

In The
United States Court Of Appeals
For The Fourth Circuit

ANGELIA NIKOLE JAMES,
Plaintiff - Appellant,

v.

CITY OF MONROE, a North Carolina Municipal Corporation;
BOBBY G. KILGORE; MARION HOLLOWAY;
GARY ANDERSON; FREDDIE GORDON; JAMES KERR;
JULIA B. THOMPSON; LYNN KEZIAH,
Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
AT CHARLOTTE

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by all parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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No. 22-1857 Caption: James v. City of Monroe, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Angelia Nikole James
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/ Bo CaudillDate: 08/29/2022Counsel for: Appellant Angelia Nikole James

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INTRODUCTION

The City Council (“Council”)¹ of the City of Monroe (“City”) removed Plaintiff-Appellant Angelia Nikole James from her elected office of City Councilmember through a rarely used common law process called amotion. Its act was premised on James’s supposed violation of a Code of Ethics that is so overbroad and vague that the City did not defend it below. Its act was likewise in retaliation for protected activity—James’s statements to police officers and the press—that offended the Council.

James asked the district court to enjoin the City from enforcing her removal. The district court denied her motion. The Court should reverse.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367(a). The district court entered its order denying James’s second motion for preliminary injunction on August 10, 2022. (JA574).

James appealed from the district court’s August 10 order on August 11, 2022. (JA602). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

¹ The non-municipal Defendants are all current or former members of the Council who voted to initiate removal proceedings, remove James, or both. (JA24-25).

ISSUES PRESENTED²

- I. The Code of Ethics applicable to City Councilmembers in Monroe requires them to behave with respect and to set a good example. The Council argued and concluded that James should be removed for violating its Code of Ethics. Is James likely to succeed in proving that the Council removed her for violating an unconstitutionally vague and overbroad Code of Ethics?
- II. Is James likely to prove that the Council retaliated against her for protected activity when the Council expressly cited James's critical statements to the press or police as grounds for the initiation of removal proceedings and, ultimately, her removal?
- III. Will James suffer irreparable harm if Defendants are permitted to exclude her from office and do the equities and public interest favor an injunction?

² The district court concluded that James failed to show likelihood of success on her equal protection claim, due process claim, and her petition for writ of certiorari. James focuses only on her § 1983 overbreadth, vagueness, and retaliation claims in this appeal.

STATEMENT OF CASE

I. The City of Monroe and City Council.

The City of Monroe has a Council-Manager form of government. (JA34). The Council sets City policies and the City budget. (JA34). The City Manager hires and supervises the heads of the City's Departments, including the Police Chief. (JA136).

The Council has adopted a Code of Ethics. (JA143). The Code of Ethics requires Councilmembers to "act with integrity" including by "[b]ehaving consistently and with respect toward everyone with whom they interact;" to "act as the especially responsible citizens whom others can trust and respect;" and to "set a good example for others in the community." (JA144-145).

James was elected to the Council in November 2019. (JA342). She took office in December 2019 for a four-year term. (JA342).

In 2021, James ran for mayor. (JA406). Defendant Marion Holloway ran against her. (JA406). The events that led to James's removal occurred during the mayoral campaign.

II. The September 9 Events.³

On September 9, 2021, James goes to the Fairfield Inn and Suites where she hopes to get a room at the end of a bizarre day.⁴ (JA416). She begins hearing God tell her there are felons at the hotel. (JA417).

James questions hotel patrons. (JA418). Hotel staff call the police. (JA575).

The police arrive and speak with James. (JA418). They recognize her as a City Councilmember. (JA223). James tells them there are felons at the hotel and asks them to search. (JA227). The police do not search. (JA227-229). They know—because they are trained to know—that James is experiencing a mental health episode. (JA133, JA141, JA196, JA299, JA241, JA258, JA262, JA385).

³ Some of the events that led to James's removal occurred in the early morning hours of September 10. For ease of reference, this brief refers to those events collectively as the September 9 events.

⁴ James engaged in a series of strange behaviors that day. For example, James woke up believing God was telling her to buy a nearby house that was already under contract. James spent much of the day attempting to view and potentially make an offer on the house—her conduct led her to argue with her husband. James went to the Fairfield Inn to avoid that argument. (JA408-416).

James goes with the police to the parking lot. (JA235). They wait for James's husband to come pick her up. (JA243). While they wait, James tells certain police officers they will be or have been promoted. (JA239). She tells others they will be or have been fired. (JA237). She tells others they will be or have been demoted. (JA237). All the police know—because they are trained to know⁵—James cannot promote, fire, or demote police officers. (JA291). But they play along. (JA239, JA263).

James's statements upset some police officers. Captain Rhett Bolen takes umbrage with James's insistence that he is only a captain "for now." (JA274). Captain Bolen knows—because he is trained to know—James is suffering from a mental health episode. (JA297-304). He knows he will make it worse if he maintains continuous eye contact with James. (JA303). He stares at her anyway. (JA303). James asks him to stop talking to her. (JA302). Captain Bolen forces discussion. (JA303).

Captain Bolen then asks James if she wants to take his badge. James says "no." He asks her again if she wants to take his badge. She asks if he wants her to take it. Captain Bolen asks a third time if James

⁵ Police are required to review the City Handbook and City policies concerning their chain of command. (JA186). The Council does not supervise police officers. (JA136).

wants to take his badge. James reaches for his badge. Captain Bolen slaps James's hand away and tells her "You ain't taking nothing." (JA287-288).

James's husband finally arrives. (JA242). James collapses onto the parking lot asphalt, crying. (JA39). She leaves with her husband. (JA39).

At home, James and her husband argue. (JA39). James calls Lieutenant Holt, a police officer James knows and likes. (JA39). She asks Holt to come to her house. (JA39). Holt heads to James but is involved in a traffic accident. (JA39). Three different officers—Officer Birchmore, Sergeant Craig, and Lieutenant Brummer—respond to James's home instead. (JA39).

James continues to tell the officers that she has promoted, fired, or demoted them. James claims that she fired Chief Gilliard and replaced him.⁶ (JA39). The officers know that is not true. (JA183, JA264, JA294). They play along. (JA239, JA263).

⁶ Earlier that day, James called Chief Gilliard and told him he should retire in May 2022. (JA169).

James begins exhibiting symptoms of a heart attack. (JA322). The police call EMS. (JA322). James is not having a heart attack, but EMS believes something is wrong. (JA39). They ask her to ride with them to the hospital. (JA39). James initially refuses but decides to go with them to check on Holt at the hospital. (JA39).

When James arrives at the hospital, she is loud and disruptive. (JA367). Officer Aycoth sees her and tries to move her into a private room. (JA368). James resists and grabs Officer Aycoth's facemask. (JA369). The facemask breaks. (JA369).

James is sedated and involuntarily committed. (JA577). Doctors diagnose her with "acute psychosis." (JA577).

On September 10, James leaves the hospital feeling much better. Soon after, reporters begin contacting her. They want to know about what happened the night before. (JA41).

III. James's Post-September 9 Statements and the Council's Reaction.

In the days and weeks after September 9, James talks to the press. (JA41-42). She tells reporters that the police lied about some of the September 9 events. (JA42). She tells the press that Captain Bolen was rude to her. (JA44).

James also expresses her belief that her political opponents—Holloway, Kerr, Thompson, and Anderson—were using September 9 to distract voters from the real issues. (JA44). James discovered that Holloway’s business benefited from a contract with the city. (JA43). James believed the contract was illegal. (JA43).

On September 28, 2021, the Council votes to censure James for the September 9 events. (JA44-45). The censure makes numerous fact findings and concludes that James violated the Code of Ethics. (JA45).

On October 20, 2021, several officers involved in the September 9 events file human resources complaints against James. (JA45). The officers complain about James’s statements to the media. (JA179, JA342, JA339). They claim she is maligning them. (JA179, JA339). They claim she is calling them bad police officers.

On November 9, 2021, the Council adopts Resolution R-2021-89 (the “Amotion Resolution”). (JA147). The Amotion Resolution directs “[t]he City Attorney . . . to prepare a petition in amotion to remove [James] from office.” (JA147). The Amotion Resolution asks the City Attorney:

to ensure that the petition incorporates information related to the September 9-10, 2021 incidents involving

[James], [Covid-19 issues], press conferences involving [James] following the September 9-10, 2021 incidents, [and] claims raised by members of the City of Monroe Police Department on or before October 20, 2021.

(JA147).

Defendant Gordon explained on the record his reasoning for the Amotion Resolution. (JA457-459). He said the resolution was necessary because James failed to apologize to several people and because “today, instead of showing any remorse, [James] used social media to demand that her supporters” come to the meeting and voice their support. (JA458-459).

On December 13, 2021, the City adopts its “Rules of Procedure for Amotion Hearing” (the “Amotion Rules”). (JA148). The Amotion Rules provide that the City cannot remove James without a finding that she engaged in misconduct in office and just cause exists for her removal. (JA157). The Amotion Rules provided that just cause exists if, *inter alia*, James engaged in noncriminal misconduct in office.⁷ (JA157).

⁷ The City proceeded only on the theory that James engaged in noncriminal misconduct in office. (JA17). The City did not pursue any other ground for removal. (JA113).

IV. Amotion Proceedings.

The Amotion Rules split proceedings into two phases: a hearing before a hearing officer (the “Evidentiary Phase”); and a hearing before the Council (the “Council Phase”). (JA148-159).

In January 2022, the City served its Petition in Amotion (“Amotion Petition”) on James. (JA17). The Amotion Petition said James “violated the City Council’s Code of Ethics by . . . not ‘[b]ehaving consistently and with respect toward everyone with whom [she] interact[s].’ James “further violated the City’s Code of Ethics by failing to ‘act as the especially responsible citizen[] whom others can trust and respect,’ and by failing to set a good example for others.” (JA17). The Amotion Petition asserted these were grounds to remove James from elected office. (JA17).

The Evidentiary Phase took place on January 27 and January 28, 2022. (JA160, JA431). During the Evidentiary Phase, the City argued James committed noncriminal misconduct in office by assaulting a police officer (Aycoth) and violating the City Charter and Code of Ethics.⁸

⁸ James was not and has never been charged with any crime, let alone an assault on a police officer, related to the September 9 events. (JA202).

On March 25, 2022, the Hearing Officer issued a report (the “H.O. Report”), concluding that cause existed to remove James. (JA129). The H.O. Report found that James assaulted Officer Aycoth, violated the City Charter and Code of Ethics by purporting to fire or promote police officers, and falsely reported to police that there were felons at the hotel. (JA115).

The Council Phase occurred on April 7, 2022. (JA461). The Hearing Officer presented her report, which the Council adopted. (JA543-545). Before voting to remove James, Defendant Thompson noted: “We all took an oath of office and part of that oath was to uphold the conduct and ethics of the city charter and the City of Monroe. And if that’s violated, there are consequences to that.”⁹ (JA542). The vote to remove James was unanimous (excluding James, who was involuntarily excused by motion). (JA545). It took effect immediately. (JA545).

⁹ The City Charter does not impose any ethical requirements. The word “ethics” does not so much as appear in the Charter. Thompson could only have been referring to the Code of Ethics.

V. This Action.

On April 23, 2022, James filed this action. (JA5). Her verified complaint alleged § 1983 free-speech retaliation claims and equal protection claims, declaratory judgment claims, and a state law petition for writ of certiorari.

On April 24, 2022, James moved for a temporary restraining order and preliminary injunction to enjoin enforcement of the removal vote. (JA6). On May 4, 2022, the district court heard and denied that motion, but enjoined the Council from filling James's seat until the Court could hear and decide James's motion for preliminary injunction. (JA7).

On May 20, 2022, James amended her complaint to include § 1983 claims for overbreadth and vagueness related to the Code of Ethics. (JA19). She then filed a second motion for preliminary injunction. (JA572).

On June 10, 2022, the district court heard arguments on James's motion. (JA8-9). During argument, Defendants did not defend the Code of Ethics' constitutionality. (JA592). Instead, they argued that the Council did not rely on the unconstitutional provisions in the Code of Ethics when it removed James from office. (JA592).

VI. The district court's order.

On August 10, 2022, the district court denied James's second motion for preliminary injunction. (JA600-601). As to James's § 1983 retaliation claims, the district court found that James either did not engage in protected speech or that her protected speech did not cause her removal. (JA585-590). Similarly, the district court rejected James's claims for overbreadth and vagueness, finding that the Council did not rely on any vague or overbroad provision of the Code of Ethics when it removed James from office. (JA590-594).

In concluding that James failed to show causation—on each of her retaliation, overbreadth, and vagueness claims—the district court pointed to the Council's supposed reliance on “non-protected” activity as grounds for removal. (JA592-594). The district court made no finding as to whether James's violation of the overbroad or vague Code, or James's protected speech, was a substantial or motivating factor in the Council's decision to remove James, and did not shift the burden of proof to the City to show that it would have made the decision in the absence of James's protected activity.

On August 11, 2022, James appealed the denial of her second motion for preliminary injunction. (JA602). The Court should reverse.

SUMMARY OF ARGUMENT

The district court abused its discretion when it denied James's second motion for preliminary injunction. The Court should reverse.

James has made a clear showing that she will succeed on her § 1983 overbreadth and vagueness claims. The Code of Ethics is unconstitutionally vague and overbroad; Defendants do not argue otherwise. (JA592).

Instead, Defendants claim the Code of Ethics's overbroad and vague sections did not cause James's removal. (JA592). That is incorrect.

From start to finish in the removal proceedings, Defendants relied on specific parts of the Code of Ethics that pose serious vagueness and overbreadth issues, provisions that require James to, among other things, behave "with respect" and "set a good example." (JA144, JA145). Such provisions are vague, overbroad, and cannot serve as the basis for an elected official's removal from office.

James has similarly made a clear showing that she will succeed on her § 1983 retaliation claims. James was engaged in protected speech

activity on and after September 9. On September 9, James criticized police officers by suggesting they should be, would be, or had been fired, promoted, or demoted. (JA237-239).

After September 9, James made statements to the press that questioned the police version of the September 9 events, criticized Captain Bolen's conduct, criticized James's political opponents, addressed the upcoming election, and called public attention to a potentially illegal City contract. (JA41-44).

The Council retaliated against James for that protected activity. The Council initiated removal proceedings against James for her press conferences. (JA147). It later voted to remove her for her September 9 criticism of police, which it claimed violated its Code of Ethics. (JA570).

The district court concluded that James failed to show she was engaged in protected speech activity. (JA586-587, JA589-590). That is legal error and an abuse of discretion.

Speech that is critical of public officials, including police, is the paradigm of protected speech. That some of the speech took the form of rude, sarcastic remarks is irrelevant to its protected status.

James has a right to criticize police and question her political opponents. She has the right to rally her supporters during an electoral campaign. The Council cannot punish her for those things—but that is exactly what the Council did, both by initiating removal proceedings and by voting to remove James from office.

The district court also concluded that James failed to show that her protected activity caused the Council's adverse action. That is also an abuse of discretion. The burdens at the preliminary injunction stage track the burdens at trial.

Here, James's burden was to show that her protected activity was a substantial or motivating factor for the Council's adverse action. She met that burden. The Motion Resolution and the Removal Order's contents *per se* indicate retaliatory animus. Since James met her burden, the burden shifts to Defendants to show by a preponderance that the Council would have made the same decisions absent James's protected activity. The district court never conducted that analysis—if it had, Defendants would not have succeeded.

Through this case, the Court can reemphasize the stringent protection afforded to core constitutional speech. It can ensure that a

member of the political minority within the governing body of a municipality cannot be removed on the majority's whim based on the politically motivated, selective enforcement of a vague, overbroad, ethical code. To do those things, the Court must reverse.

ARGUMENT

I. STANDARD OF REVIEW

This Court “review[s] a district court’s denial of a preliminary injunction for abuse of discretion, reviewing factual findings for clear error and legal conclusions de novo.” *Leaders of a Beautiful Struggle v. Baltimore Police Dep’t*, 2 F.4th 330, 339 (4th Cir. 2021) (en banc). “A court abuses its discretion in denying preliminary injunctive relief when it ‘rest[s] its decision on clearly erroneous finding of a material fact, or misapprehend[s] the law with respect to underlying issues in litigation.” *Id.* (quoting *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 188 (4th Cir. 2013) (modifications in original)).

The district court erred when it denied James’s second motion for preliminary injunction. To obtain an injunction, James had to show that (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of

the equities tips in her favor, and (4) an injunction is in the public interest. *Centro Tepeyac*, 722 F.3d at 188. James satisfied all four prerequisites. The Court should reverse.

II. JAMES IS LIKELY TO SUCCEED ON THE MERITS OF HER § 1983 OVERBREADTH, VAGUENESS, AND RETALIATION CLAIMS.

To show likelihood of success, “[p]laintiffs need not establish a ‘certainty of success,’” but need only “make a clear showing that [they are] likely to succeed at trial.” *Roe v. U.S. Dept. of Def.*, 947 F.3d 207, 219 (4th Cir. 2020) (quoting *Di Biase v. SPX Corp.*, 872 F.2d 224, 230 (4th Cir. 2017)). James made a clear showing that she is likely to succeed on her § 1983 claims for overbreadth, vagueness, and retaliation. To succeed on a § 1983 claim, a plaintiff must prove that a government actor’s official conduct deprived the plaintiff of a federal right. 42 U.S.C. § 1983. In this case, James will prove that Defendants deprived her of, at least, her federal rights to free speech and due process.

A. James is likely to succeed on her § 1983 Overbreadth and Vagueness Claims.

James made a clear showing that Defendants used an unconstitutionally vague and overbroad ordinance—the Code of Ethics—as grounds to remove her from office. Defendants’ official

conduct thereby deprived James of her rights to free speech and due process.

The Code of Ethics contains at least three unconstitutionally vague and overbroad provisions (the “Challenged Sections”): Section 2 requires Councilmembers to “act with integrity” including by “[b]ehaving consistently and with respect toward everyone with whom they interact,” (JA144); Section 4 requires Councilmembers to “act as the especially responsible citizens whom others can trust and respect,” (JA145); and Section 4 also requires Councilmembers to “set a good example for others in the community.” (JA145). “Defendants apparently do not dispute that the City’s Code of Ethics is overbroad and vague.” (JA592). They could not succeed even if they did.

1. The Code of Ethics is unconstitutionally overbroad.

The Challenged Sections are overbroad. A law is overbroad if it “reaches a substantial amount of constitutionally protected conduct” and is not narrowly drawn to serve an important governmental interest. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).

By requiring councilmembers to behave “with respect” and “set a good example,” the Code of Ethics reaches an endless array of protected

speech. *Cf. Hill*, 482 U.S. at 461-62 (concluding an ordinance prohibiting “speech that ‘in any manner . . . interrupt[s]’ an officer” was overbroad); *see also Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974) (invalidating an ordinance as overbroad where it prohibited “the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty”).

The Code of Ethics is not narrowly tailored. It was enacted pursuant to a state statute that requires municipalities to adopt an ethical code. *See* N.C. Gen. Stat. § 160A-86(b).¹⁰ But the Code of Ethics goes well beyond the statute’s requirements to include provisions that purport to regulate virtually every interaction that a Councilmember may have with anyone.

The Challenged Sections are overbroad in violation of the First and Fourteenth Amendments. The Council could not constitutionally use them to remove James from office, but that is what it did.

¹⁰ Section 160A-86(b) of the N.C. General Statutes requires only that a municipal code of ethics “address” the need to (1) obey all applicable laws; (2) uphold integrity and independence of the board member’s office; (3) avoid impropriety in the exercise of the board member’s official duties; (4) faithfully perform the duties of the office; and (5) conduct the affairs of the governing board in an open and public manner.

2. The Code of Ethics is unconstitutionally vague.

The Challenged Sections are unconstitutionally vague. A law is unconstitutionally vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Nat’l Dairy Prod. Corp.*, 372 U.S. 29, 32-33 (1963).

In *National Endowment for the Arts v. Finley*, the Supreme Court rejected a vagueness challenge to a statute that permitted the NEA to take “general standards of decency and respect for [] diverse beliefs and values” into consideration. 524 U.S. 569, 589 (1998). But the Court noted that such “terms are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns.” *Id.*

Here, Defendants have weaponized the requirement that Councilmembers show and deserve respect to justify the removal of an elected Councilmember. (JA514) (James “violated the city charter, city code of ethics and the notions of human decency and how we behave in society.”).

In such circumstances, it is the courts' duty to declare the statute unconstitutionally vague. *Cf. Tucson Woman's Clinic v. Eden*, 371 F.3d 1173, 1180 (9th Cir. 2004) ("Last, the regulation requiring physicians to ensure that a patient is . . . treated with consideration, respect, and full recognition of the patient's dignity and individuality, is unconstitutionally vague.").

3. Defendants used the Code of Ethics to Remove James.

As noted above, Defendants did not defend the Code of Ethics below. (JA592). Instead, they argued the Council did not rely on the Challenged Sections to remove James. (JA592). The evidence belies that argument. The Removal Order says James was removed for three reasons, listed conjunctively, including violation of the Code of Ethics.

- a. The Removal Order shows that the Council removed James for violating its Code of Ethics.

The Removal Order says James:

engaged in misconduct related to the duties of her office as a Member of City Council, and just cause exists for her removal from City Council due to her committing assault and battery on Officer Aycoth, violating the City Charter and Code of Ethics in purporting to fire, demote and promote Police Officers, and by making multiple false reports to the Police.

(JA570) (emphasis added).

The above-emphasized “and” makes the list of items constituting misconduct conjunctive. The meaning of “and” is contextual—it can mean, among other things, “in addition to,” or “along with,” *Navy Fed. Credit Union v. Ltd. Fin. Servs., LP*, 972 F.3d 344, 357 (4th Cir. 2020). Here, its context shows that “and” means “along with,” for two reasons.

First, the list of misconduct purports to delineate the singular “just cause,” not the plural “just causes.” “When [items] connected by a conjunction . . . are dependent, they must be taken ‘jointly.’” *Id.* (quoting *The Fundamentals of Legal Drafting* § 6.2, at 105 (2d ed. 1986)). Here, because the list describes a singular “cause,” the listed items are best read as conjunctively dependent.

Second, the Removal Order based its conclusions on the H.O. Report, which says, referencing the assault on Aycoth and statements and reports to police, “[v]iewing these three events cumulatively, they constitute misconduct in office and just cause to remove Ms. James.” (JA115).

The H.O. Report’s view—that James’s conduct constituted misconduct in the aggregate—is consistent with the Removal Order’s use of the singular “cause” and the conjunctive “and.” The best interpretation

of the Removal Order, then, is that the Council removed James for three reasons taken together, including violation of the Code of Ethics.

Other conclusions require speculation. The alleged assault on Aycoth and the false reports to police had, at best, only a highly attenuated relationship to James's official duties. It is unclear the Council would have removed James for those actions. James has therefore made a clear showing that the Council removed her for violating the Code of Ethics, including, specifically, its unconstitutionally overbroad and vague provisions.

- b. By implication, the Removal Order refers specifically to the Challenged Sections.

Defendants want to have their cake and eat it too. The City argued from the beginning of removal proceedings through their end that James violated the Challenged Sections. In the Removal Petition, the City expressly accused James of violating the Challenged Sections. (JA17). During the Evidentiary Phase, the City expressly asked Chief Gilliard and James about James's duties under the Challenged Sections, (JA181-182, JA436), and solicited testimony that James violated the Challenged Sections, (JA181-182). At the Council Phase, the City insisted that James "violated the city charter, city code of

ethics and the notions of human decency and how we behave in society.” (JA514).

Now that James has sued them for violating her free speech and due process rights, those same Defendants who unanimously voted to impose “consequences” for violations of “the conduct and ethics of the city charter and the City of Monroe,” do not even defend the Challenged Sections. (JA542). In fact, Defendants claim the Challenged Sections had nothing to do with Defendants’ decision, and that the Council’s decision was based only on other, inoffensive sections of the Charter and Code of Ethics. That is incorrect for two reasons.

First, if the City intended to remove James without reference to the Challenged Sections, it would not have repeatedly based its accusations and arguments on those sections.

Second, the Council could have, but did not, expressly list in the Removal Order the specific Code of Ethics provisions that James’s conduct supposedly violated. Instead, the Removal Order relies on the Code of Ethics in its entirety, including the Challenged Sections. (JA568 (listing several provisions of the Code of Ethics, including the Challenged Sections)).

James made a clear showing that Defendants removed James for violating the Challenged Sections of the Code of Ethics. She is likely to succeed on her § 1983 claims for overbreadth and vagueness.

B. James is likely to Succeed on her § 1983 Retaliation Claims.

To succeed on her § 1983 retaliation claims, James must show (1) she engaged in protected First Amendment activity, (2) Defendants took some action that adversely affected James's First Amendment rights, and (3) there was a causal relationship between James's protected activity and Defendants' conduct. *Martin v. Duffy*, 977 F.3d 294, 299 (4th Cir. 2020). James made a clear showing that she will succeed in proving all three elements.

1. James engaged in protected activity.

- a. James critiqued police officers during the September 9 events by telling them they were or would be fired, demoted, or promoted.

James criticized police on September 9. “[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.” *Hill*, 482 U.S. at 461. “Speech directed at officers may only be censored where it is ‘shown likely to produce a clear and present danger of a serious substantive evil that rises far above public

inconvenience, annoyance, or unrest.” *McCoy v. City of Columbia*, 929 F. Supp. 2d 541, 548 (D.S.C. 2013) (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). Short of that, “a citizen has a First Amendment right to criticize the police without reprisal.” *Webster v. City of New York*, 333 F. Supp. 2d 184, 202 (S.D.N.Y. 2004) (citing *Kerman v. City of New York*, 261 F.3d 229, 242 (2d Cir. 2001)).

The district court held that James’s statements to officers were not protected because they were knowingly or recklessly false. (JA587). That is an oversimplification. True, James could not fire, demote, or promote police. (JA136, JA291). But James was not trying to fire, demote, or promote police. She was, instead, using “you’re fired” and “you’re promoted” as a sarcastic, shorthand substitute for critiquing the officers’ performance.¹¹ (JA229).

The police knew as much on September 9. James told several officers they were or would be fired. None of them turned in their badge

¹¹ Officer Birchmore testified on direct examination that James became “agitated” after officers declined to conduct a search of the Fairfield Inn and he realized she was agitated about officers “not doing [their] jobs right, or [the] inability to do [their] jobs, because [they] weren’t doing the things like a search warrant or searching the hotel and doing things like that.” (JA229).

and headed home. (JA293, JA327). None of them called to check before going into work the next day. (JA293). They knew that James was just responding to her (possibly impaired) perception of the officers' conduct. (JA229).

James is entitled to criticize police. "The First Amendment guarantees the right to criticize the government and government officials." *Trulock v. Freeh*, 275 F.3d 391, 404 (4th Cir. 2001) (citing *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964)). "An elected official enjoys the same First Amendment freedoms as any citizen." *Greenman v. City of Hackensack*, 486 F. Supp. 3d 811, 826 (D.N.J. 2020).

Replace James on September 9 with an ordinary citizen. If that citizen told the police "you're fired," then that statement would be just as false, if taken literally, as when James made it. But the citizen could not be cited for making that statement. Consider also if James went home on September 9 and wrote "Chief Gilliard, You're Fired" on a piece of poster board. The next day, she camps outside of City Hall with her sign. Here again, Chief Gilliard could not cite James.

James's statements to the police on September 9 were protected speech. They were her means of expressing criticism and complement

concerning the police response. As such, the First Amendment shields those statements.

- b. James made constitutionally protected reports on September 9.

“Matters relating to public safety are quintessential matters of public concern.” *Goldstein v. Chestnut Ridge Vol. Fire Co.*, 218 F.3d 337, 353 (4th Cir. 2000) (internal quotation marks omitted). Here, the Council found as fact that “Ms. James told certain police officers [at the Fairfield Inn] that the Black male in the yellow vest, who was visible to the officers and Ms. James near the lobby, either was wanted for murder or was a wanted felon” and that “Ms. James then accused other Black men in the hotel lobby of being felons and instructed the police to arrest them.” (JA555). The statement that a man wanted by law enforcement, possibly for murder, was present at a hotel (i.e., a common carrier where members of the public stay overnight) is a matter relating to public safety and, therefore, of public concern.

The First Amendment protects James’s statement even though James was wrong, because the statement was not knowingly or recklessly false. *See Chappel v. Montgomery Cnty. Fire Protection Dist. No. 1*, 131 F.3d 564, 576 (6th Cir. 1997); *see also Pickering v. Bd. of Educ.*, 391 U.S.

563, 574 (1968) (“[A]bsent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”).

The record does not support the view that James made the reports knowingly or with reckless disregard to their truth. James believed there were felons at the hotel because “God was speaking to me.” (JA417). All persons who were asked, including many of the City’s witnesses, testified that James was experiencing some unknown mental health crisis on September 9. (JA133, JA141, JA196, JA299, JA241, JA258, JA262, JA385).

James was wrong, but she was not intentionally or recklessly wrong. As such, her police reports were protected speech.

- c. James made statements of public concern to the press after September 9.

In September and October 2021, James was a candidate for mayor. (JA428). After September 9, she made several statements to the press. Her statements addressed at least three matters of public concern.

First, James addressed the September 9 events. (JA43-44). By that time, those events had garnered substantial media attention. (JA41,

JA428). They had become a key issue in the mayoral race. (JA41). Second, James criticized the police officers who responded to the scene on September 9. James said police lied about some of the events, (JA42), and at least one officer, Captain Bolen, was rude to her. (JA44). Third, James criticized her political opponents. James accused Defendant Holloway (her opponent in the mayoral race) of having an improper contract with the City. (JA43). James told the press that Holloway and his running mates, Defendants Anderson, Thompson, and Kerr, were trying to use the September 9 events to distract from the issue of Holloway's improper contract. (JA44). James told her supporters not to vote for those candidates. (JA42-43).

James's statements to the press are core protected speech. Instead of being protected, however, James's speech was used as reason to subject her to removal proceedings.

2. The City took adverse action that affected James's rights.

Action is adverse to a plaintiff's free speech rights if the action would chill a person of ordinary firmness in the plaintiff's position from exercising those rights. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005).

The Council took two actions that would chill a politician of ordinary firmness. First, the Council subjected James to removal proceedings. Second, the Council removed James from office.

There are few examples of cases where courts discuss a motion's chilling effect on a politician's speech. At least one court held, however, that "[t]here could be no question that the threat of removal from office would chill any elected official from engaging in protected speech." *Bradshaw v. Salvaggio*, No. SA-20-CV-01168-FB, 2020 U.S. Dist. LEXIS 250873 *18 (W.D. Tex. Oct. 28, 2020).

More decisions exist in the public employment context. Those decisions hold that the mere threat of removal has a sufficient chilling effect. That is, "a threat to terminate, without any accompanying actual loss of a valuable job benefit" *per se* suffices to show adverse action because "a threat of dismissal from public employment is a potent means of inhibiting speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999) ("[A] public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under the First Amendment.").

If the threat of removal suffices, then actual removal must also suffice. That is, both removal itself, and the threat of removal, constitute adverse actions for the purposes of James's retaliation claims.

3. James's protected speech offended the Council and caused the Council's adverse action.
 - a. The Council initiated removal proceedings in retaliation for James's protected activity.

The Amotion Resolution expressly sets down the reasons for its adoption. It directs the City Attorney "to prepare a petition in amotion" and asked that the petition incorporate:

information related to the September 9-10 incidents involving Council Member James, as well as issues related to Covid-19 that the City became aware of on September 14, 2021, press conferences involving Council Member James following the September 9-10, 2021 incidents, claims raised by members of the City of Monroe Police Department on or before October 20, 2021.

(JA147) (emphasis added).

If that is not direct enough, consider the meeting minutes. In them, Defendant Gordon justifies the Amotion Resolution by explaining that "James had not apologized" for her September 9 conduct, and that she had "attack[ed] the employees, colleagues, other elected officials, the citizens or the people [who] work with the City of

Monroe.”¹² (JA458). Gordon concludes his remarks by noting that “[t]oday, instead of showing any remorse, Council Member James used social media to demand that her supporters come in today to speak to Council so that ‘we are NOT having CONTROL in our City.’” (JA458).

The Amotion Resolution’s reference to the officers’ October 20 “claims” also evidences retaliatory intent. Those “claims” included, for example, Sergeant Craig’s human resources complaint. (JA332-333). Sergeant Craig complained about James’s press conferences, her association at those press conferences with a Black activist, her claims that the police did a poor job on September 9, and her view that racism existed within the Monroe Police Department.¹³ (JA339-342, JA350-352).¹⁴

¹² As the September 9 events did not involve any elected official (other than James), Gordon’s comments could only refer to James’s post-September 9 criticism of her political opponents.

¹³ For example, Sergeant Craig was particularly frustrated by James’s comments to the press accusing the police department of racism. (JA342 (“Q. You don’t like being called racist? No. Definitely didn’t when she did it in the television interview.”)).

¹⁴ Chief Gilliard did not file a human resources complaint, but he did testify at the hearing that James’s statements to the press were “tough, because there has been no remorse expressed toward any of the officers who work for me.” (JA179).

These facts draw a direct line between James's protected speech and the initiation of removal proceedings. James has therefore made a clear showing of the necessary causal link.

- b. The Council voted to remove James in retaliation for James's protected activity.

Two of the three reasons cited in the Removal Order for James's removal comprise protected activity: her criticism of police on September 9, and her reports to police on September 9. As such, James has met her burden and made a clear showing of the necessary causal link. The district court misconstrued that burden. It concluded that James was obligated to show that the Council had no other potentially legitimate justification for its adverse action. That was an abuse of discretion.

- c. The district court applied the incorrect causation standard.

The district court failed to use the proper burden-shifting framework. The "same decision test" applies in the public employee context. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977). The "same decision test" is a burden-shifting test: to show retaliation, the employee must prove she was engaged in protected conduct and her conduct was "a substantial factor," or "motivating

factor,” in the adverse decision; if the employee meets that burden, then the burden shifts to the employer to prove by a preponderance that “it would have reached the same decision . . . even in the absence of the protected conduct.” *Id.*

Under *Mt. Healthy*’s burden-shifting framework, James has shown that her protected activity was a substantial factor in the Council’s adverse action. The burden should have shifted to the City to show that it would have made the same decision in the absence of that protected activity.

The district court did not shift the burden. Instead, it hypothesized that the Council could have removed James for assaulting a police officer. (JA587-589).

That speculative conclusion would not satisfy the City’s burden. What the City could have or might have done is not dispositive. The question is: why did the City remove James? The district court read the three reasons listed in the Removal Order and speculated that the City would have removed James for either of those two reasons. That speculative analysis is inconsistent with *Mt. Healthy* and constitutes an abuse of discretion.

The Council has not shown that it would have removed James absent James's protected activity. To the contrary, the Council identified James's speech as a central motivator for the removal proceedings from beginning to end. James therefore made a clear showing she is likely to succeed on the merits of her § 1983 retaliation claims.

III. JAMES WILL SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION AND THE EQUITIES AND PUBLIC INTEREST FAVOR AN INJUNCTION.

Without an injunction, James will lose the right to participate in the conduct of City business. Such loss constitutes a continuing deprivation of James's free speech rights. *See, e.g., Miller v. Hull*, 878 F.3d 523, 532 (1st Cir. 1989) (“[W]e have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment.”).

That loss is, moreover, irreparable. “In the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim” because the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Centro Tepeyac*, 722 F.3d at 191.

The balance of the equities favors an injunction. A city “is in no way harmed by issuance of a preliminary injunction which prevents the [city] from enforcing restrictions likely to be found unconstitutional.” *Id.* “If anything, the system is improved by such an injunction.” *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). “[U]pholding constitutional rights,” moreover, “surely serves the public interest.” *Id.*

Thus, James will suffer irreparable harm without an injunction and the equities and public interest favor an injunction.

CONCLUSION

The Council removed James from office for unconstitutional reasons. Its act undermines not just James’s free speech and due process rights, but the free speech and due process rights of the City of Monroe’s electorate. James should have received an injunction to mitigate that harm to her and the public, but the district court denied it. This Court should reverse.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Angelia Nikole James respectfully requests oral argument in this case and submits that oral argument would assist the Court’s consideration given the complexity and history of the above-

captioned appeal and the important constitutional law issues presented.

This 18th day of October, 2022.

Respectfully,



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