-calls Exhibit), Page ID#22550.

The calls about Novak's page prevented no dispatcher from answering any emergency call. Parma's own records—to which Connor had access—and Fed. R. Civ. P. 30(b)(6) testimony show that dispatchers answered every single incoming emergency call on March 2, 2016, both from 911 and from the seven-digit emergency line. R.106-3 (Parma Dep. (Samijlenko) at 16:18-17:16), PageID#12995-96.

When Connor asked Dobeck how to handle the investigation, he did not disclose the number, duration, or specific content of any of the calls. R.120-1 (Dobeck Dep. at 155:13-156:7), PageID#23348-49. Nor did he disclose that he had listened to all the calls and determined that, at most, one caller may have believed Novak's posts were real. R.107-1 (Connor Dep. at 211:1-212:9), PageID##19046-47; *see* R.123-12 (call transcripts), PageID##24643-56. Dobeck nevertheless

"made a determination" of probable cause and told Connor he could investigate Novak's speech as a disruption of public services. R.120-1 (Dobeck Dep. at 49:18-24), PageID#23242. Dobeck had final decisionmaking authority to advise Parma police about whether they could continue an investigation. *Id*. at 238:8-18, PageID#23431. Knowing he had failed to disclose key information, Connor relied on Dobeck's "advice" and believed Dobeck made the ultimate charging decision with his input. R.107-1 (Connor Dep. at 259:2-262:4,165:14-166:17, 168:18-169:5, 254:15-16), PageID#19094-97, 19000-01, 19003-04, 19089.

IV. Connor sought an arrest warrant 16 days after Novak removed the page from the internet.

Novak first learned that the Parma police knew about his page when, on the evening of March 2, Riley announced the investigation on the local news. Fearing police retaliation, Novak promptly took down the page. R.121-1 (Novak Dep. at 59:6-60:5; 126:1-127:21), PageID#23682; 23699; R.105-1 (Riley Dep. at 225:1-226:25), PageID#9770-71. When, on March 18, Connor received the Facebook business records he had subpoenaed, he asked Dobeck if he had enough evidence for an arrest warrant. Dobeck told him he did, and authorized him to file the criminal complaint. R.120-1 (Dobeck Dep. at 64:6-20, 67:11-19, 126:12-15), PageID#23257, 23260, 23319. Dobeck acknowledged that "[p]robable cause is a determination made in this case initially by me[.]" *Id*. at 133:9-12, PageID#23326.

V. Connor, Riley, and Dobeck never considered Novak's First Amendment rights during their criminal investigation of his speech.

Never once during the investigation did Connor, Riley, or Dobeck raise any concern about whether investigating and charging Novak for his speech on Facebook—with nothing more—would violate the First Amendment. R.107-1 (Connor Dep. at 292:8-13, 313:2-13), PageID#19127, 19148. Connor testified that he believed free speech "wasn't the issue;" he *didn't care* whether his investigation violated Novak's First Amendment free-speech rights, which he considered irrelevant because "[t]hat wasn't the focus of [his] investigation." *Id.* at 312:24-313:1, 313:2-13, PageID##19147-48. Connor claimed in his deposition that the specific question of whether Novak's Facebook page was a parody "never came up." *Id*. at 187:8-20, PageID#19022.

Connor acknowledged that reasonable officers should have knowledge of suspects' First Amendment rights, but when he consulted Dobeck, he asked no questions about Novak's First Amendment free-speech rights. *Id*. at 166:13-168:20, PageID##19001-03. *Id*. at 292:8-13, PageID#19127. And Dobeck, despite his role as Law Director, didn't consider whether investigating Novak solely for speech would implicate free-speech concerns: "[W]e did not consider this to be a First Amendment case back in 2016. We looked at it as a disruption case; disrupting public services. We didn't do your First Amendment analysis from the

reasonable reader test. That didn't cross our minds at that time." R.120-1 (Dobeck Dep. at 179:2-8, 167:10-11), PageID##23372, 23360.

Nevertheless, Dobeck admittedly knew all of the following on March 3, 2016:

- that *Hustler v. Falwell* established that parody was constitutionally protected speech,
- that parody was defined by whether a reasonable reader would believe the contents stated actual facts, and
- *that a reasonable reader wouldn't believe Novak's posts stated actual facts.*

Id. at 190:10-191:1, 232:22-233:3, PageID##23383-84, 23425-26. But Dobeck didn't apply these standards to Novak's speech, despite knowing that police and government officials should apply criminal statutes in the context of constitutional rights. *Id*. at 191:11-192:3, 226:15-227:4, PageID##23384-85, 23419-20.

VI. Connor initiated the criminal charge by procuring an arrest warrant from Parma Magistrate Fink.

Parma vests its lead investigating police officer with full discretion over an initial criminal charge. R.106-2 (Parma Dep. (Dobeck) at 48:14-22, 105:19-106:6), PageID#12894, 12951-52. Connor initiated the charge against Novak by presenting a complaint and arrest warrant to Magistrate Fink on March 18, 2016. *Id*. at 99:2-100:20, PageID#12945-46; R.107-1 (Connor Dep. at 293:1-19), PageID#19128. To obtain the arrest warrant, Connor told Fink that people were calling the dispatch

center because they believed Novak's Facebook page was the real Parma police page. *Id*. at 293:24-294:5, PageID#19128-29. But Connor knew otherwise: he had earlier concluded that Novak's posts were "a joke," *Id*. at 115:22-116:5, 118:1-5 (PageID#18950-51, 18953), but acknowledged that he "chose not to disclose that to the Court," *id*. at 116:6-8, PageID#18951.

The calls were the only "disruption" Connor identified. *Id*. at 286:25-287:12, PageID#19121-22. Connor didn't show Magistrate Fink the absurd Facebook posts and led him to believe Novak's page was a forgery designed "to confuse or to fool the public" R.92-1 (Fink Dep. at 20:23-21:3), PageID#5083-84. Magistrate Fink received the impression that these calls were "impeding the normal functions" of dispatch and creating "a time waste" for dispatch and the police. *Id*. at 51:10-22, PageID#5091.

But Connor did not provide the following information to Magistrate Fink:

- That Novak had engaged only in speech; *Id*. at 108:11-20, PageID#5105;
- That the supposedly "disruptive" calls were made to the non-emergency line; *Id*. at 66:10-15, PageID#5095;
- The small number and short duration of the calls; *Id*. at 21:13-20, 52:6-9, PageID##5084, 5091;
- That the calls did not prevent dispatchers from answering a single emergency call; *Id*. at 49:23-51:22, PageID#5091;
- ***That he had actually listened to all the calls*** and determined that, at most, ***one*** **person** calling dispatch thought Novak's page might be the genuine Parma police Facebook page; *Id*. at 66:16-24, PageID#5095;
- The posts' full content; *Id*. at 25:5-25, PageID#5085. *See* R. 124-2 (Novak's posts), PageID##24839-44 and R.124-1 (Excerpts of Facebook

business records with complete text of posts), PageID##24833-38;

- That the page was a parody, satire, or joke; R.92-1 (Fink Dep. at 21:25-22:15), PageID#5084; or
- That Connor himself *knew* the page was a joke 16 days before he requested the arrest warrant. *Id*. at 23:1-12, PageID#5084.

Had Connor told Magistrate Fink that Novak's page was a joke or that Novak's only alleged crime was speech, Fink would have considered those facts relevant. *Id.* at 108:11-109:8, 94:9-18, PageID##5105-06, 5102. Connor asked Fink no questions about Novak's First Amendment free-speech rights. R.107-1 (Connor Dep. at 299:6-9), PageID#19134. So Fink signed the complaint and warrant, and Novak was arrested on March 25, 2016—23 days after he deleted his Facebook page. *Id*. at 308:11-15, PageID#19143. Parma police jailed Novak in the county jail for four days, where another inmate threatened to "beat the shit out of" him before Novak made bail. R.121-1 (Novak Dep. at 68:1-6; 173:13-176:10), PageID##23684, 23711.

VII. Connor obtained search warrants for Novak's residence and electronic devices, which he seized and impounded.

After Novak's arrest, Connor requested two search warrants from Judge Deanna O'Donnell: one for Novak's residence on March 25 and one for Novak's seized electronics on March 28, 2016. R.108-1 (O'Donnell Dep. at 4:12-20), PageID#22742. Both search-warrant affidavits stated, in conclusory fashion, that Novak "purported himself to be a representative of the Parma Police Department" and "disrupted and impaired the function of the Parma Police Department by

knowingly posting false information." R.124-6 (Search-warrant affidavits ¶ 5), PageID#24944. But as he had done with Magistrate Fink, Connor never disclosed to O'Donnell the contents of Novak's six absurd posts, R.108-1 (O'Donnell Dep. at 18:25-20:7), PageID#22756-58, or revealed that he knew the posts were a joke. He thus misleadingly led Judge O'Donnell to believe that Novak had created an imposter page attempting to fool the public rather than a joke or parody.

In any event, O'Donnell never inquired into whether or how Novak disrupted police services, *id*. at 24:16-25:1, 33:1-21, PageID#22762-63, 22771. She "didn't go into that." *Id*. at 25:3, PageID#22763. Instead, she simply deferred to Magistrate Fink's probable-cause determination, *id.* at 23:2-6, PageID#22761, agreeing that she was "relying on the fact that someone else had already determined that there was probable cause for this investigation to be happening in the first place …," *id*. at 23:17-21, PageID#22761. And she limited her consideration to whether Connor "believed that there was evidence somewhere relative to the ongoing investigation," *id.* at 22:18-20, PageID#22760, i.e., to whether Connor would actually find Novak's computer at his residence. She executed both warrants. *Id*., PageID#22912-24.

VIII. Riley launched Connor's investigation into Novak's speech.

Although Riley emphasized that he didn't personally conduct the investigation into Novak's page, he unquestionably authorized and approved the

continuing investigation, including Connor's investigative report documenting his activity. R.105-1 (Riley Dep. at 109:9-10), PageID#9654; *see also id*. at 109:19-110:6, 119:16-17, 175:15-19, PageID##9654-55, 9664, 9720; 260:16-261:1; 214:17-215:24, PageID#9805-06, 9759-60; R.108-1 (Connor's investigative report), PageID#22907. Riley approved it even though he had concluded on day one that Novak's Facebook page was a joke and that a reasonable reader would not believe the posts stated actual facts about the Parma police. R.105-1 (Riley Dep. at 215:25-216:9, 255:10-18), PageID#9760-61, 9800. But Riley didn't instruct Connor to include those facts in his report, *id*. at 216:10-217:9, PageID##9761-62, or require him to include the posts' absurd content. Instead, he merely deferred to Connor's conclusory summary, which characterized Novak's posts as an attempt to fool the public. *Id*. at 217:23-218:10, PageID#9762-63.

And Connor's investigative report indeed glossed over the posts' inherently ridiculous content—failing to include any facts that would make that absurdity obvious. Instead, he bemoaned the posts' *content* as "derogatory in nature" about the Parma police. R.107-25 (Connor report), PageID#22736.

IX. Dobeck ratified Appellees' action against Novak even when a Parma City Councilperson questioned whether the City was violating Novak's First Amendment free-speech rights.

The day Novak was released from jail, on March 29, 2016, then-Parma Councilperson and attorney Jeff Crossman emailed Dobeck asking "how confident

the administration is in pursuing a felony case against Mr. Novak for creating a fake Parma PD Facebook page and what the civil ramifications might be." R.124-18 (Crossman-Dobeck email exchange), PageID#25111. Councilman Crossman sent a link to a case in which Peoria, Illinois had to settle a similar matter involving Twitter, warning that "there is certainly precedent about using social media for parody and, as the Twitter case illustrates, parody is protected speech." *Id*. Crossman expected Council to have concerns about "whether residents will view this prosecution as an appropriate use of safety forces" and "whether the City is incurring civil liability[.]" *Id*.

Replying, Dobeck reaffirmed his belief that police action based on the content of Novak's speech was appropriate. Condemning the content of the post "strongly encourag[ing] minorities not to apply," Dobeck complained: "For a community that has for decades battled an unfair reputation of being racially insensitive, this is destructive misinformation." *Id*. at PageID#25110. Dobeck disagreed that Novak's Facebook account was parody, reasoning that the Peoria Twitter account was *labeled* as satire while Novak's Facebook page was not. But Dobeck acknowledged he had not researched the legal question of whether, to qualify as protected speech, parody must be labeled as such. R.120-1 (Dobeck Dep. at 259:10-260:14), PageID#23452-53. (It need not be.)

Dobeck counseled waiting for the County grand jury to consider indictment, insisting that "the police have acted reasonably." R.124-18 (Dobeck-Crossman email exchange), PageID#25110. Dobeck assured Crossman that he would review evidence and analyze whether Novak's speech was protected. But he did neither. R.120-1 (Dobeck Dep. at 272:3-273:22, 279:17-22), PageID#23465-66, 23472.

X. Connor misled the grand jury when he testified that dispatch was "inundated with phone calls" to 911 and that 11 callers "honest to God" believed Parma posted Novak's page—and when he pronounced the grand jurors that Novak's page was not protected parody.

On April 11, 2016, Defendant Connor testified before the grand jury that "the police department including the 911 call center and city hall were getting *inundated* with phone calls" about Novak's page. R.86-1 (Grand-jury trans. at 1, 3 (emphasis added)), PageID#4429, 4431. Connor testified that he listened to "the calls that came in to the 911 dispatch center" (without clarifying that none of these calls was made to 911) and that there were "11 phone calls placed from residents" who "*honest to God believed that we posted this and this was real information*." *Id*. at 4 (emphasis added), PageID#4432.

Connor spontaneously, and personally, advocated to the grand jury that Novak's indictment would not run afoul of the First Amendment: "You can see the difference between parody and satire. Trust me, there's no issues with that, there's no issues with the [F]irst [A]mendment, but you can't do what he did and absolutely mirror a government page and then portray yourself to be something

you're not." *Id.* at 6-7, Page ID#4434-35. He went on: "That's what our argument is. This is not satire. This is not parody. Many—maybe he was thinking he was doing that, but he didn't by any means." *Id*. at 7, PageID#4435. Connor implied that parody must be labeled to be protected speech by referring to "pages out there that they have, you know, our logo up there and instead of force they put farce, f-a-r-c-e. Clearly parody, clearly satire. His was not. It was an exact replica of our page." *Id*.

Connor's *sua sponte* advocacy about the First Amendment and parody to the grand jury—revealed only when courts ordered the transcript be unsealed—showed that his earlier, repeated protests in his deposition that First Amendment free-speech rights and parody were not a part of his Novak investigation were false. *See*, *e.g.*, R.107-1 (Connor Dep. at 185:16-24; 187:8-20; 313:2-10), PageID#19020, 19022, 19148.) The First Amendment and parody were very much on his mind.

The grand jury indicted Novak.

XI. Defendant Connor falsely testified that his investigation of Novak's Facebook page interrupted his work on a home-invasion case.

In an apparent gambit to salvage the amemic "disruption" case, Connor introduced a new claim on August 11, 2016 during Novak's criminal trial that Novak's speech disrupted public services by interrupting his work on another case. R.6-1 (Novak criminal-trial trans. at 198:13-16), PageID#1501.) He insisted that

investigating Novak forced him to postpone taking a DNA buccal swab from a defendant in a home-invasion case, which had been scheduled for March 2, 2016. *Id*. at 198:13-199:9, PageID#1501-02; *see also* R.107-1 (Connor Dep. at 350:11-351:3), PageID#19185-86.

But that was a lie. Connor's own report for that case showed that the swab had been scheduled for March *4*—not March 2. *Id*. at 350:3-10, PageID#19185.

And at his March 2020 deposition in the present case, Connor claimed that investigating Novak actually caused him to miss a March 2 pretrial in the home-invasion case. *Id*. at 351:4-17, 352:1-20., PageID#19186, 19187.

But that, too, was a lie. Connor's report *did not even list* a pretrial scheduled or cancelled for March 2 (*Id*. at 352:12-23, PageID#19187) because, as the public docket for that case shows, no pretrial was ever set for March 2, R.102-9 (Docket for buccal-swab case, NOVAK015352-79, publicly available at https://cpdocket.cp.cuyahogacounty.us/CR_CaseInformation_Docket.aspx?q=QIkNADjvWvLlcrwmGQaaeQ2 (last accessed Nov. 12, 2020)), PageID#9446-73.

XII. Parma provided no official training to its officers on how to apply criminal statutes while respecting suspects' First Amendment free-speech rights.

Parma had no policies requiring officer training on suspects' First Amendment free-speech rights. R.106-1 (Parma Dep. (Blair) at 25:15-17; 126:23-

127:8), PageID#12819, 12844. Parma did not train its officers on any of the following:

- the categories of speech excepted from First Amendment protection; *Id*. at 69:23-70:3, PageID#12830.
- the constitutionally protected status of speech made on the internet; *Id*. at 52:23-53:3, PageID##12825-26.
- that officers may not base probable-cause determinations on protected speech; *Id*. at 53:11-16, PageID#12826.
- that protected speech is not a crime; *Id*. at 55:12-17, PageID#12826.
- that officers cannot criminalize speakers for other people's reactions to speech. *Id*. at 59:16-21, PageID#12827. *See also* R.105-1 (Riley Dep. at 284:1-22), PageID#9829.
- how to determine whether speech is affirmatively protected as parody. R.106-1 (Parma Dep. (Blair) at 44:10-22, 45:24-46:5), PageID##12823, 12824; R.107-1 (Connor Dep. at 120:5-121:4, 128:14-15, 142:20-143:6, 147:8-16, 150:21-151:1), PageID##18955-56, 18963, 18977-78, 18982, 18985-86; R.105-1 (Riley Dep. at 49:9-50:11), PageID#9594-95.

In lieu of training officers to make these decisions, Parma directed officers to seek advice from supervisors or the law department on an *ad hoc* basis. R.106-1 (Parma Dep. (Blair) at 25:18-26:9, 30:4-22), PageID#12819, 12820; R.107-1 (Connor Dep. at 168:16-20, 254:10-16, 260:15-18), PageID#19003, 19089, 19095.

PROCEDURAL BACKGROUND

In 2019, this Court in large part affirmed the District Court's denial of Defendants' motions to dismiss. *Novak v. City of Parma*, 932 F.3d 421, 430 (6th

Cir. 2019). Following remand and discovery, Connor, Riley, and the City of Parma filed two separate motions for summary judgment on November 13, 2020 (R.100 (Parma's) and R.101 (Connor's and Riley's)), which the district court granted on February 24, 2021 (R.128 (Opinion and Order)). It is that Order that Novak here appeals.

SUMMARY OF THE ARGUMENT

For the district court, "the constitutional right at question" in this case "is not whether Novak was entitled to be free from retaliatory action based on his speech. *He was*." R.128 (Opinion and Order at 15), PageID#25707 (emphasis added). But "[t]he more specific question [of] whether Novak was free from an arrest that was supported by probable cause," according to the court, "was already clearly decided prior to Novak's arrest." *Id*., citing *Reichle v. Howards*, 566 U.S. 658, 665 (2012), and in a manner adverse to Novak.

Are these statements consistent? How can Novak enjoy a right to be free from retaliation based on speech if that very speech can provide probable cause for his arrest? It seems that, in its effort to identify a "particularized" question for qualified-immunity purposes, the district court has identified one that is *not particularized enough*. The *real* right at question in this case is not whether, in general, Novak had a right to be free from an arrest supported by probable cause,

but whether the probable cause that allegedly supports the arrest can be based on his protected speech alone.

Fortunately, *that* question has also been clearly decided—in Novak's favor.

Once it is appreciated that Appellees lacked probable cause to arrest and prosecute Novak (because their purported probable cause was based only on Novak's speech—he engaged in no other conduct), Appellees become potentially liable for all claims Novak alleges; and fact issues foreclose the entry of summary judgment. For this and other reasons, Appellees are also liable for imposing "prior restraints" on Novak in violation of the First Amendment. And because the rights Novak asserts were all clearly established at the time Appellees acted, qualified immunity doesn't protect them. The Privacy Protection Act, too, survives, unaffected by "probable cause." So is the prior-restraint claim. And finally, because of the City of Parma's admitted failure to train its police officers and its law director's *de facto* assumption of policymaking authority (as well as Ohio statutes delegating this same authority), the City is also exposed to municipal liability for its officials' unconstitutional and otherwise improper actions.

This Court should reverse the district court's summary judgment for Appellees on all claims, and the denial of partial summary judgment for Novak on the issue of probable cause.

LAW AND ARGUMENT

I. Issues of material fact preclude summary judgment on the question of probable cause.

A. The district court erred in making a finding of probable cause based solely on Novak's protected speech.

1. The district court misconstrued and misapplied *Reichle v. Howards*, 566 U.S. 658 (2012).

The district court erred in finding probable cause that Novak violated Ohio Rev. Code §2909.04(B) based solely on Novak's speech without first analyzing whether that speech was First Amendment protected. It cites *Reichle v. Howards*, 566 U.S. 658, 664-65 (2012), for the proposition that "the Supreme Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." R.128 (Opinion and Order at 15), PageID#25707.

But that is not the right Novak claims in this case. Novak contends that he had a First Amendment right to be free from any arrest, search, seizure, or prosecution predicated upon constitutionally protected speech—or, stated differently, that protected speech alone cannot supply the probable cause needed to justify these enforcement actions.

Reichle is distinguishable from the present case because, there, the government did not purport to base its probable-cause determination on protected speech. *Reichle* instead addressed the question of whether an individual could

bring a First Amendment-retaliation claim when the challenged arrest was *otherwise* supported by probable cause.

In *Reichle*, Secret Service agents protecting then-Vice President Cheney overheard the plaintiff (Howards) criticizing Cheney's policies and then saw him touch Cheney's shoulder, which Howards, when questioned, falsely denied. *Id*. at 660-61. While that false denial created probable cause to arrest Howards under 18 U.S.C. §1001—because he made a materially false statement to federal agents—the appeals court denied qualified immunity from Howards's First Amendment claims, identifying issues of fact regarding the officers' motives. *Id*. at 662-63. The Supreme Court reversed the partial qualified-immunity denial, holding that it was not clearly established that an arrest supported by probable cause could violate the First Amendment—even if the officer had an additional retaliatory motive. *Id*. at 663. But again, the probable cause arose from Howards's having lied to federal agents (unprotected activity) and not from his criticisms of Cheney (protected activity).[1]

[1] Also unlike Howards', Novak's speech itself did not violate the specific terms of any statute. The federal statute violated in *Reichle*, 18 U.S.C. §1001(a)(2), specifically regulated speech by prohibiting materially false and fraudulent statements to federal agents, and Officer Reichle observed Howards violating it. The Ohio statute at issue here, in contrast, does not criminalize any particular speech, but instead prohibits "knowingly us[ing] a computer … so as to disrupt, interrupt, or impair the functions of any police … operations." Ohio Rev. Code §2909.04(B). Speech is neither a necessary nor (as this case shows) a sufficient condition of a violation of this statute.

2. The two cases the district court cited to exemplify the *Reichle* rule are distinguishable because, in both, the suspect "did something" to support probable cause.

To further support its ruling, the district court cited two cases that followed *Reichle*: *Phillips v. Blair*, 786 F. App'x 519 (6th Cir. 2019), and *Marshall v. Farmington Hills*, 693 F. App'x 417 (6th Cir. 2017). Both are distinguishable because the officers based their probable-cause determinations, in part if not exclusively, on conduct other than speech. In neither case did the officers urge that probable cause existed based solely on the suspect's speech.

Whereas Novak only "said something," the suspects in these cases both "said something" and "did something" that created probable cause. *See Phillips*, 786 F. App'x at 527-28 (suspect refused to comply with officers' order to exit truck and then engaged in physical struggle with three investigating officers); *Marshall*, 693 F. App'x at 423-24 (suspect refused to surrender weapon during traffic stop after officer's repeated lawful commands).

But "[h]ere," according to this Court, "we have nothing like that. Novak did not create a Facebook page criticizing the police *and* use his computer to hack into police servers to disrupt operations. The sole basis for probable cause to arrest Novak was his speech." *Novak*, 932 F.3d at 431 (emphasis in original). "And there is good reason to believe," the Court continued, "that, based on the reasoning

underlying the First Amendment retaliation cases, this is an important difference." *Id*.

Indeed both the *Phillips* and *Marshall* courts appear to have appreciated this difference. In a passage the district court here quotes, *Phillips* reversed the denial of qualified immunity due to the absence of "controlling authority clearly establishing a First Amendment right to be free from a retaliatory arrest *otherwise* supported by probable cause…" 786 F. App'x at 529 (emphasis added). And following *Reichle*, the *Marshall* court agreed that there is no clearly established "right to be free from a retaliatory arrest that is *otherwise* supported by probable cause." 693 F. App'x at 426 (quoting *Reichle*, 566 U.S. at 664-65; emphasis added).

What happens when an arrest is not "otherwise" supported by probable cause but is based on protected speech alone? Fortunately, this Circuit provides a clearly established answer.

B. The law of this Court, which was clearly established before 2016 but ignored by the district court, is that protected speech cannot by itself create probable cause for a crime.

1. *Sandul v. Larion* mandates reversal of the district court's summary judgment.

Sandul v. Larion, 119 F.3d 1250 (6th Cir. 1997), governs the present case because it squarely addresses whether an officer can base probable cause on protected speech. Officer Larion arrested John Sandul for leaning out of his

moving vehicle and shouting "f--k you" to a group of abortion protesters while extending his middle finger. Sandul engaged in no other conduct. Believing that Sandul's expressive conduct violated Livonia's disorderly-conduct ordinance, Officer Larion pursued and arrested Sandul. *Id*. at 1252.

In Sandul's false-arrest and First Amendment-retaliation lawsuit, the district court granted summary judgment to Larion, finding that the disorderly-conduct ordinance provided probable cause and that, even if the ordinance was unconstitutional, Larion was qualifiedly immune. *Id*. at 1253.

This Court reversed, finding that Sandul's First Amendment right to speak as he had was clearly established. "As a reasonable officer, Larion should have known that the words and gestures used by Sandul were constitutionally protected, and that under the First Amendment, the disorderly-conduct ordinance could only apply to 'fighting words.'" *Id*. at 1256. "*Such protected speech*," this Court emphasized, "*cannot serve as the basis for a violation of any of the Livonia ordinances at issue*." *Id*. at 1256 (emphasis added).

A precisely analogous conclusion is warranted here: Novak's speech cannot serve as the basis for a violation of the "disrupting public services" statute, since such statute can prohibit only speech (e.g., fighting words, incitement, etc.) excepted from constitutional protection.

2. *Swiecicki v. Delgado* reaffirmed the *Sandul v. Larion* rule and established that issues of fact regarding whether an officer acts based on the content of a suspect's speech preclude summary judgment.

This Court reiterated and applied the *Sandul* analysis in *Swiecicki v. Delgado*, 463 F.3d 489 (6th Cir. 2006), where the defendant officer arrested the plaintiff for disorderly conduct because he yelled at baseball players during a Cleveland professional-baseball game. *Id*. at 491-92. When analyzing whether Swiecicki's speech gave Officer Delgado probable cause to arrest, the Court invoked the *Sandul* rule that "[a]n officer may not base his probable-cause determination on speech protected by the First Amendment." *Id*. at 498, citing *Sandul* at 1256. Officer Delgado "therefore lacked probable cause to arrest Swiecicki if Delgado based his decision on protected speech." *Id*. at 499. *Sandul*, after all, had "ma[de] clear that the content of Swiecicki's speech could not serve as the basis for a violation of Cleveland's disorderly conduct ordinance." *Id*. at 499-500, 502. Swiecicki's First Amendment right to engage in such speech, moreover, was clearly established at the time of his arrest. *Id*. at 502.

C. Protected speech may be *considered* in effecting an arrest, but only to the extent it provides *evidence* of a crime apart from the speech.

As this Court recognized, protected speech can sometimes be a "wholly legitimate consideration" when officers make an arrest. *Novak*, 932 F.3d at 430 (quoting *Reichle*, 566 U.S. at 668). But the circumstances in which this is the case

are quite limited. *Reichle* was addressing situations in which a suspect's speech, while not itself criminal, provided *evidence* of a crime. In such a case, the Court explained, even if an officer possesses "animus toward the content of a suspect's speech," the officer may make the arrest not because of that animus but because the "speech provides evidence of a crime or suggests a potential threat." *Id*. at 668.

To illustrate this distinction, the *Reichle* Court invoked *Wayte v. U.S.*, 470 U.S. 598, 612-13 (1985), in which an individual penned letters to the Selective Service protesting the draft. While not themselves criminal, the letters provided evidence of the individual's intent to willfully fail to register for the draft, which was a crime. *Id*.

Unlike in *Reichle*, Connor and Riley did not "consider" Novak's speech in a "wholly legitimate" manner. They did not look to his speech as evidence of his intent to engage, or of his having engaged, in *other* criminal conduct. Instead they believed his speech *was* the crime. And they never found, presented, or postulated evidence of any "conduct" other than his speech, despite the passage of more than three weeks between the single day the Facebook page was online and the date they had Novak arrested.

D. The First Amendment protected Novak's speech because his speech did not fall within any of the few discrete exceptions to the First Amendment's broad grant of protection.

As of 2016, the law was clearly established that the First Amendment protects all speech except that occurring "in a few limited areas," namely:

(1) "advocacy intended, and likely, to incite imminent lawless action,"

(2) obscenity;

(3) defamation;

(4) speech integral to criminal conduct;

(5) fighting words;

(6) child pornography;

(7) fraud;

(8) true threats; and

(9) speech "presenting some grave and imminent threat the government has the power to prevent."

See Novak, 932 F.3d at 427, citing *U.S. v. Stevens*, 559 U.S. 460, 468 (2010); *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012), citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Giboney v. Empire Storage & Ice Co*., 336 U.S. 390 (1949) (criminal conduct); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *New York v. Ferber*, 458 U.S.

747 (1982) (child pornography); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748 (1976) (fraud); *Watts v. United States*, 394 U.S. 705 (1969) (true threats); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (grave and imminent threat).

As Parma Law Director Dobeck admitted, Novak's speech fell into none of these exceptions. R.120-1 (Dobeck Dep. at 167:10-170:18), PageID#23360-63. Regardless of how Appellees or the district court characterize Novak's Facebook page, then, clearly established First Amendment jurisprudence compels the conclusion that Novak was protected from criminal liability for this speech.

E. Novak's Facebook page was constitutionally protected as parody.

Indeed, clearly established law affirmatively protects the specific type of speech (i.e., parody) in which Novak engaged. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56–57 (1988); *Novak*, 932 F.3d at 427. As *Hustler* explained, parody is speech that "could not reasonably have been interpreted as stating actual facts."

Appellees' argue that Novak's speech was not parody because it was "false" and "confusing." But parody by its nature doesn't "state actual facts," and the law is clearly established that false speech is still protected speech. *United States v. Alvarez*, 567 U.S. 709, 722 (2012). Speech that confuses or angers readers, moreover, enjoys the same protection as more congenial speech. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

In any event, and as this Court explained in its earlier opinion, Connor and Riley "are wrong to think that we look to a few confused people to determine if the page is protected parody." *Novak*, 932 F.3d at 427. After all, "[t]he test is not whether one person, or even ten people, or even one hundred people were confused by Novak's page." *Id*. For parody, "the law requires a reasonable reader standard, not a 'most gullible person on Facebook' standard." *Id*. at 424. (Even Appellees agree with this conclusion. *See*, *e.g.*, R.123-8 (Appellees' responses to first set of requests for admissions), PageID##24563 (Riley), 24580 (Connor).) "The test is not whether some actual readers were misled, but whether the hypothetical reasonable reader could be (after time for reflection)," when considering the post in its context, including its intended audience. *Farah v. Esquire Magazine*, 736 F.3d 528, 537 (D.C. Cir. 2013).[2]

While Appellees insist that *some* people were "confused," many vocal commenters were not. *See* R.105-3 (Facebook business record), PageID#12537-666. Indeed ***both Riley and Dobeck (as Parma's 30(b)(6) witness) admitted that a reasonable reader would not believe Novak's page stated actual facts***. *See, e.g.*, R.105-1 (Riley Dep. at 77:17–18, 78:4–5, 78:12–15, 85:1–2, 88:4–7, 95:25–96:4),

[2] When Dobeck advised Connor in 2016, he knew that parody was protected speech under *Hustler*, knew that parody was defined based on whether a reasonable reader would believe it stated actual facts, and knew that a reasonable reader would not believe Novak's page stated actual facts. R.120-1 (Dobeck Dep. at 190:10-191:1, 232:22-233:3), PageID#23383-84, 23425-26.

PageID##9622, 9623, 9630, 9633, 9640-41; R.120-1 (Dobeck Dep. at 84:9–11), PageID#23277. Only Connor held out.

Their admissions comport with the evidence showing minimal "confusion." Although thousands of people read Novak's page, at most 15 people contacted the City, and most of them recognized that the page was not Parma's. *See* R.105-3 (Facebook Business Record), PageID#9871-12666; R.123-12 (Dispatch-call trans.), PageID#24643-56. And Connor, having listened to all the phone calls, agreed that at most one or two callers may have believed the posts stated real facts. R.107-1, PageID#19047. A reasonable jury would agree with these thousands of readers that it was not believable that the Parma police would be performing abortions in a police van in the Giant Eagle parking lot using an experimental technique they developed; holding a pedophile-reform event at a Catholic church in which those successfully playing puzzles and games could become Parma police officers; or attempting to starve the local homeless population.

Appellees' admissions also give rise to the following question: when two out of three Appellees *agree with Novak* that no reasonable reader would, upon reflection, regard his posts as factual, is there really anything left for a jury to decide? And given the obviously parodic character of Novak's posts, could any reasonable jury disagree with Novak, Riley, and Dobeck on the issue?

If, as this Court determined when ruling on Appellees' motions to dismiss,[3] the reasonable-reader question is one for a jury, summary judgment should be reversed because Appellees offer no evidence that a *reasonable reader* would believe Novak's page stated facts. But in light of the developed record, the question should now be determined as a matter of law.

F. The district court enforced an unconstitutional "heckler's veto" in holding that individuals' purported confusion about Novak's page was sufficient to override First Amendment protection.

1. Police cannot violate constitutional rights because of hostility to their exercise.

The district court found that, even if Novak's Facebook page was protected, "[his] conduct in confusing the public" was not. R.128 (Opinion and Order at 3), PageID#25695. But again, Novak's only "conduct" was speech. It is not as if he spoke *and* did something else that confused the public. In endorsing Appellees' decision to criminally penalize Novak for his speech because of how other people reacted to it, the district court enforced a constitutionally verboten "heckler's veto." *See Bible Believers v. Wayne County*, 805 F.3d 228, 255 (6th Cir. 2015).

A "heckler's veto" occurs when police act to silence a speaker based on the angry reactions of others who disagree. *Id.* at 234. Effecting a heckler's veto is

[3] The Court determined that "[w]hether Novak's page was a protected parody is a question of fact that we cannot answer *at this stage*." 932 F.3d at 428. But armed with Appellees' admissions, the Court could (and should) now return an affirmative answer.

unconstitutional because the government cannot punish speech "solely on the basis that it 'stirred people to anger, invited public dispute, or brought about a condition of unrest.'" *Id.* at 249, quoting *Terminiello* at 5; *see also Novak*, 932 F.3d 421, 424 ("The First Amendment [is not] bothered by public disapproval, whether tepid or red hot").

This prohibition survives even safety-based justifications for punishing a speaker based on others' reactions. Anticipating that officers may be tempted to use public safety as a pretext, this Court pointed out that "a heckler's veto effectuated by the police will nearly always be susceptible to being reimagined and repackaged as a means for protecting the public, or the speaker himself, from actual or impending harm." *Bible Believers* at 255. But that doesn't make it any more defensible.

Here, it is undisputed that Appellees sought to punish Novak because of other people's reactions to his speech. And the district court took the bait. This error requires reversal.

2. Listeners' reactions to speech are not a content-neutral basis to criminalize speech.

"Listeners' reaction to speech is not a content-neutral basis" for police to "tak[e] an enforcement action against a peaceful speaker." *Bible Believers* at 247, quoting *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992), and citing *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1996). In *Bible Believers*, the

officers argued that their decision to arrest speakers for disorderly conduct was content-neutral because their "only consideration was maintaining the public safety." *Id*. at 247. The Court rejected this argument, recognizing that the listeners reacted angrily (thus creating the purported safety concern) *because of* the speech's content. *Id*.

Content-based restrictions are presumed invalid, *Bible Believers* at 253, and will not "survive strict scrutiny unless the restriction is narrowly tailored to be the least-restrictive means available to serve a compelling government interest." *Id*. at 248, quoting *U.S. v. Playboy Entm't Grp*., 529 U.S. 803, 813 (2000). Punishing a speaker based on listeners' hostility "will seldom, if ever, constitute the least restrictive means available to serve a legitimate government purpose." *Id*., citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

Appellees' actions in this case cannot survive strict scrutiny because forcing Novak to endure arrest, incarceration, an invasive residential search, property seizure, prosecution, and a criminal trial did *not* constitute the least restrictive means to serve any arguably legitimate government purpose. To the limited extent the City of Parma had a compelling and legitimate interest in reassuring the public

that Novak's page was not genuine, Riley did that with "more speech" on the local news. *See Bible Believers* at 243.

After learning about Riley's interview, Novak permanently removed the page from the internet. But despite knowing that Novak had taken down the page *23 days earlier*, Appellees arrested Novak and initiated the prosecution, which served no objective except to punish Novak for his previous speech. Criminalizing speech is not a legitimate governmental interest.

G. The district court erred in failing to require Appellees Connor and Riley to apply the criminal statute constitutionally.

In his opposition to Appellees' motions for summary judgment, Novak cited several cases in which courts determined that statutes are overbroad when they purport to proscribe constitutionally protected activity. The district court found it significant that "none of these cases held that, in the absence of any clear legal precedent and for purposes of qualified immunity, a police officer should question whether a statute is unconstitutional." R.128 (Opinion and Order at 22), PageID#25714. The court's comment is confusing: Novak's cases *themselves* supply the "clear legal precedent" for the cited proposition. Perhaps the court understood Novak to be suggesting that, before making an arrest, officers must always question the *facial* validity of the implicated statute. He was not. But an accused certainly has a right to expect reasonable consideration of the statute's constitutionality *as applied* to his own speech or conduct.

Contrary to the district court's reasoning, then, a statute need not be facially unconstitutional to be unconstitutional as applied in a specific circumstance. It was clearly established long before 2016 that officers can't apply "disruption" statutes to criminalize pure speech. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 455 (1987). The *Hill* Court recognized that an ordinance prohibiting "interrupt[ing] any policeman in the execution of his duty" could not apply to protected speech because "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Id*.

In *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007), this Court specifically held that officers have a duty to apply statutes in a constitutional manner. Leonard was arrested on obscenity and disorderly-conduct charges after using the phrase "God damn" while speaking at a township board meeting. *Id*. at 351-52. The district court granted summary judgment to Robinson, the arresting officer, finding that he "had probable cause to arrest Leonard because he had violated the plain language of those statutes and Robinson was 'to enforce laws until and unless they are declared unconstitutional.'" *Id*. at 353 (internal citations omitted).

But this Court reversed, holding that no reasonable officer would think the statute at issue could be constitutional *as applied to Leonard's speech*. *Id.* at 359. Because Robinson therefore lacked probable cause to arrest Leonard, the Court reversed the summary grant of qualified immunity. *Id*. at 361.

The concern expressed in *Leonard* is amplified here, where "the vague language of [Ohio Rev. Code §2909.04(B)] further heightens the concern" that "some police officers may exploit the arrest power as a means of suppressing speech." *Novak*, 932 F.3d at 431 (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018)). "Taken at face value," this Court recognized, "the Ohio law seems to criminalize speech well in the heartland of First Amendment protection." *Novak*, 932 F.3d at 432. "This broad reach gives the police cover to retaliate against all kinds of speech under the banner of probable cause." *Id*. These concerns provide all the more warrant for officers to be circumspect in their application and enforcement of §2909.04(B) and for district courts to view askance its application to pure speech.

H. Because of Connor's and Riley's lies, distortions, and omissions, fact issues remain regarding whether the officers had probable cause to believe Novak had committed a crime.

In the Facts section above, Novak recounts all the facts and circumstances that ensured that, even if the law permitted prosecutions based on protected speech, Connor and Riley never acquired probable cause. Novak commends a full re-read of these pages to the Court.

The district court was overly impressed that, besides Connor, "several other law enforcement officials reviewed the facts before charges were brought against Novak." R.128 (Opinion and Order at 22), PageID#25714. What this misplaced

faith overlooks is that Connor withheld the most salient facts from these officials, facts that would have given even the most hard-nosed official pause before concluding that Ohio Rev. Code §2909.04(B) had likely been violated. Left to apply their own free-wheeling interpretation of the statute, unmoored to the facts and unconcerned with the First Amendment, these officials were bound to make the very mistake that brought Novak to federal court. So in the end, what the district court tries to characterize as a mutually supportive network of legal professionals—whose ostensibly independent judgments (they were anything but) lent convergent validity to an unassailable probable-cause determination—was in reality a house built on the shifting sands of lies, distortions, and half-truths. Certainly there exist material-fact issues regarding Appellees' lack of candor and forthrightness—and, consequently, regarding the propriety of these officials' probable-cause determinations.

II. The district court erred in denying partial summary judgment to Novak and in granting qualified immunity to Connor and Riley, who ignored the clearly established law that probable cause for a crime may not be based solely on protected speech.

Because the constitutional rights discussed above were clearly established at the time of the actions of which Novak complains, Appellees are not protected by qualified immunity. The district court erred in concluding otherwise.

Qualified immunity applies only absent a showing that (1) the officer violated the plaintiff's constitutional right; and (2) the right was clearly

established. *Wright v. City of Euclid, Ohio*, 962 F.3d 852, 864 (6th Cir. 2020), citing *Fazica v. Jordan*, 926 F.3d 283, 289 (6th Cir. 2019).

To be clearly established, "the contours of the right must be sufficiently clear such that a reasonable officer has fair warning." *Baynes v. Cleland*, 799 F.3d 600, 613 (6th Cir. 2015). The law doesn't require a "case directly on point," and "the specific acts or conduct at issue need not previously have been found unconstitutional for a right to be clearly established law." *Id*., 799 F.3d at 615–16.

As the Supreme Court has explained, the purpose of qualified immunity is to provide government officials "breathing room to make reasonable but mistaken judgments *about open legal questions*." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (emphasis added). But the legal question of whether an officer can base probable cause on protected speech alone was not an "open legal question" in 2016: this Court answered that question in the negative in *Sandul* and *Swiecicki*. And when the law is clearly established, "[s]tate employees may not rely on their ignorance of even the most esoteric aspects of the law to deny individuals their [constitutional] rights." *Sandul*, 119 F.3d at 1256 (citations omitted).

Even if Novak's speech presented "open legal questions"—and it did not—Connor and Riley did not make a "mistaken judgment." These officers never even *considered* whether Novak had engaged in protected speech, let alone whether they could base probable cause for a crime solely on that speech. Courts may not grant

qualified immunity based on ignorance of the clearly established law. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985).

III. Appellees' lack of probable cause requires reversal both of the district court's summary disposition of Novak's constitutional claims and of its denial of partial summary judgment to Novak.

According to this Court, Novak's retaliation claims "turn[ ] on two issues: (1) whether Novak's Facebook page was a parody and (2) whether the Parma police had probable cause to arrest Novak for his page." 932 F.3d at 427. Novak has demonstrated *both* that his Facebook page was parody *and* that Appellees lacked probable cause to arrest him (or, at the very least, that issues of material fact preclude summary judgment on these questions). These demonstrations expose Appellees to liability on each of Novak's constitutional claims.

A. Novak made a sufficient showing on his Fourth Amendment claims.

The supposed presence of probable cause is the *only* basis on which the district court concluded that Appellees are entitled to summary judgment on Novak's Fourth Amendment claims. *See* R.128 (Opinion and Order at 19), PageID#25711. But because Novak has refuted the court's probable-cause premise (or has at least identified relevant issues of material fact), this Court should reverse summary judgment on his claims for wrongful arrest (Claim 7), unlawful search (Claim 8), unlawful property seizure (Claim 9), and malicious prosecution (Claim 11).

B. Novak has made a *prima facie* showing of First Amendment retaliation.

"If the police *did not* have probable cause to arrest Novak, then he may bring a claim of retaliation." *Novak*, 932 F.3d at 429 (emphasis in original). Novak asserted three claims for First Amendment retaliation (Claims 1, 3, and 6). Each requires a *prima facie* showing that:

(1) he engaged in constitutionally protected speech;

(2) Appellees took adverse action against him that would likely chill a person of ordinary firmness from continuing the speech; and

(3) the adverse action was motivated at least in part by the protected speech. *Novak*, 932 F.3d at 427, citing *Paige v. Coyner*, 614 F.3d 273, 277 (6th Cir. 2010).

1. Novak engaged in constitutionally protected speech.

As detailed above, Novak's Facebook speech was protected by the First Amendment as a matter of law, both because it did not fit within any of the narrowly defined exceptions to free-speech protections and because it was affirmatively protected as parody. Because of the obvious absurdity of Novak's posts, the Court can make this determination as a matter of law. But at a minimum, issues of material fact foreclose summary judgment *for Appellees*. Even the district court "agrees that there is a genuine dispute of material facts on whether the Facebook post was protected by the First Amendment." R.128, PageID#25708.

2. Connor and Riley took actions against Novak that would chill a person of ordinary firmness from continuing to speak.

Connor and Riley had Novak arrested and jailed, his home raided, and his electronics seized. Any one of these actions would chill a person of ordinary firmness from continuing to speak. Together, they leave little doubt that Novak satisfies this second element of his First Amendment-retaliation claim.

3. Appellees' adverse actions against Novak were motivated at least in part by Novak's protected speech.

As shown above, Novak's only "conduct" was speech on Facebook. He didn't "say something" and "do something"—he just "said something." *Novak*, 932 F.3d at 431. It follows that, when Connor and Riley took action against Novak, they did so based on his speech; there was no other "conduct" that could have prompted it. It is equally clear (and uncontested) that Appellees were motivated by the *content* of Novak's Facebook posts. Connor, for example, reported that he was "not amused by any posts." R.107-1 (Connor Dep. at 56:12), PageID#18891. And Dobeck, in his email exchanges with Councilman Crossman, complained that Novak's post about the City's "strongly encouraging minorities not to apply" for job openings was racially "destructive misinformation." There was nothing about the *manner* in which Novak spoke (as opposed to the speech's content), moreover, that was threatening or gave rise to concerns about other criminal activity.

But whether Connor and Riley sought to exact retribution against Novak for the "disruption" he allegedly caused or for embarrassing their department (or for

some combination of the two) is a question of fact that should not have been resolved on a summary-judgment motion. *See, e.g., International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335, n.15 (1977) (proof of discriminatory motive or intent is fact-intensive determination); *Hoard v. Sizemore,* 198 F.3d 205 (6th Cir. 1999) (summary judgment may not be granted where motive is a genuine issue of material fact); *Rahab v. Buchanan*, 2018 WL 3743993, *3 (S.D. Ohio Aug. 7, 2018) ("Courts regularly treat motive, when it is a material issue in a case, as a question of fact to be proved to the jury"; "While it is a question of law whether a particular motive is lawful or not, it is a question of fact whether a particular actor behaved with that motive").

A reasonable jury could find that Connor, with Riley's approval, procured Novak's arrest to punish him for protected speech criticizing his (Connor's) police department. It could also find that the officers wouldn't otherwise have arrested Novak because, as they acknowledge, he engaged in no other conduct. Novak therefore meets the third element of his *prima facie* retaliation claim.

IV. Connor and Riley imposed prior restraints on Novak's speech.

Novak also "plausibly allege[d]" a "prior restraint" under the First Amendment. *Novak*, 932 F.3d at 433. For this claim, Novak needn't establish a lack of probable cause or prove that Appellees acted from an illegal motive.

A prior restraint is an administrative or judicial order "that forbids protected speech in advance." *Id*. at 432, citing *Alexander v. U.S*., 509 U.S. 544, 552 (1993). Prior restraints are presumed unconstitutional. *Id*., citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Informal actions designed to chill speech can also be prior restraints. *Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County*, 544 U.S. 1301, 1306 (2005), citing *Bantam Book v. Sullivan*, 372 U.S. 58, 68 (1963).

The right to be free from prior restraints is the foundation of the First Amendment's free-speech protections because it confers the right to speak in the first place. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. United States*, 403 U.S. 713 (1971); *Nebraska Press v. Stuart*, 427 U.S. 539, 594 (1976) (Brennan, J., concurring) (right against prior restraints is "all but absolute").

Appellees imposed three prior restraints on Novak: Connor sent correspondence to Facebook demanding that it take down Novak's page so he couldn't publish more posts; Riley publicly threatened to criminally prosecute the page's author; and Appellees seized and impounded Novak's electronics to prevent him from speaking through those media.

The district court fails to address the third listed restraint at all and, for time-related reasons, disputes that the first two qualify as "administrative orders." It is wrong on all counts.

When Appellees seized Novak's electronic devices, they blocked virtually all channels of communication that would otherwise have been available to Novak and effected a classic prior restraint. *See*, *e.g.*, *Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (near-complete restriction on speaker's chosen medium violated First Amendment); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) (restrictions on expressive technologies violate First Amendment rights). Unchallenged as it was by the district court, this prior-restraint claim, at a minimum, should survive summary judgment.

Appellees' demand to Facebook and press release were not "administrative orders," according to the court, because they presented no enforcement threat. "[A]ny such threat," according to the district court, "no longer existed because Novak voluntarily deleted his Facebook page" and because, having already constructed his Facebook page, "Novak had already spoken, so to speak." R.128 (Opinion and Order at 18), PageID#25710. Thus any threat "could only be a reference to prosecution post-publication." *Id.* But "[i]f the press release threatened post-facto enforcement,…it would not also qualify as a prior restraint." *Id*.

In so holding the district court misapplies what it refers to as the "well-established distinction between prior restraints and subsequent criminal punishments" acknowledged in *Alexander v. United States*, 509 U.S. 544, 550 (1993), a case having nothing in common with Novak's. After being convicted of

racketeering, the *Alexander* defendant was subject to forfeiture of his business assets. But the fact that the deprivation "effectively shut down his adult entertainment business," which may have included future protected activity, did not convert the forfeiture into a prior restraint, *id*. at 549, among other reasons because the penalty was not *threatened* but had actually been imposed. Here, Novak suffered no a criminal penalty (or even a conviction), and Appellees' actions appear to have been designed at least as much to ensure that Novak could not compose future Facebook parodies as to punish him for past ones.

Under well-established law, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" against speech, specifically including police "threats of prosecution[,]" are illegal under the First Amendment. *Bantam Books v. Sullivan*, 372 U.S. 58, 66–67 and n. 8 (1963) (administrative commission's threat of informal sanctions was unlawful prior restraint); *Griffin v. Condon*, 744 F. App'x 925, 929 (6th Cir. 2018) (threats are "quintessential" prior restraints); *Dearborn Pub. v. Fitzgerald*, 271 F.479, 480 (N.D. Ohio 1921) (threat to arrest vendor for circulating purportedly scandalous publication was unlawful prior restraint); *New Am. Library v. Allen*, 114 F. Supp. 823, 832 (N.D. Ohio 1953) (Youngstown police chief lacked "lawful power to suppress publications under the threat of prosecution.")

The district court's pronouncements also make little sense. It is unclear

whether, for the court, Novak's panicked deletion of his Facebook page disqualifies the letter to Facebook, the press release, or both from "prior-restraint" status. But the correct answer is neither. Connor sent his letter to Facebook *before* Novak deleted the page, so the letter can readily be understood as having presented a threat (even if, as the district court concludes, R.128 (Opinion and Order at 18), PageID#25710, Connor "did not necessarily expect Facebook to comply with his request." *See Novak*, 932 F.3d at 433 (an administrative order needn't be binding)). The press release, moreover, needn't be understood "only [as] a reference to prosecution post-publication," R.128 (Opinion and Order at 18), PageID#25710, as the district court incorrectly assumes. Oftentimes (and this case provides as clear an example as any) officials learn of allegedly objectionable speech only *after* it has occurred; and when they seek to stop it or ensure it doesn't happen again (e.g., by demanding that the forum be dismantled), they impose a constitutionally infirm prior restraint. In any event, "[l]aws enacted to control or suppress speech may operate at different points in the speech process," including when they "subject[ ] the speaker to criminal penalties." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010).

V. The district court erred in granting summary judgment on the municipal-liability claims against the City of Parma.

A municipality is liable under 42 U.S.C. §1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose

edicts or acts may fairly be said to represent official policy, inflicts the injury [for which] the government as an entity is responsible under §1983." *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694 (1978). Beyond official policy, a municipality has an actionable "custom," even if "not formally sanctioned, [if] the plaintiff offers proof of policymaking officials' knowledge and acquiescence to the established practice." *Spears v. Ruth*, 589 F.3d 249, 256 (6th Cir. 2009) (cleaned up), citing *Monell*, 436 U.S. at 690–91.

A municipality may be held liable for an official's constitutional-rights violation when the plaintiff can show *any one* of the following: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decisionmaking authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; *or* (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Jackson*, 925 F.3d at 828. As next shown, Parma is liable here under (2), (3), and (4) for its violation of Novak's constitutional rights, including his First Amendment rights to criticize police and engage in protected speech without retaliation (including retaliatory arrest) and his Fourth Amendment rights to be free from unreasonable search, seizure, and arrest and to be free from malicious prosecution.

A. Parma is liable for the decisions of Law Director Dobeck, its legal policymaker, who authorized and approved Connor's decisions to violate Novak's rights.

A municipality is liable for "a single decision taken by the highest officials responsible for setting policy *in that area of the government's business*." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (emphasis added). The law does not define policymaking authority in "some categorical, 'all or nothing' manner" but instead looks to whether officials possess policymaking authority "in a particular area, or on a particular issue." *McMillan v. Monroe County, Ala.*, 520 U.S. 781, 785 (1997).

Here, Parma delegated policymaking authority to Dobeck for the City's legal opinions and litigation strategy, including the final municipal determination of probable cause. Parma's custom or policy flowed through his actions as "the decision[s] of the municipality" to create the "moving force behind the constitutional violation[s]." *See Rush v. City of Mansfield*, 771 F.Supp. 2d 827, 865 (N.D. Ohio 2011) (where jury could find that officer's discretion was "final and unreviewable[,]" the officer's decision "was the decision of the municipality[.]"); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 379 (1989).

In *Bible Believers*, *v. Wayne County*, 805 F.3d 228, 255 (6th Cir. 2015), this Court held that the Wayne County Corporation Counsel had taken two actions that "easily resolve[ ] the matter of municipal liability." *Id*. at 260. First, the County's

counsel advised the plaintiffs-speakers in advance of their planned demonstration that they could be held criminally liable "for conduct which has the tendency to incite riotous behavior or otherwise disturb the peace." *Id*. at 260. And second, the officers consulted the County's counsel "to confirm that they could threaten [the speakers] with arrest for disorderly conduct because [the speakers'] speech had attracted an unruly crowd of teenagers." *Id*.

The County attorney's letter misstated the law because "speech cannot be proscribed simply because it has a 'tendency' to cause unrest or because people reacted violently in response to the speech." *Id*., citing *Ashcroft*, 535 U.S. at 253. And even though her letter did not express an official policy, "her direction and authorization for [the officers] to threaten [the speakers] with arrest…is certainly an action for which she 'possesse[d] final authority to establish municipal policy'" under ordinances establishing the County counsel as the chief legal advisor to the County's agencies. *Id*. Even though, as in the present case, the municipal advisor in *Bible Believers* was classified as "an advisor," the Court found *Pembaur* controlling. *Id.* at 260-61, citing *Pembaur*, 475 U.S. at 484.

Parma is liable for Dobeck's legal opinions and direction to Connor because state law and municipal custom vested Dobeck with final policymaking authority. Ohio statutes granted Dobeck final policymaking authority for Parma's legal opinions, positions, and strategies. Ohio Rev. Code §§733.51, 733.53, and 733.54.

As the elected chief municipal prosecutor and highest law-department official, Dobeck spoke on the City's behalf when he rendered legal opinions to Parma officials under Ohio Rev. Code §733.54. His opinions were subject to review by no one within Parma's administration—as Dobeck's response to Councilman Crossman's email shows. *See* R.124-18 (Dobeck-Crossman email exchange), PageID#25110-13. Dobeck's determinations were reviewed only by underinformed judicial officers *who were not legally part of the municipality*. Ohio Rev. Code §1901.01; *Foster v. Walsh*, 864 F.2d 416, 418–19 (6th Cir. 1988).

Dobeck, a statutorily designated legal policymaker for Parma, rendered opinions that caused Appellees to violate Novak's constitutional rights because Parma customarily directed officers to conform their actions to the law department's advice—and officers customarily did. Appellees' testimony established that Parma trained and instructed its officers to seek legal "advice" from the law director when they did not understand the law governing their conduct, and officers customarily treated this "advice" as *de facto* instruction. *See*, *e.g.*, R.105-1 (Riley Dep. at 185:7–14, 190:24–192:12), PageID#9730, 9735-37.

Appellees urged that Dobeck was giving advice that Connor was free to ignore. Cincinnati made a similar argument in *Pembaur v. City of Cincinnati*—that the prosecutor was merely giving "legal advice" when he told deputy sheriffs to forcibly enter a clinic to retrieve grand-jury witnesses and that only the county

sheriff could establish policy on these practices. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 (1986). But the Supreme Court rejected this argument because Ohio Rev. Code §309.09(A) (1979) allowed county prosecutors to establish county policy and the officers acted "[p]ursuant to standard office procedure" by "refer[ring] this matter to the Prosecutor and then follow[ing] his instructions." *Id*., 475 U.S. at 484–85. The Cincinnati police department directed officers to seek "advice" from the prosecutor when appropriate. *Id*. The Supreme Court "decline[d] to accept respondent's invitation to overlook this delegation of authority by disingenuously labeling the Prosecutor's clear command mere 'legal advice.'" *Id*. (emphasis added). The Court held that the prosecutor acted as the final decisionmaker for the county, subjecting it to §1983 liability. *Id*.

This Court should likewise give no credence to Connor's attempt to rebrand Dobeck's advice as non-binding under Parma's established custom and practice. Ohio Rev. Code §733.54 (the municipal counterpart to the county-prosecutor statute *Pembaur* analyzed) anointed Dobeck with final policymaking authority for Parma's legal opinions, and Parma instructed officers to rely on those opinions. *Pembaur*'s holding was based on the officer's actions, which followed the custom of relying on the prosecutor's advice. *Pembaur*, 475 U.S. at 484–85. The same holds true here.

This includes Dobeck's opinions that the facts presented probable cause for a violation of Ohio Rev. Code §2909.04(B) and his directions to Connor based on that opinion. R.120-1 (Dobeck Dep. at 24:8–9, 25:1–3), PageID#23217, 23218. *See also id*. at 47:5–15, 50:3–7, 133:9–12, PageID#23240, 23243, 23326. Although Dobeck characterized his probable-cause determination as a "prescreen" because judicial officers then make decisions on warrants, Dobeck's decision on probable cause is the final word for Parma because he is its highest legal official. *Id*. at 133:9–17, PageID#23326. His word choices illustrate his authority: "I determine probable cause" (*Id*. at 47:8, PageID#23240); "I made a determination that the elements of disrupting public service, there was at least a finding of probable cause" (*Id*. at 49:19–21, PageID#23242); "Probable cause is a determination made in this case initially by me." *Id.* at 133:9–10, PageID#23326.

Appellees improperly attempt to deflect the Court's attention from their own policymaking authority by urging that Magistrate Fink—who issued a warrant because Connor provided false and misleading information—made the final decision for Parma. Parma Municipal Court's judicial officers are not City of Parma officials because, under Ohio law, the Parma Municipal Court is a separate, *state* entity. Ohio Rev. Code §1901.01. This Court agrees. *See*, *e.g*., *Mancini v. City of Garfield Heights*, 37 F.3d 1499 (6th Cir. 1994) (Ohio municipality cannot be liable for acts of municipal court because these courts are "part of the state court

system and not subject to the supervision of municipal governments); *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1988) (Ohio municipal courts are separate from municipalities where they sit and are not subject to city-council supervision.

But one unreported Sixth Circuit case, *Liptak v. City of Niles, Ohio*, Case No. 98-4078, 198 F.3d 246 (Table) at *5–7 (6th Cir. 1999), instructs that Parma could be liable for its municipal magistrate's decisionmaking. In *Liptak*, this Court held that an Ohio municipal judge who issued an arrest warrant acted as a final municipal policymaker on the issue of probable cause. *See also Mechler v. Hodges*, Case No. C-1-02-948, 2005 WL 1406102 at *17–18 (S.D. Ohio Jun. 15, 2005) (holding that municipal magistrate who approved arrest warrant was final municipal decisionmaker on whether warrant should be issued).

B. Parma had a custom, pattern, practice, and policy of refusing to distinguish between protected and unprotected speech in criminal investigations and violating First Amendment free-speech rights.

Parma is also liable for its officials' custom, pattern, practice, and policy of indifference to protected speech in criminal investigations and leveraging cries of "disruption" or "obstruction of official business" to effect this end, as a bevy of prior cases and incidents shows. In *City of Parma v. Campbell*, the court reversed convictions for a criminal defendant who supposedly obstructed official business because convictions for "boisterous statements to police" would "run afoul of constitutionally protected right of freedom of speech." R.124-22 (*City of Parma v.*

Campbell, 2001 WL 1352657 (Ohio Ct. App. Nov. 1, 2001)), PageID#25190-93. Parma police threatened criminal charges for "disrupting public services" against local high-school students who expressed fear on Facebook about rumors of school shootings. R.124-23 (Parma police incident report), PageID#25198-206. In June 2014, the Parma police arrested Douglas Odolecki for a sign warning drivers of an OVI checkpoint with the words "Checkpoint Ahead—Turn Now" after telling him to remove the words "Turn Now" based on the law department's advice, which he refused to do. The Ohio appeals court reversed because Odolecki had engaged in protected speech. R.124-24 *(City of Parma v. Odolecki*, 2017 WL 2291601 at *1 (Ohio App. 8th Dist. May 25, 2017)), PageID#25226-35.

In this case, Parma should have known better because Dobeck and his law department had repeatedly briefed First Amendment and speech-related issues. *See* R.124-25 (*City of Parma v. Fonte*, App. Br., 2013 WL 7873409 at 7 (Ohio App. 8th Dist. May 6, 2013) (briefing when speech loses protection)), PageID#25236-54; R.124-20 (*Bunch v. City of Parma*, No. 06-CV-2207, Compl. at 37 (N.D. Ohio Sep. 13, 2006) (alleging that Parma has "overt disregard for the citizens"); and Ans., *Bunch v. City of Parma*, No. 06-CV-2207 (N.D. Ohio Jan. 18, 2007) (admitting that "Parma has a duty to train its police officers regarding constitutional law)), PageID#25142-59; R.124-21 (*Quinn's Auto v. City of Parma*, No. 96-CV-620, 2006 WL 5244368 at *5 (N.D. Ohio Oct. 2, 2006) (involving First

Amendment violation)), PageID#25160-89; R.124-26 (*City of Parma v. Kline*, 8th Dist., Nos. 74617, 74618, 1999 WL 820467 (Oct. 14, 1999) (various "obstruction of official business" and "failure to obey police order" issues" implicating defendant's speech)), PageID#25255-59; *Bagi v. City of Parma*, Case No. 1:14-CV-558, 2016 WL 4418094 (N.D. Ohio Aug. 19, 2016) (briefing First Amendment-retaliation issues), *see id*. at *13–15). Indeed, the law department, with outside counsel, was briefing *Bagi* during the March 2016 Novak investigation.

C. Parma should have trained its officers that pure speech is not a crime unless it falls into one of several specific exceptions from constitutional protection.

A municipality is liable under §1983 on a failure-to-train claim if it is deliberately indifferent because "a municipal actor disregarded a known or obvious consequence of his action." *Jackson v. City of Cleveland*, 925 F.3d 793, 836 (6th Cir. 2019), citing *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997). Evidence includes either (1) "prior instances of unconstitutional conduct demonstrating that the City had notice that the training was deficient and likely to cause injury but ignored it" *or* (2) "evidence of a single violation of federal rights, accompanied by a showing that the City had failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." *Id*., citing *Campbell v. City of Springboro*, 700 F.3d 779, 794 (6th Cir. 2012).

This Court has held that "evidence pointing to a City's failure to provide *any* training on key duties with direct impact on the constitutional rights of citizens" is enough to survive summary judgment on a *Monell* failure-to-train claim. *Gregory v. City of Louisville*, 444 F.3d 725, 754 (6th Cir. 2006) (emphasis in original), citing *Sell v. City of Columbus*, 47 F. App'x 685, 694-95 (6th Cir. 2002). Parma's admitted failure to train its officers on basic First Amendment free-speech issues created "obvious potential" for exactly the sort of constitutional-rights violations its officers inflicted on Novak.

Several decisions by this Court show that summary judgment is improper on failure-to train claims when the lack of training had predictable results. *See Jackson*, 925 F.3d at 836 (reversing summary judgment and rejecting Cleveland's argument that its on-the-job training was sufficient); *Wright v. City of Euclid, Ohio*, 962 F.3d 852, 881 (6th Cir. 2020) (reversing summary judgment because a reasonable juror could find Euclid's "practical training exercises" deficient); *Gregory v. City of Louisville*, 444 F.3d 725, 754 (6th Cir. 2006) (city's custom of failing to train established "the requisite fault on the part of the City and the causal connection to the constitutional violations experienced by Plaintiff"); *see also Thomer v. City of Cincinnati*, Case No. 1:13-CV-340, 2013 WL 6175585 at *4 (S.D. Ohio Nov. 22, 2013) (denying dismissal because "officers' [need] to distinguish legitimate free speech from disorderly conduct is obvious" and

training's inadequacy was "very likely to result in the violation of constitutional rights").

Here, Parma's custom of failing to train on *any* First Amendment free-speech issues aside from protests dictates the same result. Dealing with speech—including deciding whether it's protected—is "a significant component of police duties with obvious consequences for criminal defendants." This is especially true because Dobeck has admitted in pleadings that "the City of Parma has a duty to train its police officers regarding constitutional law." *See* R.124-20 (Answ., *Bunch v. City of Parma*, No. 06-cv-2207, at 37 (N.D. Ohio Jan. 18, 2007)), PageID#25142-59; *see also* R.124-21 (Mot. Summ. J., *Quinn's Auto v. City of Parma*, Case No. 96-cv-620, 2006 WL 5244368 at 5 (N.D. Ohio Oct. 2, 2006)), PageID#25160-89. But Appellees insist they spotted no First Amendment issues, despite recognizing that Novak's posts were a joke. *See*, *e.g.*, R.107-1 (Connor Dep. at 187:8–20), PageID#19022; R.105-1 (Riley Dep. at 135:14–16), PageID#9680.

The City was responsible for its officers' ignorance of Novak's clearly established constitutional rights, and for that it must be held to account.

VI. The district court erroneously granted summary judgment on Novak's state-law claims.

While the district court correctly observes that Novak's various state-law claims depend on a showing that Appellees acted with "malicious purpose, in bad

faith, of in a wanton or reckless manner," R.128, PageID#25729, it fails to acknowledge the ample record evidence that this is exactly how Appellees behaved. The only support the court offers for its "no-malice" conclusion is its opinion that Connor "was not obligated to explain to Magistrate Fink or the grand jury that Novak viewed his Facebook page as a parody protected by the first Amendment." *Id*. But as thoroughly discussed above, Novak identified numerous occasions on which Connor affirmatively misled Dobeck, the reviewing judges, the grand jury, and the court in Novak's criminal trial—and numerous other occasions on which he withheld critical information from them that could easily have produced a different outcome. All these acts and omissions evidence a malicious state of mind. At a minimum, issues of material fact exist regarding the motives and intent from which Appellees acted.

CONCLUSION

The district court's erroneous probable-cause determination infected its rulings on nearly all of Novak's claims. As identified by the district court, claims 1, 3, 6, 7–9, 11, 16, 18b, and 27 fell victim to this reversible error. R.128 (Opinion), PageID#25700-25702. Novak's municipal liability and state-law claims also survive for the independent reasons explained above. For all these reasons, this Court should reverse the district court's entry of summary judgment for Appellees and its denial of Novak's motion for partial summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 13,703 words (exclusive of items not counted under 6 Cir. R. 32(b)(1)), as determined by the word-count function of the word-processing system used to prepare the document, and thus complies with the type-volume limitation of Appellate Rule 32(a)(7)(B)(i) (subject to the expanded word count requested *instanter*).

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CERTIFICATE OF SERVICE

I certify that on July 30, 2021, I filed the above document electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit. The Court's ECF system will automatically generate and send by e-mail a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

/s/Subodh Chandra
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ADDENDUM
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Doc No.	Document Title	PageID#	Date Filed
6-1	Novak criminal-trial transcript	1304-1623	10/18/2017
86-1	Transcript of grand-jury testimony of Defendant Thomas Connor	4429-4438	8/5/2020
92-1	Deposition of Edward Fink	5078-5149	11/12/2020
100	Defendant City of Parma's motion for summary judgment	8986-8987	11/13/2020
101	Defendants Connor's and Riley's motion for summary judgment	9227-9228	11/13/2020
102-3	Manual filing of recordings of calls to Parma Police Department	9328	11/13/2020
102-4	Parma deposition (Samijlenko) excerpts	9329-9371	11/13/2020
102-9	Docket for buccal-swab case	9446-9473	11/13/2020
105-1	Deposition of Kevin Riley	9545-9863	11/16/2020
105-3	Facebook business record	9871-12666	11/16/2020
106-1	Deposition of James Blair	12812-12845	11/16/2020
106-2	Parma Deposition (Dobeck)	12846-12990	11/16/2020
106-3	Deposition of Walter Samijlenko	12991-12998	11/16/2020
107-1	Deposition of Thomas Connor	18835-19264	11/16/2020
107-12	Connor's categorization of dispatch calls	22550	11/16/2020
107-25	Connor's report	22735-22736	11/16/2020
108-1	Deposition of Judge Deanna O'Donnell	22738-22927	11/17/2020
120-1	Deposition of Timothy Dobeck	23193-23520	12/22/2020
121-1	Deposition of Anthony Novak	23667-24166	12/22/2020
123-8	Appellees' responses to first set of requests for admissions	24561-24594	12/22/2020
123-12	Transcripts of calls to dispatch	24643-24656	12/22/2020
124-1	Facebook business record excerpts	24833-24838	12/22/2020

124-2	Screenshots of Novak's parody posts	24839-24845	12/22/2020
124-5	Emails from Connor to Facebook	24931-24937	12/22/2020
124-6	Facebook search-warrant documents	24938-24949	12/22/2020
124-18	Crossman-Dobeck email exchange	25110-25113	12/22/2020
124-20	Exhibit 20 to Novak's opposition to City of Parma's motion for summary judgment	25142-25159	12/22/2020
124-21	Exhibit 21 to Novak's opposition to City of Parma's motion for summary judgment	25160-25189	12/22/2020
124-22	Exhibit 22 to Novak's opposition to City of Parma's motion for summary judgment	25190-25193	12/22/2020
124-23	Parma Police incident report	25194-25225	12/22/2020
124-24	Exhibit 24 to Novak's opposition to City of Parma's motion for summary judgment	25226-25235	12/22/2020
124-25	Exhibit 25 to Novak's opposition to City of Parma's motion for summary judgment	25236-25254	12/22/2020
124-26	Exhibit 26 to Novak's opposition to City of Parma's motion for summary judgment	25255-25259	12/22/2020
128	Opinion and order	25693-25730	2/24/2021
129	Judgment entering summary judgment in favor of Defendants and against Plaintiff	25731	2/24/2021
132	Novak's notice of appeal	25774	3/11/2021