No. 22-1857

In the United States Court of Appeals for the Fourth Circuit

ANGELIA NIKOLE JAMES,

Plaintiff-Appellant,

v.

CITY OF MONROE, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina

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November 17, 2022

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 22-1857 Caption: James v. City of Monroe, et al.

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City of Monroe, Bobby G. Kilgore, Marion Holloway, Gary Anderson, Freddie Gordon, James Kerr
(name of party/amicus)

Julia B. Thompson, and Lynn Keziah

who are appellees, make 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/ N. Cosmo Zinkow Date: November 17, 2022

Counsel for: Appellees

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) from a decision of the district court denying a motion for preliminary injunction. *Atkins v. Scott*, 597 F.2d 872, 873 (4th Cir. 1979).

ISSUE PRESENTED

While James was a member of the Monroe City Council, she engaged in misconduct in office: She assaulted a police officer, ordered police to arrest innocent people, and purported to fire the chief of police and other police officers. After a two-day evidentiary hearing, during which James admitted to the above conduct, she was removed from the City Council.

James responded by challenging certain provisions of the City's Code of Ethics on assorted constitutional theories and moving for a preliminary injunction to reinstate her on the City Council. In denying the motion, a decision that is reviewable for abuse of discretion, the district court found that James was unlikely to succeed on her claims because unchallenged provisions of the City's Code of Ethics and City Charter warranted her removal.

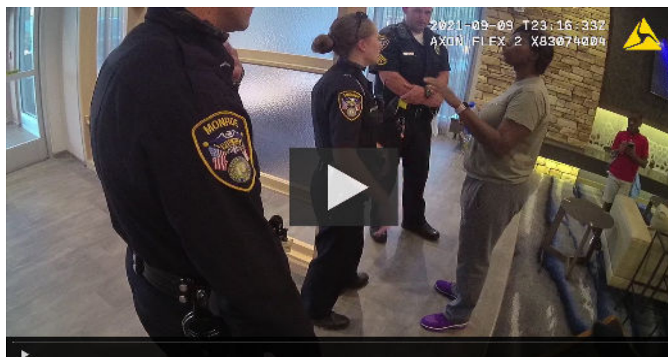
Did the district court properly exercise its discretion?

INTRODUCTION

While the Plaintiff, Angelia Nikole James, was a member of the Monroe City Council, she assaulted a police officer, ordered police officers to arrest innocent people, and purported to fire the police chief and other police officers that did not follow her unlawful orders. Through a well-established North Carolina procedure known as amotion, James was removed from the City Council for misconduct in office.

James filed this lawsuit to challenge her removal. She also sought preliminary injunctive relief that would, if granted, immediately reinstate her as a member of the City Council.

The district court denied this request, correctly concluding that James was not likely to succeed on the merits of her constitutional claims. For one, it is undisputed that James assaulted a police officer. It is also undisputed that James violated the Monroe City Charter and certain provisions of the City's Code of Ethics. And critically, all of this conduct took place while James was wielding her purported "authority" as a councilmember. As James put it, and as captured in the video that follows, the police needed to "follow and respect" her "authority" because she was "on City Council."



J.A. 132 (Video Clip 5.b).[1]

James now asks this Court to place her back on the City Council.[2] But her remaining arguments face an even greater uphill battle than before: Not only must James show a likelihood of success on the merits of her claims—i.e., that her vagueness, overbreadth, and retaliation claims warrant her reinstatement as a member of the City Council—but also that the district court abused its discretion in determining otherwise.

Against the weight of these overlapping standards (likelihood of success on the merits and abuse of discretion), James' arguments fail for

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[1] Hyperlinks were omitted from the version of the record index included in the Joint Appendix. *See* J.A. 130 n.1. These hyperlinks are available in the version of the same document available on the district court's docket. For ease of reference, those hyperlinks have been provided throughout the brief.

[2] James has abandoned many of her arguments on appeal—including her primary defense below that her conduct was excusable because she only consumed a smoothie for breakfast. J.A. 92, J.A. 105.

multiple reasons—including because she has not challenged a single one of the district court's factual findings as clearly erroneous.

In sum, James' request to be immediately reinstated as a member of the City Council is without merit. And the district court's well-reasoned decision denying James' motion for preliminary injunction should be affirmed.

STATEMENT OF THE CASE

James' misconduct

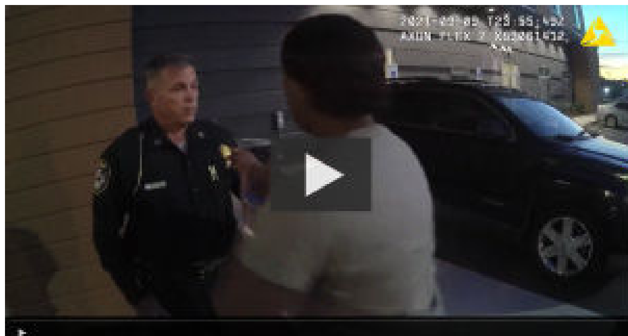
On September 9, 2021, James was a member of the Monroe City Council and a candidate for mayor. After a dispute with her husband, James ventured to a hotel. J.A. 575. Once there, however, she was informed that the hotel had no vacancies. J.A. 575. That is where James' conduct at issue began.

James approached hotel patrons, demanding that they remove their masks. J.A. 575. James accused some of those patrons of being "murderers" and "felons." J.A. 587. James called the police. J.A. 575. So did the hotel staff. J.A. 575.

James became hostile with multiple police officers that arrived on the scene. At that point, James:

- instructed police officers to arrest innocent hotel patrons. J.A. 587.
- told officers that she was "on City Council" and that they must "follow and respect" her "authority." J.A. 132 (Video Clip 5.b).
- purported to fire some police officers and promote others. J.A. 587.

- attempted to forcibly remove a police officer's badge from his chest, as captured by the video that follows. J.A. 582.



J.A. 132 (Video Clip 1.a).

Later that evening, James ripped a mask (worn for COVID protection) from an officer's face, breaking its straps. J.A. 369. Although body cam footage of this assault on a police officer is not available, James has "admitted to pulling Officer Aycoth's mask off his face." J.A 101.

James was not arrested because of her status as a councilmember. J.A. 377, J.A. 577.

In the weeks that followed, James had numerous communications with the press. J.A. 42–44, J.A. 578.

James was not elected Mayor. J.A. 46.

The amotion proceedings

In November 2021, the City Council adopted a resolution initiating the amotion proceeding. J.A. 548. Among other things, the resolution

recognized the city's authority to utilize amotion to remove a member of City Council for misconduct in office.[3] J.A. 548.

The following month, the City Council approved amotion rules of procedure. J.A. 548. Those rules split the proceeding into two phases. J.A. 578. Phase one would consist of an evidentiary hearing before a hearing officer. J.A. 578. Phase two would consist of a hearing before the City Council to receive the hearing officer's recommended findings of fact and conclusions of law, and to determine whether James should be removed. J.A. 578. The City Council then approved a petition in amotion, initiating the two-phase procedure. J.A. 11.

The evidentiary hearing lasted almost two full days. J.A. 580. James was represented by counsel and testified. J.A. 580. The hearing officer's 46-page report concluded that the "evidence indicates that Ms. James engaged in misconduct in office and that just cause exists for her removal from office." J.A. 129. The report further noted that "[i]f the

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[3] The North Carolina Supreme Court has recognized that members of a governing board, such as a City Council, have the inherent power of amotion to remove an elected town official under appropriate circumstances, including for misconduct in office. *See Berger v. New Hanover Cnty. Bd. of Comm'rs*, No. 13 CVS 1942, 2013 WL 4792508, at *9 (N.C. Super. Ct. Sept. 5, 2013) (collecting cases). James has abandoned her claim challenging this procedure. Pl.'s Br. at 2 n.2.

councilmembers agree based on their review of the evidence in the Record, then they—and only they—can answer the question as to whether Ms. James should be removed." J.A. 129.

The hearing officer then presented her recommended findings of fact and conclusions of law to the City Council. J.A. 583. And the City Council voted to remove James from office. J.A. 583. The Council's removal order concluded that 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[4] in purporting to fire, demote and promote Police Officers, and by making multiple false reports to the Police." J.A. 570.

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[4] The City adopted its Code of Ethics in accordance with the statutory requirement that "[g]overning boards of cities . . . shall adopt a resolution or policy containing a [C]ode of [E]thics to guide actions by the governing board members in the performance of the member's official duties as a member of that governing board." N.C. Gen. Stat. § 160A-86(a). The City's Code of Ethics is based on a Model Code of Ethics published by the University of North Carolina's School of Government. *See* A. Fleming Bell, II, *A Model Code of Ethics for North Carolina Local Elected Officials*, UNC School of Government, *available at* https://perma.cc/4YQC-HPUJ.

The district court proceedings

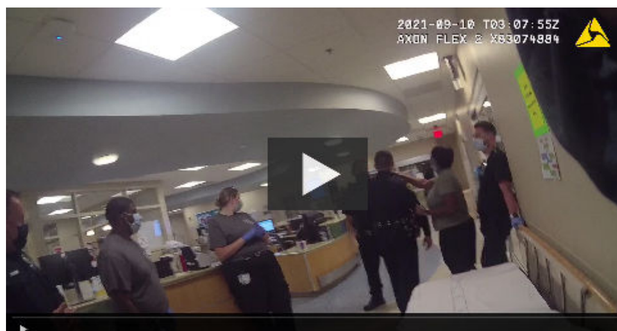
Following her removal, James filed this lawsuit and sought a temporary restraining order and preliminary injunction requiring that she be reinstated on the City Council. After the district court denied her motion for temporary restraining order, James filed an amended complaint and a second motion for preliminary injunction. J.A. 7–8.

In deciding James' second motion for preliminary injunction, the district court primarily focused on two issues.

First, the district court considered James' assault on a police officer. The evidence of this assault was undisputed: At the amotion hearing, James admitted under oath "to pulling Officer Aycoth's mask off his face." J.A. 101. The hearing officer concluded that: "Ms. James' actions were therefore assault on a police officer." J.A. 117. The City Council's removal order adopted this same finding. J.A. 570. And the district court did the same, finding that James "physically assaulted a police officer." J.A. 595. The district court determined that this misconduct provided—and, indeed, was—an independent basis for James' removal. J.A. 589, J.A. 593. James failed to make a "clear showing" to the contrary. J.A. 589.

Second, the district court considered James' violations of the Monroe City Charter. James did not challenge the provisions of the City Charter that warranted her removal. J.A. 593. Those provisions provide, in relevant part, that "[n]either the Mayor, the City Council, nor any member thereof shall direct the conduct or activities of any City employee, directly or indirectly, except through the City Manager." J.A. 136. In addition, under the "council-manager" form of government, only the city manager may "appoint and suspend" city employees, and a councilmember may not "serve or act as manager." N.C. Gen. Stat. §§ 160A-148, -151.

The district court determined that James' conduct violated these provisions of the City Charter and State law, as reflected in the overwhelming evidence in the record, including in the following videos:



James: "*Aycoth is fired, he's already fired, you're going to be fired, you're going to be fired, and you're going to be fired.*" J.A. 132 (Video Clip 2.e).

> **James:** *"So he just got promoted to captain today . . . and he got promoted as captain today . . . Bryan isn't the chief of police anymore . . . I fired Bryan."* J.A. 132 (Video Clip 6.a).

Indeed, throughout the evening, James purported to fire and promote police officers at least 34 times. *See* J.A. 132, Video Clip 1.a at 0:30, 0:32, 1:02, 2:28, 2:42; Video Clip 1.c at 0:08, 0:09, 0:12, 0:14, 0:20; Video Clip 2.a at 0:23, 0:33, 0:35, 0:42, 0:44; Video Clip 2.b at 0:38, 0:40, 0:42, 0:45; Video Clip 2.d at 0:05; Video Clip 2.e at 0:02, 0:03, 0:04, 0:05, 0:06; Video Clip 3.a at 0:35, 0:41, 0:44, 0:47; Video Clip 6.a at 0:03, 0:07, 0:21, 0:23, 0:39.

Based on this and other evidence, the district court found that James' numerous attempts to "fire, demote, and promote Police Officers" provided an independent basis for her removal. J.A. 593. And as to James' argument that her speech was constitutionally protected, the district court found that the statements at issue were "knowingly, or at the least recklessly, false." J.A. 587.

The district court also determined that James' constitutional claims suffered from causation problems. James' First Amendment retaliation claim lacked but-for causation. J.A. 588. Likewise, as to James' overbreadth and void for vagueness claims, the district court noted that striking the challenged provisions of the City's Code of Ethics "would lead to the same result." J.A. 593.

In reaching this conclusion, the district court noted that James did "not challenge each provision of the Code of Ethics relied on by the City and [did] not challenge the City Charter." J.A. 593. The unchallenged provisions of the Code of Ethics provided that councilmembers should "obey all laws applicable to their official actions as members of the council," not "act on behalf of the council" unless the council "specifically authorizes it," and only "take official action as a body." J.A. 568.

Based on the above, the district court determined that James had not demonstrated a likelihood of success on her First Amendment retaliation claim, her void-for-vagueness claim, or her overbreadth claim. J.A. 590, J.A. 594. James' second motion for preliminary injunction was denied. J.A. 601.

SUMMARY OF ARGUMENT

The district court properly denied James' motion for preliminary injunction and for several reasons should be affirmed.

First, denying James' motion for preliminary injunction was appropriate based on her undisputed misconduct in office. James has effectively conceded that her misconduct—including her assault on a police officer—occurred in office. And that undisputed misconduct in office bars each of her constitutional claims: her void-for-vagueness claim, her overbreadth claim, and her First Amendment retaliation claim. *See infra* at 16–28.

Second, denying James' motion for preliminary injunction was appropriate for additional, claim-specific reasons. James' attempt to fire, demote, and promote police officers did not constitute protected speech. Nor did her ordering police officers to arrest innocent hotel patrons amount to protected speech. Likewise, as the record confirms, James' post-incident communications with the press had no bearing on her removal. So her First Amendment retaliation claim fails for these additional reasons. *See infra* at 29–38.

Lastly, James' "aggregate misconduct" theory is meritless. It relies on the validity of predicate claims (void for vagueness and overbreadth) that fail on their own. So this theory must fail, too. Regardless, as the district court found, both the hearing officer and the City Council made independent conclusions as to each of the three instances of misconduct separately—a finding that James has not challenged as clearly erroneous. So James' "aggregate misconduct" theory is also foreclosed by the record. *See infra* at 39–43.

For these reasons, James' motion for preliminary injunction was appropriately denied. The City respectfully requests that the Court affirm.

STANDARD OF REVIEW

A party seeking a preliminary injunction must establish that she "is likely to succeed on the merits, that [she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A district court's denial of a motion for preliminary injunction "will not be disturbed on appeal unless the record shows an abuse of [ ] discretion, regardless of whether the appellate court would, in the first instance, have decided the matter differently." *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc).

In applying this standard, the district court's factual findings are reviewed "for clear error" and its legal conclusions are reviewed "de novo." *Id.* Clear error requires more than a decision "being just maybe or probably wrong." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009). It must be "dead wrong"—that is, it must strike the Court "with the force of a five-week-old, unrefrigerated dead fish." *Id.*

ARGUMENT

I. The district court properly denied James' motion for preliminary injunction based on her undisputed misconduct in office.

A. James effectively concedes that her misconduct—including her assault on a police officer—occurred in office.

James has failed to challenge any of the district court's factual findings as clearly erroneous. Nor has James pursued her writ of certiorari claim. This dooms her appeal in several distinct ways.

First, James attempts to launch virtually all of her appellate arguments from the premise that her assault on Officer Aycoth was merely an "*alleged* assault." Pl.'s Br. at 24 (emphasis added). But the district court found that James "*physically assaulted a police officer*." J.A. 595 (emphasis added).[5] James has not contested this finding—or any of the district court's factual findings, for that matter—as clearly

[5] The fact that James has never been formally charged with a crime is irrelevant. Pl.'s Br. at 10 n.8. It is James' misconduct—not whether James was arrested—that is relevant here. J.A. 569. Moreover, the undisputed facts reveal that the only reason Officer Aycoth "did not arrest or charge [James] with assault [was] because she was a councilmember"—a fact that only further establishes that her conduct was "in office." J.A. 577.

erroneous. So for purposes of this appeal, and as the record clearly confirms, James assaulted a police officer.

Second, James suggests on appeal that her assault on Officer Aycoth was "at best, only [ ] highly attenuated" to her official duties. Pl.'s Br. at 24. But a collection of body cam footage, nearly a page of the district court's order, and James' own concessions confirm otherwise. J.A. 597, J.A. 132 at 31–39.

James' conduct and interactions with officers throughout the evening at issue confirm that she was acting under the guise of her alleged authority as a councilmember. The examples of this conduct are legion:

- purporting to hire and fire police officers at least 34 times. *See supra* at 11.
- attempting to forcibly remove a badge from Captain Bolen's chest, then telling him, "do I need to call Bryan Gilliard[6] on you?" *See supra* at 6.

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[6] Bryan Gilliard is the City of Monroe Chief of Police. J.A. 13.

- explaining to Officer Aycoth that he was "about to lose his job," then ripping his mask from his face. J.A. 132 (Video Clip 2.a).
- telling Officer Broome to "follow and respect" her "authority" because she was "on City Council." J.A. 132 (Video Clip 5.b).

Critically, James' opening brief does not challenge the district court's findings and conclusions of law related to her certiorari claim either.[7] But it was there, on James' certiorari claim, that the district court found "sufficient evidence to support the Hearing Officer's finding that [James'] misconduct occurred 'in office.'" J.A. 597. James' tactical decision to abandon her certiorari claim on appeal, therefore, is fatal to the rest of her appeal: James' misconduct—from the assault on Officer Aycoth, to her attempts to fire and promote police officers, or otherwise—"occurred in office." *Id.*[8] And James cannot argue otherwise for the first

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[7] The district court properly exercised jurisdiction over James' certiorari claim, a claim that arises under state law and involves review by writ of certiorari of the City Council's amotion decision. Doc. 11, Joint Memorandum (discussing *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 174 (1997)).

[8] James has expressly abandoned three of her claims in this appeal, including her certiorari claim: "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

time in her reply brief. *See, e.g., Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996) ("Under the decisions of this and the majority of circuits, an issue first argued in a reply brief is not properly before a court of appeals.").

For each of these reasons, James cannot legitimately dispute that she engaged in misconduct in office.

B. James' undisputed misconduct in office bars each of her constitutional claims.

James contends that she was likely to succeed on the merits of three constitutional claims: a facial void-for-vagueness claim and overbreadth claim, both of which challenge certain provisions of the City's Code of Ethics, and a First Amendment retaliation claim focusing on post-incident statements to the press. As discussed below, James' undisputed misconduct in office bars each of these claims. Thus, she was not likely to succeed on any of them, and the district court properly exercised its discretion in denying the motion for preliminary injunction.[9]

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on her § 1983 overbreadth, vagueness, and retaliation claims in this appeal." Pl.'s Br. at 2, n.2.

[9] James suggests that the City conceded in the district court that its Code of Ethics was unconstitutionally vague and overbroad. Pl.'s Br. at 14 (citing J.A. 592). James is mistaken. The City argued that regardless

1. James' misconduct bars her void-for-vagueness challenge.

It is well-established that a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law." *Fusaro v. Howard*, 19 F.4th 357, 374 (4th Cir. 2021).[10] Here, James brought a facial challenge to certain provisions of the Code of Ethics on void-for-vagueness grounds.[11] J.A. 79. Yet as the district court noted,

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of whether James' challenge to the Code of Ethics had any substantive basis, it necessarily failed for other reasons—reasons that the district court adopted.

[10] Although the district court did not expressly cite to the *Fusaro* line of cases, the reasoning of the order tracks the same analysis, as shown below. Regardless, under what is known as the "right for any reason" doctrine, this Court may "affirm on any ground fairly supported by the record." *Korb v. Lehman*, 919 F.2d 243, 246 (4th Cir. 1990).

[11] The amended complaint confirms that James brought a facial challenge. It alleges broadly that "[a] person of common intelligence can only guess at the meaning of" the Code of Ethics, and that the Code of Ethics "fails to provide explicit standards" for those that enforce it. J.A. 79. The amended complaint goes on to seek "a judicial declaration that the Code is unconstitutionally vague and broad," not just as applied to James. J.A. 80; *see Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 460 n.10, *vacated on other grounds*, 14 F.4th 322 (4th Cir. 2021) (quoting *AFSCME Council 79 v. Scott*, 717 F.3d 851, 862 (11th Cir. 2013)) ("'We look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature.' . . . Here, [plaintiff] requested a broad declaration that the challenged provisions were unconstitutional and requested that they be enjoined generally, not simply as to her. Her claim was thus facial in nature.").

James "does not challenge *each* provision of the Code of Ethics relied on by the City." J.A. 593 (emphasis added).

For instance, James does not challenge the provision of the Code of Ethics providing that councilmembers "should obey all laws applicable to their official actions as members of the council," nor does she challenge the provision requiring that councilmembers "take official action as a body." J.A. 568.

Because James has not challenged these provisions, along with the many factual findings that show clear violations of these provisions, it is undisputed that James violated the Code of Ethics—in other words, it is undisputed that James engaged in conduct that, under the Code of Ethics, was "clearly proscribed." *Fusaro*, 19 F.4th at 374. So she "cannot complain of the vagueness of the law" through a facial challenge. *Id.*

The district court, therefore, did not abuse its discretion in denying James' motion for preliminary injunction on void-for-vagueness grounds.

2. James' misconduct bars her overbreadth challenge.

An enactment is not overbroad unless it prohibits a substantial amount of protected expression. *Legend Night Club v. Miller*, 637 F.3d

291, 294 (4th Cir. 2011). The party advancing this claim "bears the burden of demonstrating, from the text of the law and *from actual fact*, that substantial overbreadth exists." *United States v. Chappell*, 691 F.3d 388, 396 (4th Cir. 2012) (internal quotations omitted). Moreover, in a facial challenge like this one, courts declare enactments overbroad "only as a last resort." *Legend Night Club*, 637 F.3d at 297 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

As a result, "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech." *Virginia v. Hicks*, 539 U.S. 113, 124 (2003). Due to this speech-focused analysis, when the "behavior prohibited by [an act] is closer to conduct than speech" it is "a particularly inappropriate case in which to entertain the 'strong medicine' of an overbreadth challenge." *Chappell*, 691 F.3d at 396.

This Court's decision in *Chappell* illustrates this rule. There, the plaintiff was pulled over by a state trooper for speeding and lied about his status as a police officer. *Id.* at 391. Chappell was later charged under a state statute that prohibited impersonating a police officer. On appeal to this Court, Chappell argued that the statute was

"unconstitutionally overbroad because it bans a substantial amount of protected speech." *Id.* Chappell did not focus on his own behavior; rather, he argued that the law put at risk "the behavior of adults who attend costume parties dressed as a police officer, children playing cops and robbers, and actors portraying law enforcement officials." *Id.* at 393.

In rejecting this argument, the Court focused on two things. First, that the "behavior prohibited" by the law was "closer to conduct than speech." *Id.* at 396. And second, that Chappell's arguments were "based on speculation, not actual fact." As to this second point, the Court further noted that "[t]he overbreadth claimant bears the burden of demonstrating, from the text of the law and *from actual fact*, that substantial overbreadth exists." *Id.* (internal quotations omitted).

Here, as identified by the district court, the same rationale reveals significant issues with James' overbreadth claim.

First, the district court determined that conduct-specific provisions of the Code of Ethics—that is, provisions of the Code of Ethics that James did not challenge—led to her removal. J.A. 593. Specifically, those provisions provide that councilmembers should "***obey*** all laws applicable to their official actions as members of the council," not "***act*** on behalf of

the council" unless the council "specifically authorizes it," and only "***take*** official ***action*** as a body." J.A. 568 (emphasis added). This "behavior prohibited" by the Code of Ethics is "closer to conduct than speech." *Chappell*, 691 F.3d at 396.

Second, the district court determined that James "[had] not demonstrated the alleged unconstitutional provisions *caused* her removal." J.A. 592–593 (emphasis added). So although James may have taken issue with "the text of the law," her constitutional challenge did not originate "*from actual fact*." *Chappell,* 691 F.3d at 396. She could not, therefore, show that her challenge to the Code of Ethics was "specifically addressed to speech or to conduct necessarily associated with speech." *Virginia*, 539 U.S. at 124.

In this way, James raising constitutional issues with speech-related provisions of the Code of Ethics that did not cause her removal is no different than the plaintiff in *Chappell* hypothesizing about how the law there could apply to "adults who attend costume parties dressed as a police officer." *Chappell*, 691 F.3d at 393. Because James did not demonstrate that the challenged provisions of the Code of Ethics actually

caused her removal, James' concerns, like those in *Chappell*, were "based on speculation, not actual fact." *Id.* at 396.[12]

In sum, the *unchallenged* provisions of the Code of Ethics that caused James' removal involved behavior that was "closer to conduct than speech." *Chappell*, 691 F.3d at 396. And the *challenged* provisions of the Code of Ethics were not, as a matter of "actual fact," at issue. *Id.* Accordingly, substantial overbreadth did not exist, and James was not likely to succeed on the merits of her overbreadth claim.

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[12] Indeed, for the same reasons, James cannot even satisfy a basic Article III standing inquiry. Like all federal plaintiffs, James had to establish injury in fact and redressability, such that the remedy she seeks (reinstatement on the City Council) would redress the alleged injury (an allegedly overbroad Code of Ethics). *See Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) ("It is axiomatic that the Article III standing requirements apply to all actions in the federal courts; the fact that the claimant may assert facial vagueness and overbreadth challenges does not alter this aspect of federal jurisprudence."); *Covenant Media of N.C., L.L.C. v. City of Monroe*, 285 F. App'x 30, 36 (4th Cir. 2008) (holding that the overbreadth doctrine does not "eliminate the need to demonstrate an injury in fact"). As a result, James' attempt to challenge speech-related provisions of the Code of Ethics that did *not* actually cause her removal only further presents injury in fact and redressability problems. *See id.*

3. James' misconduct bars her First Amendment retaliation claim.

When pursuing a First Amendment retaliation claim, "it is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). Rather, "the motive must *cause* the injury"—i.e., the motive "must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Id.*; *see also Hartman v. Moore*, 547 U.S. 250, 260 (2006) ("[A]ction colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway.").

Here, James alleges that she was removed from office based on certain communications with the press. Pl.'s Br. at 33. In James' view, the "facts draw a direct line between [her] protected speech and the initiation of removal proceedings." Pl.'s Br. at 35.

No such line exists. As discussed above, James does not contest the factual determination that she assaulted a police officer, nor does she deny that she violated the City Charter or certain provisions of the Code of Ethics. *See supra at* 16. These numerous instances of undisputed misconduct—i.e., "significant conduct that is not protected speech"—

justified the district court's conclusion that there was "not a sufficient causal link to state a claim for retaliation." J.A. 588. James failed to make a "clear showing" to the contrary, J.A. 589, so she cannot "draw a direct line between [her] protected speech and the initiation of removal proceedings." Pl.'s Br. at 35.

In an attempt to sidestep this analysis, James raises the burden-shifting framework set forth in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 286 (1977). She posits that because this matter involves a public employee, the district court abused its discretion by not requiring "the City to show that it would have made the same decision in the absence of" her alleged protected activity. Pl.'s Br. at 36. That argument is mistaken for at least two reasons.

First, James cannot satisfy step one in a *Mt. Healthy* analysis. Under that framework, a party must, in the first instance, establish that she was engaging in protected activity. Here, the district court determined, as discussed at length below, that James "did not engage in protected activity." J.A. 589 n.6. In other words, there was no burden to shift under *Mt. Healthy*. *See Martin v. Duffy*, 977 F.3d 294, 299 (4th Cir.

2020) (explaining that *Mt. Healthy* burden-shifting does not occur until "[a]fter an employee establishes a prima facie case of retaliation.").

Second, *Mt. Healthy*'s burden-shifting analysis does not mechanically apply in a preliminary injunction posture. James still has the "*ultimate burden* to make a clear showing of likelihood of success on the merits," which she failed to do: "the record before the Court contains sufficient evidence for Plaintiff's removal regardless of the protected activity." J.A. 589 n.6 (emphasis added); *see also Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (collecting cases on a plaintiff's "ultimate burden").

For these reasons, James cannot establish the "but-for" causation necessary to show a likelihood of success on her First Amendment retaliation claim—i.e., her "ultimate burden." J.A. 589 n.6. The analysis set forth in *Mt. Healthy* does not change this result.

II. The district court properly rejected James' First Amendment retaliation claim for additional, claim-specific reasons.

In addition to the causal requirements discussed above, a party bringing a First Amendment retaliation claim must also show that they "engaged in protected First Amendment activity." *Martin*, 977 F.3d at 299. As discussed below, the speech that led to James' removal was not protected.

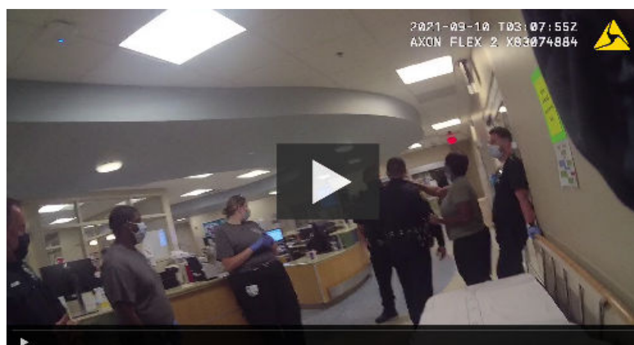
A. James attempting to fire, demote, and promote police officers did not constitute protected speech.

The First Amendment protects speech on matters of public concern. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Speech involves a matter of public concern "when it involves an issue of social, political, or other interest to a community." *Love-Lane*, 355 F.3d at 776. When applying this standard, courts consider "the content, form, and context of the given statements, as revealed by the whole record," *id.*, asking whether the statements may be "fairly characterized as constituting speech on a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

Still, speech that may have otherwise been protected can lose its protected status. For example, when a public employee makes

statements that are "knowingly or recklessly" false, those statements lose their protected status. *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968). This limiting principle recognizes that an individual's interest in uttering certain falsehoods "is subordinate to the government's interest in suppressing it." *Brasslett v. Cota*, 761 F.2d 827, 840 (1st Cir. 1985).

Here, over a four-hour period during the evening at issue, James purported to fire, demote, and promote various police officers at least 34 times. *See supra* at 11. James asserts that these statements were merely "sarcastic shorthand for critiquing the officers' performance," such that "the First Amendment shields those statements." Pl.'s Br. at 26–27, 29. This attempt to excuse James' behavior as mere "sarcasm," however, is belied by the record:



J.A. 132 (Video Clip 2.e).

As the district court recognized—and as anyone objectively watching the body cam footage would recognize, too—James' statements

cannot be "fairly characterized" as a joke. *Rankin*, 483 U.S. at 384. Nor was anyone laughing, as the video footage confirms. In fact, James admitted at the amotion hearing that her behavior was wrong:

> **Q**: *We've seen a video where, at various points throughout the evening, you tell officers, you're fired, you're fired, you're going—you're going to be fired. You say that repeatedly. Do you regret making those statements?*
>
> **A**: *I do*
>
> **Q***: And why do you regret it?*
>
> **A**: *Because that's something City Council cannot do.*

J.A. 425.

This admission upends any notion that James' statements were merely "sarcastic shorthand for critiquing the officers' performance." Pl.'s Br. at 26–27. No one questions whether "James is entitled to criticize police." Pl.'s Br. at 28. What she is not entitled to do, however, is try to fire them—i.e., violate the City Charter and Code of Ethics. *See supra* at 12. This is something that James, as she admitted herself, "cannot do." J.A. 425.

In short, James' statements purporting to fire, demote, and promote police officers cannot be "fairly characterized" as protected speech. *Rankin*, 483 U.S. at 384. Rather, they were "knowingly, or at the least

recklessly, false." J.A. 587. James' arguments suggesting otherwise are contradicted by the record, including her own admissions.[13]

B. James ordering police officers to arrest innocent hotel patrons did not constitute protected speech.

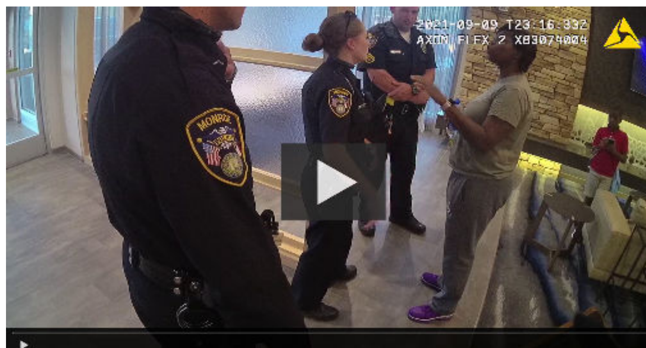
James next argues that demands made to police at the hotel were constitutionally protected because they involved "a matter relating to public safety." Pl.'s Br. at 29. As discussed below, James' statements did not constitute protected speech.

When James arrived at the hotel on the evening at issue, hotel staff informed her that "there was not a room available for her." J.A. 575. So James took matters into her own hands. After she called the police, she proceeded to identify "murderers" and "felons" in the hotel lobby—conduct that led the hotel staff to also call the police. J.A. 553.

When police arrived, they were informed by hotel staff that James had been "harassing customers." J.A. 553. At that point, James began

[13] James' hypothetical explaining that "Chief Gilliard could not cite James" if she were an "ordinary citizen" holding up a sign that says "Chief Gilliard, You're fired" misses the mark. Pl.'s Br. at 28. James was removed because she was a member of City Council that violated the City Charter and Code of Ethics. Those provisions would not apply to an "ordinary citizen." What James' hypothetical does do, though, is reveal that James was removed for her conduct, not her speech.

ordering police to arrest certain hotel patrons. But "[t]he officers did not comply." J.A. 554. Unhappy with this result, James then called the chief of police, demanding that he "have the officers arrest the felons at the hotel." J.A. 554. After the chief of police explained to James that "the officers could not do that," J.A. 554, James took out her frustration on Officer Broome:



J.A. 132 (Video Clip 5.b).

> **James**: *"I'm on City Council."*
>
> **Officer Broome**: *"I understand."*
>
> **James**: *"OK, and I want you to understand that there's authority that you have to follow and respect. Do you understand that?"*[14]

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[14] As discussed above, the City Charter provides that no councilmember "shall direct the conduct or activities of any City employee, directly or indirectly, except through the City Manager." J.A. 136.

The district court concluded that James failed to demonstrate that her "false claims about guests at the hotel being felons and murderers are constitutionally protected speech as opposed to recklessly false statements." J.A. 587; *see also Pickering*, 391 U.S. at 574. Indeed, they were "at the least, recklessly false." J.A. 587.

In arguing that her speech was not knowingly or recklessly false, James pivots to her previously alleged (and unsubstantiated) "unknown mental health crisis." Pl.'s Br. at 30. Specifically, James points out that certain witnesses speculated that she "was experiencing some unknown mental health crisis." Pl.'s Br. at 30. But attempting to reinfuse this matter with that defense is inappropriate given that James does not argue that the factual findings related to her *lack* of any medical condition are clearly erroneous. Thus, this issue is not before the Court.

Nor could it reasonably be. The record clearly establishes that James' mental-health justification for her misconduct was, at best, unsubstantiated. The hearing officer viewed James' medical witness as "not sufficiently thorough" because, among other things, the witness "failed to communicate with any of the medical professionals who treated Ms. James." J.A. 103. The removal order further noted that there was

only "minimal evidence in the record" related to James' medical condition. J.A. 562. And the district court found that evidence of James' mental illness lacked thoroughness and included inconsistencies. J.A. 598.

For each of these reasons, the district court properly determined that James' false reports to police were not protected speech.[15]

C. The record confirms that James' communications with the press had no bearing on her removal.

James' communications with the press were likely protected speech. But as discussed below, those statements had no bearing on her removal.

The hearing officer's 46-page report does not reference communications James had with the press following the evening at issue. J.A. 84–149. Nor did the City Council rely on those communications

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[15] Internal inconsistencies in James' brief also call into question any notion that her statements involved "a matter relating to public safety." Pl.'s Br. at 29. On the one hand, James says that the police officers should have known that her "hiring and firing" statements were jovial, "sarcastic shorthand." Pl.'s Br. at 26–27. Yet at the same time she would have the Court treat contemporaneous statements as critical, public-safety "reports" protected by the First Amendment. James cannot have it both ways.

when removing James. J.A. 548–571. Based on this, the district court made a factual determination that James' post-September 9 statements to the press "were not found as misconduct in office by the Hearing Officer's Report or the Removal Order." J.A. 586.

In an attempt to overcome this finding, James points to what she speculates could be a link—although a tenuous one—between the statements made to the press and her removal. That link is found in a resolution that preceded the actual amotion proceedings. In asking the city attorney to prepare a petition in amotion, the resolution broadly references "issues related to" the "incidents" that occurred on the evening at issue. J.A. 459. And when listing those incidents, reference is made to the "press conferences involving Council Member James." J.A. 459. Importantly, though, this resolution was not part of the proceeding itself; it was simply a document authorizing it.

James asserts that this sole reference to her communications with the press indicates "*per se* retaliatory animus." Pl.'s Br. at 16 (citing no authority). According to James, assaulting a police officer, violating the City Charter, and violating the Code of Ethics had nothing to do with the City Council initiating removal proceedings and ultimately removing her.

Instead, those proceedings only took place—and she was only removed—in retaliation for her communications with the press.

Neither the record nor the law supports this conclusion.

It is true that certain police officers filed human resources complaints against James following her communications with the press. And it is perhaps true that certain councilmembers were upset with James. But that does not undo the 46-page report of the hearing officer admonishing James for her "egregious" behavior that was entirely untethered to those statements. J.A. 119. Nor does it overcome the body cam footage recounting her egregious behavior. The overwhelming evidence shows that the district court did not commit clear error by determining that "post-September 9 statements to the press [ ] were not found as misconduct in office by the Hearing Officer's Report or the Removal Order."[16] J.A. 586.

Furthermore, as the district court noted, even if James' removal had been partially based on protected speech, she still had "the ultimate

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[16] Because James does not argue that this finding was clearly erroneous, she cannot argue that adverse action was taken against her for post-September 9 statements to the press. Nor can she advance a "chilling effects" argument based on them.

burden to make a clear showing of likelihood of success on the merits"—a burden that she failed to satisfy. J.A. 589 n.6. James did not meet this burden, in part, because even if some of her speech was protected, and even if some of that protected speech was given weight by the City Council, it was not the but-for cause of her removal. *See supra* at 26.

For all of these reasons, the district court properly exercised its discretion in rejecting James' First Amendment retaliation claim for additional, claim-specific reasons.

III. The record does not support James' "aggregate misconduct" theory.

Faced with the numerous deficiencies in her claims described above, James advances a "misconduct-in-the-aggregate" theory. This approach contends that James was removed for the collective sum of her misconduct—i.e., assaulting a police officer, *plus* purporting to fire police officers, *plus* ordering police officers to arrest innocent hotel patrons—rather than each of those acts independently justifying her removal from office. Under this theory, James posits that if one basis for her removal was flawed, there was an insufficient basis to remove her.

James' "aggregate" theory fails for at least four reasons.

First, as described above, James' void for vagueness and overbreadth claims fail in their own right. *See supra* at 20–25. So a misconduct-in-the-aggregate theory that relies on those claims must also fail.

Second, the record shows that it was not, in fact, "misconduct in the aggregate" that led to James' removal. Rather, the district court determined that "a closer look at the Hearing Officer's Report shows that the Hearing Officer analyzed and made independent conclusions as to each of the three instances of misconduct separately, and found each to

be misconduct in office." J.A. 588. And again, James has failed to make any "clear error" argument here.[17]

It is true that the hearing officer's report—not the removal order—on one occasion uses the phrase "cumulatively" when discussing James' misconduct. J.A. 115. But the hearing officer's report did not remove James from office. The City Council's removal order did. To that end, the hearing officer's report was in no way binding on City Council, as the report itself made clear:

> Ms. James engaged in misconduct in office and [ ] just cause exists for her removal from office. *If the councilmembers agree based on their review of the evidence in the Record, then they—and only they—can answer the question as to whether Ms. James should be removed.*

J.A. 129 (emphasis added).

As these points show, James cannot close the gap between the hearing officer's report and the removal order by simply arguing that "the Removal Order based its conclusions on the H.O. Report." Pl.'s Br. at 23.

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[17] James also argued below that her removal was "infected" by unconstitutional provisions and conduct. James abandoned this argument in her opening brief, so it too has been waived. *See, e.g.*, *Cavallo*, 100 F.3d at 1152 n.2 ("That the question was raised in the district court is immaterial.").

Third, James' textual arguments fare no better. James argues that the use of "and" in the removal order's list of items constituting misconduct makes the sentence conjunctive, supporting the misconduct-in-the-aggregate view. Pl.'s Br. at 23. The district court made quick work of this argument, pointing out that "[t]he sentence would not be correct with the use of the word "or" in place of "and." J.A. 589.

James next points to the use of "the singular 'just cause,' not the plural 'just causes.'" Pl.'s Br. at 23. But this argument conflicts with language found elsewhere in the removal order: "*Cause* for removal exists if the City Council finds that the Councilmember has committed *one or more*" offenses. J.A. 569 (emphasis added). As this shows, the removal order uses the phrase "cause" to describe "one or more" bad acts. Because "identical words used in different parts of the same act are intended to have the same meaning," James' attempt at a textual argument is a lost cause. *Freight Drivers & Helpers Loc. Union No. 557 Pension Fund v. Penske Logistics LLC*, 784 F.3d 210, 215 (4th Cir. 2015).

Finally, even under her "aggregate" theory, James would still lose. That is because in no instance were challenged provisions of the Code of Ethics relied upon as the sole basis for her removal:

Misconduct in Office	**Violated**
Assaulting Officer Aycoth	unchallenged Code of Ethics provisions
Firing police officers	unchallenged City Charter and unchallenged Code of Ethics provisions
Demanding that police arrest innocent hotel patrons	unchallenged City Charter and unchallenged Code of Ethics provisions

For all of these reasons, James' "aggregate" theory falls well short of showing that that the district court abused its discretion.[18]

* * *

[18] James' textual arguments do not move the needle in favor of the "misconduct-in-the-aggregate" approach. Even if they did, though, James' arguments only create an ambiguity, at best, in which case her motion for preliminary injunction was properly denied. *See, e.g.*, *Di Biase v. SPX Corp.*, 872 F.3d 224, 235 (4th Cir. 2017) ("[A]mbiguity is simply insufficient to support a finding that success on the merits is "likely" rather than merely "possible" and is fatal to Plaintiffs' motion for preliminary injunction."); *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 293 (4th Cir. 2011) (noting that ambiguity alone cannot satisfy the burden to make a clear showing of likelihood of success on the merits).

To say the least, James was not removed on a "whim." Pl.'s Br. at 17. While a member of the City Council, James engaged in egregious misconduct in office. As the district court found, she "physically assaulted a police officer." J.A. 595.

Removing her from office was the only appropriate course of action. And in response to that appropriate action, James launched this lawsuit against the City and the members of the City Council, suing them in their individual capacities, seeking punitive damages, and seeking her immediate reinstatement on the City Council.

The district court saw this lawsuit for what it was, and it properly exercised its discretion in denying James' request for an order immediately reinstating her as a member of the City Council. The district court's well-reasoned, well-supported decision should be affirmed.

CONCLUSION

The district court's denial of James' motion for preliminary injunction should be affirmed.

This 17th day of November, 2022.

Respectfully submitted,

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STATEMENT ON ORAL ARGUMENT

The City defers to the Court's judgment on whether oral argument would aid the decision-making process.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 8.1(e)(2) or 32(a)(7)(B) because this brief contains 7996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Word in 14-point Century Schoolbook type.

This 17th day of November, 2022.

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