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Work Session I: First Amendment and Section 1983

The First Amendment and Section 1983 for Cities

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Curriculum Vitae

Miles Risley is the City Attorney of Corpus Christi, Texas. He received his law degree from the University of Texas in 1992. He graduated summa cum laude from West Texas State University in 1989.

Mr. Risley has practiced municipal law since 1994. He became City Attorney of Corpus Christi in 2014. He was City Attorney of Wichita Falls between 2009 and 2014. Prior to his service in Wichita Falls, he was the City Attorney of Victoria, Texas. Before coming to Victoria, he practiced with the law firm of Byington, Easton, and Risley, PC in Austin, Texas. He has also been an adjunct instructor at Victoria College and has served as a U.S. Army Military Intelligence Officer.

Mr. Risley has been a municipal attorney and member of the International Municipal Lawyer's Association (IMLA) for approximately 30 years. Mr. Risley is also a Local Government Fellow of the International Municipal Lawyer's Association (IMLA). In addition, Mr. Risley is a fellow of the Texas State Bar College and has made presentations to IMLA, the TCAA, and the National Contract Management Association. His presentations and papers have discussed land use law, municipal court, economic development, the Fair Housing Act, the Texas Open Meetings Act, the Texas Public Information Act, government contracting, gang injunctions, the Fair Labor Standards Act, and tow truck regulation. He has also previously served as the President of the Texas Coalition for Affordable Power, which advocates for the interests of electricity consumers and purchases electricity for more than 170 cities and other political subdivisions.

Mr. Risley has extensive experience dealing with the First Amendment and 42 USC 1983 lawsuits. He has served as attorney in more than 1,000 public meetings. He has drafted or reviewed more than 5,000 ordinances, many of which touch upon First Amendment issues. Also, the cities for which he has served as City Attorney for the last 15 years handle their own civil rights lawsuits, and he has dealt with more than 100 civil rights lawsuits, many of which involved alleged First Amendment violations.

First Amendment and 1983 for Cities

Municipal attorneys need to understand the basic First Amendment claims that cities face. The First Amendment to the U.S. Constitution reads:

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

42 U.S.C. § 1983 creates civil liability for a city's deprivation of a person's First Amendment rights as follows:

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

Top Reasons that municipalities and their employees get accused of violating the First Amendment:

1. **The city terminated an employee or engaged in some action making an employee believe they would soon be terminated.** Terminated employees often allege their termination is in retaliation for exercise of their free speech rights. They are desperate for causes of action, especially in employment at will situations. These terminated employees will often claim that their termination was retaliation for their exercise of their First Amendment right to express themselves. They will face multiple formidable challenges:

   (a) Pickering/Connick Balancing Tests: The Court created the first test in the two-tiered analysis: the Pickering balancing test. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Fifteen years later, in 1983, the Court added the second test to the two-tiered analysis: the Connick public concern test. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *A Matter of Public Concern: "Official Duties" of Employment Gag Public Employee Free Speech Rights* [*Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)], 46 Washburn L.J. 603, 610 (Spring, 2007).

- ***Pickering Balancing Test.*** An employee's speech disrupts the efficiency of a public employer when it: (1) adversely affects the employee's own performance; (2) disturbs harmony and discipline in the workplace; (3) interferes with the regular operation of the government office or agency; or (4) undermines public trust in the office or agency by disseminating false information in such a way that renders the government employer unable to effectively counter the employee's speech. **The Pickering Balancing Test often favors the employee.**

- ***Connick Public Concern Test.*** A public employee's free speech rights only extend to speech regarding matters of public concern. *Connick v. Myers*, 461 U.S. 138, 147. **Under the Connick Public Concern Test, the employee usually loses. The following case holdings and dictum demonstrate this:**

  - *Holland v. Rimmer*, 25 F.3d 1251, 1255 (4th Cir. 1994). When a county administrator was fired on account of his manner of disciplining subordinates, his First Amendment claim failed because "[s]uch internal personnel matters are not likely to arouse the public's interest and do not become matters of public concern merely because they occur in a public agency."

  - *Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1234 (10th Cir. 1998). A high school football coach's "self-serving" comments about his supervisors's treatment of him was deemed "of a personal nature,"

  - *Ayoub v. Tex. A & M Univ.*, 927 F.2d 834, 837 (5th Cir. 1991) & *Khuans v. Sch. Dist*., 123 F.3d 1010, 1016-17 (7th Cir. 1997). A professor's complaint of discriminatory treatment in setting his salary and a school psychologist's criticism of the management of the school were private matters.

  - *Wytrwal v. Saco Sch. Bd.,* 70 F.3d 165, 168-70 (1st Cir. 1995) (holding that criticism of special education department and suggestion that school is violating special education laws is public concern speech).

  - *Taylor v. FDIC*, 132 F.3d 753, 769 (D.C. Cir. 1997) (noting that motion filed in lawsuit, "purpose [of which] was to avoid personal sanctions, not to expose wrongdoing" does not address matter of public concern);

  - *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1226 (6th Cir. 1997) (stating that part-time bus drivers' request for unemployment benefits "during the summer months while they were unemployed is far more a matter of private interest than public concern");

  - *Withiam v. Baptist Health Care of Okla.,* 98 F.3d 581, 583 (10th Cir. 1996). "bald, unadorned and nonspecific endorsement" of current managers

of hospital "offered nothing at all to inform the public about the management of the hospital" and, thus, "did not involve a matter of public concern");

• *Hanton v. Gilbert*, 36 F.3d 4, 7 (4th Cir. 1994). Complaints about one's job duties and about new policy of charging user fee for use of university microscope do not address issues of public concern).

• *Smith v. Fruin*, 28 F.3d 646, 653 (7th Cir. 1994). Complaint about secondhand smoke in office is not public concern speech.

• *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1060 (2d Cir. 1993) (recognizing that "demands and complaints seeking an increase in towing referrals" is not public concern speech).

• *City of San Diego v. Roe*, 543 U.S. 77 (2004). Making a video of oneself stripping off his police uniform and masturbating does not qualify as a matter of public concern.

The following cases found employee speech to be a matter of "public concern" under the *Connick* test. See the following cases:

• *Thomas v. Whalen*, 51 F.3d 1285, 1290 (6th Cir. 1995). Opposing gun control legislation is a matter of public concern.

• *Paradis v. Montrose Mem'l Hosp.*, 157 F.3d 815, 818 (10th Cir. 1998). Accusing a hospital administrator of unethical and illegal conduct is a public concern. \

• Cragg v. City of Osawatomie, 143 F.3d 1343, 1345-46 (10th Cir. 1998). Putting up a yard sign opposing the recall of city council members is a public concern.

• *Campbell v. Ark. Dep't of Corr.*, 155 F.3d 950, 958- 59 (8th Cir. 1998). Corruption and lack of security at a prison is a public concern.

• *Dill v. City of Edmond*, 155 F.3d 1193, 1202 (10th Cir. 1998). Publicly alleging that other officers are withholding exculpatory evidence in a murder case is a matter of public concern.

(b) Speech is part of Employee's Duties. When government employees make statements as part of their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their statements from employer discipline. See *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951 (2006). In *Garcetti*, the Supreme Court declared that job-related speech is not

protected by the First Amendment. The significant fact in this case, the Court emphasized, was that the employee admittedly wrote the critical memorandum pursuant to his duties as an employee, and not as a citizen Some cases that applied *Garcetti* are as follows:

- *Foerster v. Bleess*, 2022 U.S. App. LEXIS 127, *8 (5th Cir. 2022). An employees' expressions were made pursuant to his duties as police chief)

- *Paske v. Fitzgerald*, 785 F.3d 977, 984 (5th Cir. [Tex.] 2015). A police officer's speech at a meeting of higher ranking officers was not protected by the First Amendment, when he was invited to the meeting in his role as a police officer, his attendance was part of his job, he spoke in response to an invitation from his supervisor for job-related questions, and he contributed to the formation and execution of official policy by participating in internal discussions of the police department's operations.

- *Nixon v. City of Houston*, 511 F.3d 494, 498 (5th Cir. [Tex.] 2007). A city police officer's speech at the scene of an accident criticizing the police department's high-speed chase policy and statements later made to the media, for which he was subsequently suspended, were held to be made pursuant to his official duties and during the course of performing his job and, therefore, he was not protected against retaliation by the police department under the First Amendment. The fact that the officer's statement was not authorized by the police department and that speaking to the media was not part of his regular job duties was not dispositive.

(c) Policies that govern employee speech can be constitutionally infirm by being non-viewpoint neutral or by being overbroad. Terminated or otherwise aggrieved employees will often review employee policies for illegal provisions. Cities need to be careful to avoid employee policies that violate free speech rights of employees. An example of non-viewpoint neutral policy is a policy prohibiting only critical or unfavorable speech about the employer. *Westbrook v. Teton Cty. Sch. Dist. No. 1*, 918 F. Supp. 1475 (D. Wyo. 1996) (finding school district's policy forbidding criticism of co-workers or supervisors, including members of the school board, outside of limited settings to be unconstitutionally overbroad). They can also be overly broad, such as a Fire Department regulation requiring the fire chief's pre-approval before making any comments for publication. *Providence Firefighters Local 799 v. City of Providence*, 26 F. Supp. 2d 350, 352, 357 (D.R.I. 1998).

(d) Be aware that plaintiff may attempt to shift the burden of proof via *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle.* 429 U.S. 274, 281 (1977). In *Mt. Healthy*, Fred Doyle, a teacher for the Mt. Healthy school district, was the president of the local teacher's association who was openly and publicly critical of the Mt. Healthy Board of Education. As a teacher, Doyle argued with school employees in the cafeteria, referred to students in a derogatory manner within a

disciplinary complaint, and made obscene gestures to two female students. In one incident, Doyle's school circulated a memo specifying standards for teacher dress and appearance. Doyle objected, calling into a local radio show detailing and critiquing that memo. The superintendent of the Mt. Healthy Board of Education recommended that Doyle not be rehired due to, in the superintendent's opinion, Doyle's unprofessional handling of the matter. The U.S. Supreme Court held that Doyle had the burden to prove that the Board of Education considered his protected speech a "motivating factor" in the decision not to rehire him. After Doyle proved that one of the causes of his termination was retaliation for exercising his First Amendment rights, the burden shifted to the defendant to prove that the termination would not have occurred but for Doyle's exercise of those rights.

(e) Be aware of other employment claims. Discrimination complaints have administrative pre-requisites that are difficult for many attorneys to navigate. Therefore, often, a 1983 claimant in an employment context is compensating for their inability to make a discrimination complaint. Failure to exhaust administrative remedies does not deprive a trial court of jurisdiction over a Section 1983 claim. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2D 172 (1982).

(f) If an employee has not yet been terminated, think about whether his claim involves any other kind of "adverse employment action". Adverse employment actions for purposes of stating a Section 1983 claim include discharges, demotions, refusals to hire, refusals to promote, and reprimands. *Juarez v. Aguilar*, 666 F.3d 325, 332 (5th Cir. [Tex.] 2011); *Jackson v. Texas Southern University*, 997 F. Supp. 2d 613, 634 (S.D. Tex. 2014)]. A job transfer, even without a cut in pay or other tangible benefits, may constitute an adverse employment action under Section 1983. It can be deemed a demotion if the new position is objectively worse. The employee's subjective perception that a demotion has occurred is insufficient. The employee must show that the transfer makes the job "objectively worse" See *Scott v. Godwin*, 147 S.W.3d 609, 617 (Tex. App.—Corpus Christi 2004, no pet.); see also *Burnside v. Kaelin*, 773 F.3d 624, 626 (5th Cir. [Tex.] 2014) (transfer can be adverse action even without accompanying pay cut or other tangible benefit loss when it is objectively equivalent to discharge, demotion, or reprimand)]. The following actions were held **not** to be adverse employment actions in an associate professor's First Amendment retaliation action against a university: requests to retire; discouraging her attempts to secure promotion; providing her lower compensation than that provided to her peers; disqualifying her from serving on committees and in other academic activities; personal disparagement; and giving her heavier teaching loads. *Jackson v. Texas Southern University*, 997 F. Supp. 2d 613, 635 (S.D. Tex. 2014).

2. **The city arrested someone who made offensive statements to the police.** Police deal with many people who are demonstrating their worst selves. Often, they are drunk,

angry, depressed, otherwise-inebriated, or simply expressing their most offensive personality traits. They often express themselves to the police in a manner that might be protected by the First Amendment except for their other violations of the law. Further, many disorderly conduct-type charges contain elements that are expressive in nature. It is natural that many arrests are accompanied by the arrestee's allegation that the arrest was caused, at least in part, by the First Amendment-protected expression of the arrestee. To prevail in a retaliation claim under § 1983, a plaintiff must prove that (1) the plaintiff engaged in constitutionally protected speech; (2) the arresting officer caused the plaintiff to be arrested; (3) the defendant's actions were motivated by the plaintiff's engagement in constitutionally protected conduct, and (4) the arrest was not supported by probable cause or was not a crime for which arrests rarely occurred. Prior to 2019, if plaintiffs could prove the first three of these elements, defendants then had the burden to prove that they would have taken the same action absent the protected conduct. See *Choose Your Words Carefully: Reimagining Retaliatory Arrest After Nieves V. Bartlett*, 90 Fordham L. Rev. 873, 881 (November 2021). In 2019, the U.S. Supreme Court issued the opinion of *Nieves v. Bartlett*, which further required the plaintiff to prove that probable cause was absent or that the arrest was not for a crime for which an arrest of a person in similar circumstances would generally not occur. *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

3. **The city regulated the content of signs.** In theory, if you have to read the sign to regulate the sign, then you are regulating the content of the sign. This often subjects sign ordinances to strict scrutiny and results in those ordinances being struck down by courts. Nonetheless, **c**ities often regulate the content of signs, and such regulations are often upheld by the courts. Content-based sign regulations lead to most of the litigation. Examples of content-based distinctions included in many local sign ordinances are:

    - **Billboards.** Most ordinances define a billboard as a sign "advertising goods or services not offered on the premises." Some local ordinances simply use the term "off-premises sign" in lieu of the generic "billboard." It is impossible to determine whether a sign relates to goods or services offered on the premises (or not) without reading the sign.

    - **Real estate signs** are a popular (and probably useful) content-based category of signs often exempted from regulation or given special treatment. The 1977 Supreme Court decision in *Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977).* almost seems to require a content-based exemption for such signs in a residential area in which signs in general are highly restricted.

    - **Construction signs.** Signs identifying contractors and design professionals involved in a project often receive the same sort of exemption or special treatment as real estate signs, although the public purpose in favoring this category is far less clear.

- **Directional Signs.** Although standard directional signs to such things as hospitals or particular highways are usually public signs and not regulated through a sign ordinance, many local sign ordinances carve out special provisions for off-site directional signs for businesses or for particular uses, often institutional uses such as churches and schools. Temporary directional signs provided the core facts and framed the issue before the Supreme Court in *Reed v. Gilbert.*135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

- **Logo/identification signs.** Some local ordinances limit the message on freestanding signs to a logo or name of a business, prohibiting any message regarding products, services or price.

- **Political signs.** Many local ordinances offer special treatment to political signs. Although probably intended to offer liberal treatment to political signs, many local ordinances impose limits on them far more restrictive than those applicable to real estate signs, thus triggering a major constitutional problem.

- **Price signs.** Some local ordinances offer special treatment to signs stating the prices of particular goods (usually gasoline).

- **Time and temperature signs.** Some local sign ordinances carve out an exception from limitations on "moving" or "flashing" signs to allow these in commercial areas.

See Regulation of Signs Using Content-Based Distinctions, 3 Zoning and Land Use Controls § 17.02 (2023).

(a) Billboards. Municipalities are often sued by billboard companies because billboard companies have the money and incentive to sue cities. The primary issue is whether cities can regulate billboards (off-premise signs) more strictly than signs advertising activities on the property.

In *Reed v. Gilbert*, the town of Gilbert, Arizona, adopted a comprehensive sign code that applied distinct size, placement, and time restrictions to 23 different categories of signs, giving more favorable treatment to some categories (such as ideological signs or political signs) and less favorable treatment to others (such as temporary directional signs relating to religious events, educational events, or other similar events). *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). The Court rejected the contention that the restrictions were content neutral because they did not discriminate on the basis of particular viewpoints, reasoning that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."576 U. S., at 169, 135 S. Ct. 2218, 192 L. Ed. 2d 236. Unlike the sign code in *Reed*, the City's sign ordinances here do not single out any topic or subject matter for differential treatment. A sign's message matters only to the extent that it informs the sign's

relative location. Thus, the City's on-premises/off-premises distinction is more like an ordinary time, place, or manner restriction, which does not require the application of strict scrutiny. See *Frisby* v. *Schultz,* 487 U. S. 474, 482. Pp. 6-8, 108 S. Ct. 2495, 101 L. Ed. 2D 420. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC,* 596 U.S. 61, 142 S. Ct. 1464, 1467 (2022).

The main problem with discriminating against billboards is that commercial messages are treated more strictly than non-commercial messages. This conflicts with Supreme Court precedent that non-commercial sign regulation should be less strict than commercial sign regulation. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 at 513 (1981). This tension will lead to future cases in this area. This problem was highlighted in *Auspro Enters., LP v. Tex. DOT*, 506 S.W.3d 688 (Tex. App. 2016), rev. den. 2017, which held that Texas Highway Beautification Act [which regulates billboards near state highways] was unconstitutional as applied to noncommercial signs.

(b) Other signs. After *Reed v. Gilbert*, courts have been striking down dozens of sign ordinances. Some of the notable cases are as follows:

- ***28 Rocket Outdoor Adver., LLC v. City of Pompano Beach,*** 2016 U.S. Dist. LEXIS 168487 (S.D. Fla. 2016). The court held that provisions of a local sign ordinance were unconstitutional as follows: a provision regulating murals, because it gave administrators too much discretion; a special category for signs conferring a "public benefit," because it also gave administrators too much discretion; and the procedural provisions, which did not include an effective time-limit or notice of appeal. The court rejected an argument that "official directional and traffic signs" gave administrators too much discretion, because the terms have a clear meaning.

- ***www.RicardoPacheco.com v. City of Baldwin Park,*** 2017 U.S. Dist. LEXIS 107256 (C.D. Cal. 2017). The federal court in California granted a preliminary injunction against enforcement of portions of a sign ordinance, finding that the following provisions were content-based and that the city had "made no attempt" to meet its burden of defending a strict scrutiny claim: provisions allowing extra flags for specified periods around three national holidays; provisions allowing extra signage for specific periods around elections; provisions allowing for additional, temporary commercial signs for 'business openings" and "special events" (court found a speaker preference, although city argued that businesses could actually display any message on those signs; the lead plaintiff in the case was an unincorporated association bearing the same name as the website and apparently formed to challenge allegedly corrupt practices by Ricardo Pacheco, a city council member).

- ***City of Painesville Bldg. Dep't v. Dworken & Bernstein Co.,*** L.P.A., 89 Ohio St. 3d 564, 2000 Ohio 488, 733 N.E.2d 1152 (2000), where the law firm challenged a time limit imposed on political signs on business property;

although the major cases on time limits on political signs (see § 17.04[4]) relate to such signs on residential property, the Ohio court in this case applied the doctrine of strict scrutiny—and the ordinance failed.

- ***Sweet Sage Café, LLC v. Town of N. Redington Beach,*** 2017 U.S. Dist. LEXIS 11413 (M.D. Fla. 2017), app. dism. 2017 U.S. App. LEXIS 16816 (11th Cir. 2017) struck down a sign ordinance with 17 content-based exemptions.

4. **The city or one of its officials blocked someone's offensive comment on social media.** When a government agency social media site invites public comment, comments should not be blocked, deleted, or hidden based on viewpoint expressed. If a City opens a social media account that is open to comments, then it has opened a limited public forum, in which it cannot engage in viewpoint discrimination. *See Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 Marq. L. Rev. 1045, 1069-1070 (Summer 2019).

   The First Amendment prohibition on viewpoint discrimination is not simple to apply to social media because many social media sites are not the "official" site of a municipality, but are merely sites initiated or operated by different public officials. The typical struggle is whether an account is the public official's personal account for which he/she is engaging in First Amendment protected activity as an individual or is the public entity's means of informing the public of the activities of the office.

   In 2019, three United States Circuit Courts of Appeal issued opinions concluding that social media blocking by government officials violates the First Amendment. *Knight First Amend. Inst. v. Trump,* 928 F.3d 226, 230 (2d Cir. 2019). *Biden v. Knight First Amend. Inst.,* 141 S. Ct. 1220, 1220-21, 1227 (2021) *Robinson v. Hunt Cnty.*, 921 F.3d 440, 449, 452 (5th Cir. 2019). These courts held that: (1) public officials who operate interactive social media accounts in their official capacity have created government-controlled public forums for speech and (2) the officials cannot then engage in viewpoint-based regulation of private speech in those forums by blocking people or deleting their comments based on the perspective being expressed. If, instead, the official controls the account in her <u>private</u> capacity, then there is no state action, the First Amendment does not apply, and the official is free to censor or block people, at will. Since 2019, many federal district courts and four additional Circuit Courts of Appeal have concurred with this basic framework. See *Campbell v. Reisch: The Dangers Of The Campaign Loophole In Social-Media-Blocking Litigation*, 25 U. Pa. J. Const. L. 147, 148-149 (March, 2023).

   Determining the threshold question of whether a public official operates the relevant social media account in his/her official capacity (i.e.,"under color of state law") has led to different approaches by the circuits. Most circuit courts apply a totality-of-the-circumstances approach. This approach takes into account the following factors in determining whether a government official's publicly accessible social media account is operated in an official, versus personal, capacity:

- whether the official presents herself on the social media account as a government actor by using her government title and address, linking to her government website, or displaying photographs of herself engaged in government business;

- whether the official uses the account to communicate with the public about her official duties and activities; and

- whether third parties, such as other government actors and members of the public, interact with the account as though it belonged to a government official.

See Knight Institute to Represent Plaintiff in the First Social-Media-Blocking Lawsuit to Reach Appellate Court, Knight First Amend. Inst. (May 2, 2018).

In January 2021, the 8th Circuit in *Campbell v. Reisch* prioritized a fourth consideration of whether the account was initially created as a campaign device, rather than as a tool of governance, and whether it continues to aid in any future re-election by creating a favorable impression of the official's job performance. *Campbell v. Reisch: The Dangers Of The Campaign Loophole In Social-Media-Blocking Litigation*, 25 U. Pa. J. Const. L. 147, 148-149 (March, 2023). *Campbell v. Reisch* indicates that the most effective way for a public official to keep a social media account private is to tie it to his/her campaign. In keeping the account private, the government official should not use the account for any official purpose or in a way that appears an extension of the public office in which they serve. *Technological Transformation of the Public Square: Government Officials Use of Social Media and the First Amendment,* 47 Mitchell Hamline L. Rev. 510, 530 (2021).

5. **The city arrested a person who was filming police or other government employees.** Cities may not arrest persons who are merely filming police or other government actors in a public place. Nonetheless, such arrests are a common occurrence. There are many section 1983 cases involving a private citizen's claim of First Amendment retaliation for filming the police. *See, e.g., Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017); *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011); see also *Seth F. Kreimer, Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 363-66 (2011).

Most federal circuits have recognized a First Amendment right to record on-duty peace officers. However, the 3rd and 4th Circuits have cases to the contrary. See *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262-63 (3d Cir. 2010) (finding the defendant officer did not lack probable cause and acted in good faith when he detained a civilian because the civilian did not have a constitutional right to film the officer without the officer's consent); see also *Syzmecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (failing to find a clearly established right to film police activity in a public forum). In

Syzmecki v. Houck,the 4th Circuit upheld the lower court's ruling in favor of the defendant police officer in a 42 U.S.C. § 1983 complaint. The court agreed with the lower court's finding that a citizen's assertion to First Amendment protection of her conduct – recording police activity in a public venue - was unfounded as said right had not been clearly established within the Fourth Circuit when the alleged conduct occurred. See *Filming the Police: An Interference or a Public Service*, 48 St. Mary's L. J. 145, 153-154 (2016).

In *Irizarry v. Yehia*,a police officer tried to block a journalist from filming, shone his flashlight into the camera, and then drove his cruiser at the journalist. The journalist brought a First Amendment retaliation claim under 42 U.S.C.S. § 1983. *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022). In that case, 10th Circuit held that, under the First Amendment, filming the police performing their duties in public is a clearly established protected activity, noting that the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have all concluded in published opinions that the First Amendment protects a right to film the police performing their duties in public. See 2 Police Civil Liability § 8A.11 (2023).

Nonetheless, police still use many theories of criminal jurisprudence against persons filming them. Many state statutes originally drafted to regulate wiretapping prohibit more generally the recording or interception of oral communications unless all parties to the conversation consent. Police officers regularly rely on these statutes to arrest citizens who insist on recording the officers without their consent, often after the citizens have used the records to file complaints against the police. See *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 358 (January 2011). Also see *Recording Calls and Conversations*, JUSTIA (last updated Oct. 2021), https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/[https://perma.cc/N3ND-7XK7].

Another group of arrested filmers involves persons who were purposely agitating government actors into arresting them for filming, such as “First Amendment Auditors”. See *1st Amendment auditors make police walk the line between enforcement, constitutionality*, Sara Cardine, L.A. TIMES, July 16, 2022. First Amendment auditors frequently seek to incite confrontation or aggression through harassing or argumentative behavior that stems from another motivation besides the asserted protection of individual liberties, such as obtaining popularity and money from social media views. Indeed, the rising popularity of First Amendment auditor videos has led to a competition among auditors, leading to attempts to create more dramatic videos in order to attract more clicks and subscribers for advertising revenue**.** A violent interaction between an auditor and government officials can result in a video that generates millions of views on YouTube and thousands of donations to the auditor. *First Amendment Audits*, 46 Los Angeles Lawyer 20, 22 (July-August 2023).

First Amendment auditors will attempt to leverage the limited knowledge of field-level government employees by pushing the boundaries of limited public forums. They will attempt to protest and film publicly visible activities in a manner that make public

officials uncomfortable. Countering these tactics requires briefing the field-level employees on the rights of these purposely offensive actors. See Teri Webster, *First Amendment 'Auditors' Filming Public Buildings, Police, Called 'Terrorists' But Are They Really*?, Blaze (Jan. 13, 2019), [https://perma.cc/9AVT-6CJP]. A sample briefing card is as follows:

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6. **The city broke up a protest.** Generally, the right of the public to demonstrate and protest in public spaces is a constitutionally guaranteed free speech right under the First Amendment. *What Acts Constitute Excessive Force in Violation of the U.S. Constitution when used against Demonstrators or Protesters*, *64 A.L.R. Fed. 3d 5* 64 A.L.R. Fed. 3D 5. Nonetheless, the First Amendment does not bar states and municipalities from arresting protestors who are committing crimes, such as trespassing or damaging property. Additionally, law enforcement officers and officials are permitted to disperse public demonstrations if there appears to be a clear and present danger of a riot, public disorder, impeding of traffic on public streets, or threats to public safety, peace, or order. Nonetheless, breaking up a large group must be done carefully to minimize dangers to law enforcement officers as well as protesters.

   The chief danger in breaking up protests is using excessive force. Police use of force violates the Fourth Amendment if it is objectively unreasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Protestors have brought challenges to a wide variety of practices utilized by law enforcement officers, such as their use of sound devices, particularly to disperse crowds, choking, beating, or striking demonstrators, roughly handling protestors, utilizing pain compliance techniques, shooting rubber bullets or other projectiles, striking protestors with a vehicle, using a taser on demonstrators, tightening handcuffs or zip ties on arrestees, confining detainees in a locked police vehicles, depriving protestors of food or water, or spraying demonstrators with chemical agents such as mace or pepper spray. *What Acts Constitute Excessive Force in Violation of the U.S. Constitution when used against Demonstrators or Protesters*, 64 A.L.R. Fed. 3d 5.

7. **The city established a permit system for protests and/or parades.** Cities may require permits for parades and protests. However, they must be justified without reference to the content of the regulated speech, be narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. A content-neutral time, place, or manner restriction can be imposed in a public forum, but only if it is a "narrowly drawn and precise enactment that aims at specific conduct." See *Permit Schemes: Under Current Jurisprudence, What Permits are Permitted?*, 56 Drake L. Rev. 381, 406 (Winter, 2008). The U.S. Supreme Court has laid out certain legal boundaries for permit schemes in five crucial cases:

   - *Freedman v. Maryland*, 380 U.S. 51 (1965). Government may not require prior submission of content of expression to the government prior to issuance of permit.

   - *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Prior restraints of 1st Amendment protected activities require clear, narrow, objective, and definite standards. No unbridled discretion.

- *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). Governments do not have unbridled discretion to assess parade/demonstration permit fees and the fee may not be assessed based on reaction of audience to demonstration. (ie. no heckler's veto).

- *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002). Use of public forum must be content-neutral. A licensor may not pass judgment on the content of the speech.

- *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002). Door-to-door religious canvassers who are not soliciting funds may not be required to obtain permits.

See Permit Schemes: Under Current Jurisprudence, What Permits are Permitted?, 56 Drake L. Rev. 381, (Winter 2008).

8. **The city restricted a Sexually Oriented Businesses (SOB).** A huge amount of First Amendment jurisprudence is based on the regulation of SOB's. These businesses include sexually oriented book, video, or novelty stores or arcades, live performance or nude dancing cabarets, motion picture theatres or video viewing facilities, escort or outcall agencies, and other types of sexually oriented businesses. V*alidity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses -- Types of Businesses Regulated*, 21 A.L.R.6th 425. Like billboard companies, SOB's have the funds and incentive to sue cities to maintain their lucrative operations that depend on their public spectacle. Further, many politically powerful groups oppose SOB's and pressure local politicians to be creative in their restrictions. Consequently, most municipal attorneys will encounter SOB regulation as a regular part of their careers. When regulating SOB's, a municipal attorney is wise to rely on a tried-and-true ordinance that has withheld constitutional scrutiny, preferably in the same state, and should be careful to include all of the latest studies in his/her findings as justification for an SOB ordinance. The general allowable framework is as follows:

   • Cities may ban nude dancing in establishments that sell alcoholic beverages. *California v. LaRue*, 409 U.S. 109 (1972). Cities must be careful not to run afoul of state preemption when doing so.

   • Cities may prohibit SOB's from locating within 1,000 feet of any residential zone, single-or multiple-family dwelling, church, park, or school. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986).

   • SOB regulation requires generally requires a City to include findings referencing studies relating the SOB regulation in question to the effects of the regulated type of SOB on municipal crime rates, property values, neighborhoods, or other vices. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002).

- Cities may establish no-touch buffer zones between entertainers and customers. *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002).

- Local governments may restrict the hours of operation of SOB's. *Ctr. for Fair Pub. Policy v. Maricopa Cty.*, 336 F.3d 1153 (9th Cir. 2003).

- Cities must leave open "ample alternative means of communication" and may not effectively zone SOB's out of existence. *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee Cty.*, 337 F.3d 1251 (11th Cir. 2003).

- Cities may prohibit SOB's from selling alcohol. *Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196 (11th Cir. 2003).

- Cities may not establish distance limitations on SOB's that are merely adult video stores or adult book stores. *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003).

- Cities may require female dancers to cover their breasts and genitals while performing. *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003).

9. **The city limited (or arrested) a commenter in a City Council meeting.** Cities often are sued for violating the First Amendment rights of commenters at City Council meetings. These suits are becoming more common as persons seeking fame on social media often appear at City Council meetings for the sole purpose of making outrageous statements that will prompt a government response. Cities may limit comments to the subjects of the meetings. However, many other prohibitions are sought by governing officials that are more Constitutionally problematic.

   A city council meeting has been held to be a limited public forum. *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). By creating a "public comment" item on the agenda, a city creates a "public forum" where First Amendment protections are afforded. Because of the "public forum," the council cannot exclude a person from speaking because it does not like the viewpoint of the speaker. Reasonable time, place and manner regulations are permissible, but any content-based prohibition must be viewpoint neutral and be narrowly drawn to effectuate a compelling state interest. *Perry Educ. Ass'n v. Perry Local Educators' Assn*., 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983). Viewpoint discrimination is impermissible in any forum. *Marshall v. Amuso*, 571 F. Supp. 3d 412, 421 (E.D. Pa. 2021).

   By creating a "public forum" by allowing public comment, it is a violation of the First Amendment to selectively prohibit others from similarly addressing the council as to the same matters based on their speech. See *Gault v. City of Battle Creek*, 73 F.Supp.2d 811, 814 (W.D. Michigan 1999). Recent U.S. Supreme Court opinions indicate that regulation of a limited forum, such as "public comments" may survive under a test that is less strict than the one above stated. *Good News Club v. Milford Cent. Sch.*, 533 U.S.

98, 106, 121 S. Ct. 2093 (2001). Under the less strict test for reviewing limited forum speech, content-based restrictions are permitted so long as they are designed to confine the "forum to the limited and legitimate purposes for which it was created." *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 281 (3rd Cir. 2004). Under this reasoning, the city potentially may limit the "public forum" to comments that address specified city concerns (For example, the city may eliminate public comment on items unrelated to city business). However, (i) any restrictions on speech must be viewpoint neutral; and (ii) restrictions must be reasonable in light of the purpose served by the forum ("public comment" section). See *City Meetings and the First Amendment*, TCAA 2006 Summer Conference https://www.tml.org/DocumentCenter/View/422/Open-Meetings-and-the-First-Amendment-PDF. Under this analysis, content-related regulation is permissible so long as the content regulation is tied to the limitations that frame the scope of the "Public Forum" e.g. the regulation is neutral as to viewpoint within the subject matter of the content.

A commonly sought prohibition is a prohibition on "personal attacks". Such a prohibition is risky because it is an inherently viewpoint-based regulation. The Michigan Attorney General described one way to limit "personal attacks" as follows:

> 'if the definition of personal attacks included the manner in which an employee of the board or a board member carries out his or her duties, then the rule restricting such speech would be invalid, but if the definition of personal attacks refers to the conduct of the person being attacked that is totally unrelated to the manner in which he or she performs his or her duties, the exclusionary rule may be applied'
>
> See *Gault v. City of Battle Creek*, 73 F.Supp.2d 811, 814 (W.D. Michigan 1999), citing 1977-1978 Mich. Office of Attorney General No. 5332.

Nonetheless, in *Griffin v. Bryant*, the District of New Mexico concluded that a policy prohibiting "negative mention ...of any Village personnel, staff or the Governing Body" was facially unconstitutional because it "permit[ted] praise and neutral feedback, but not criticism, of both government employees and, worse, the Governing Body itself." *Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1173 (D.N.M. 2014). In *Marshall v. Amuso*, the Eastern District of Pennsylvania found that the policy restrictions on the use of "abusive" and "offensive" comments were impermissible viewpoint discrimination. *Marshall v. Amuso*, 571 F. Supp. 3d 412, 421 (E.D. Pa. 2021).

Additional considerations.

No respondeat superior liability in 1983 cases. The lack of respondeat superior liability for cities is often surprising to non-1983 practitioners. A successful **Rule 12(b)(6) Motion** from a case based on First Amendment statements to the police is attached that makes these points. See **Attached Rule 12(b)(6) Motion.**

Cities act through hundreds of agents, most of whom do not have policy-making authority. Therefore, the most effective way to defend many 42 U.S.C. §1983 (§1983) suits is to allege that the act of the person who committed an alleged civil rights violation was not furthering an official policy, practice or procedure of the city. As a general principle, a municipality is not liable under §1983 for the actions of its employees. Please note that a municipality may be held liable under §1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision. *St. Louis v. Praprotnik*, 485 U.S. 112, 119, 108 S. Ct. 915, 922 (1988).

A municipality cannot be liable under § 1983 based on a theory of *respondeat superior*, rather, plaintiffs must prove that their injury was caused by action pursuant to official municipal policy or custom. 42 U.S.C.A. § 1983; *see Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2D 626 (1997); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001); *McClure v. Biesenbach*, 355 F. App'x 800, 803-04 (5th Cir. 2009). *Jones v. City of Mesquite*, Civil Action No. 3:18-CV-0117-B, 2018 U.S. Dist. LEXIS 136291, at *18 (N.D. Tex. 2018).

While §1983 claims may be brought against municipalities "where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," municipalities cannot be held liable solely for employing a tortfeasor; that is, they "cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690-91 (1978); *see also Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2D 626 (1997) ("We have consistently refused to hold municipalities liable under a theory of *respondeat superior*.").This is because "under §1983, local governments are responsible only for 'their *own* illegal acts.'" and they are not vicariously liable under § 1983 for their employees' actions." *Connick v. Thompson*, 563 U.S. 51, 60, 131 S. Ct. 1350, 179 L. Ed. 2D 417 (2011). S*ee* also *Pembaur v. City of Cincinnati*, 475 U.S. 469 at 479 (1986).

Requiring municipal-liability plaintiffs to identify an allegedly unconstitutional municipal policy or custom "ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997) at 403-04 (citing *Monell*, 436 U.S. At 694). "To prevent municipal liability . . . from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged."*Board of County Comm'rs v. Brown*, 520 U.S. 397 at 410 (1997). In § 1983 cases, it is far more difficult for a plaintiff to establish municipal liability . . . than to establish individual liability. *Ayers v. City of Holly Springs*, 2006 U.S. Dist. LEXIS 74811, 2006 WL 2943295.

To state a claim for municipal liability under§ 1983, "a plaintiff must show the deprivation of a federally protected right caused by action taken 'pursuant to an official municipal policy.'" *Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010) (citing *Monell*, 436 U.S. At 691). "A plaintiff must identify: '(1) an official policy (or custom), of which (2) a policymaker can

be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom.'" *Id.* at 541-42. (quoting *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002)).”Isolated unconstitutional actions by municipal employees will almost never trigger [municipal] liability." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)

Please note, informal governmental policies can establish Section 1983 liability against individuals acting in their official capacity to the same extent as formal governmental policies can [Juarez v. Aguilar, 666 F.3d 325, 335 (5th Cir. [Tex.] 2011)]. Also, for a defendant to be liable under Section 1983, the defendant must have been the final decision-maker. However, an informal decision, as well as a formal decision, can be an adverse employment decision for purposes of imposing liability. *Juarez v. Aguilar*, 666 F.3d 325, 334 (5th Cir. [Tex.] 2011)]. *Juarez* rejected the contention that an adverse employment decisions of collective bodies, such as school boards, can only result from recorded votes.

Statute of Limitations: The time limit for state and local employees to file a lawsuit for violating the First Amendment varies from state to state. This is because Congress did not establish a time limit for claims under the federal law that allows people to sue when someone acting “under color of state law” violates rights guaranteed by federal law. So, the Supreme Court has said that federal courts should use the time limit for personal injury claims in the state where the court is located. This is the same time limit set by each state for automobile accident claims. Depending on the state, the time limits run from one year (Kentucky, Louisiana and Tennessee) to six years (Maine and North Dakota). See *What statute of limitations is applicable to a damage action under Federal Civil Rights Acts*, 98 A.L.R.2d 1160, 2. Also see *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431, 24 Fair Empl. Prac. Cas. (BNA) 827, 24 Empl. Prac. Dec. (CCH) P 31393 (1980); *Rolax v. Whitman*, 175 F. Supp. 2d 720 (D.N.J. 2001), decision aff'd, 53 Fed. Appx. 635 (3d Cir. 2002); *Daniel v. Safir*, 175 F. Supp. 2d 474 (E.D. N.Y. 2001), judgment aff'd, 42 Fed. Appx. 528 (2d Cir. 2002).

Please note that, while state law controls which statute of limitations is applied in a § 1983 action, federal law determines when a cause of action accrues. *Elliott Reihner Siedzikowski & Egan, P.C. v. Pennsylvania Employees Benefit Trust Fund*, 161 F. Supp. 2d 413 (3d Cir. 2002). Also, note that an enforcement action brought by Equal Employment Opportunity Commission in federal court against employer alleged to have violated Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.) is not subject to state statutes of limitations. *Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402, 14 Fair Empl. Prac. Cas. (BNA) 1718, 14 Empl. Prac. Dec. (CCH) P 7619 (1977).

Attachment - Rule 12(b)(6) Motion

IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

DENISE ECKERT	**§**	
	§	
v.	**§**	**CIVIL ACTION NO. 2:19-cv-00326**
	§	
CITY OF CORPUS CHRISTI, TEXAS;	**§**	
and JACOB O'SULLIVAN, *Individually*	**§**	**JURY TRIAL**

DEFENDANT, CITY OF CORPUS CHRISTI'S RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

COMES NOW, the CITY OF CORPUS CHRISTI (hereinafter, the "City"), a Home-Rule city, Municipal Corporation and Political Subdivision of the State of Texas, a Defendant in the above-styled and numbered cause, and files this its Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim and in support thereof Defendant City of Corpus Christi would show as follows:

A. INTRODUCTION

1. Plaintiff, DENISE ECKERT, filed suit pursuant to 42 U.S.C. § 1983, alleging false arrest, malicious prosecution, unlawful search and seizure and First Amendment free speech violations against the City and licensed peace officer with the City's Police Department, JACOB O'SULLIVAN. As demonstrated in the arguments below, Plaintiff has failed to state a claim upon which relief can be granted against the City. Accordingly, her claims against the City should be dismissed.

B. ARGUMENTS & AUTHORITIES IN SUPPORT OF RULE 12(B)(6) DISMISSAL

I. Rule 12(b)(6) Standard of Review

2. To survive a Rule 12(b)(6) motion to dismiss, Plaintiff's Complaint need only

include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The complaint, however, must allege "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a formulaic recitation of the elements of a cause of action will not do."). A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. at 556. A court should not accept "threadbare recites of a cause of action's elements, supported by mere conclusory statements," which "do not permit the court to infer more than the mere possibility of misconduct." *Ashcfroft v. Iqbal*, 556 U.S. 662, 681, (2009) (quoting *Twombly*, 550 U.S. at 570).

3. In *Iqbal*, the Court pronounced that a complaint must contain more than labels and conclusions to satisfy the pleading standard of Rule 8. *Id*. at 676-78 ("[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'"). Essentially, *Twombly* and *Iqbal* establish a two-prong process for the Court: 1) take the factual allegations as true, so long as the complaint is well pleaded and not simply conclusory, and 2) determine if the complaint plausibly gives rise to a claim upon which relief can be granted. Thus, under the *Twombly* and *Iqbal* framework, Plaintiff needs more than conceivable, conclusory allegations which have obvious, alternative explanations in order to meet the stand-

ard and survive a Rule 12(b)(6) motion.

II. The Monell Three-Tiered Standard Must Be Met Before Municipal Liability Can Attach.

4. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and he must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *see also Biliski v. Harborth*, 55 F.3d 160, 162 (5th Cir. 1995). Section 1983 does not create substantive rights, but instead provides remedies for rights established elsewhere. *Graham v. Connor*, 490 U.S. 386, 393–94, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989). A cognizable claim under section 1983 requires a plaintiff to demonstrate deprivation of a federally secured right—and municipal liability arises "when [the] execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dept. of Soc. Servs. of N.Y.*, 436 U.S. 658, 691-94 (1978) ("Congress did not intend municipalities to be held liable [under § 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort.").

5. A governmental entity cannot be liable for civil rights violations under a theory of *respondeat superior* or vicarious liability. *Monell.*, 436 U.S. at 694; *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003). Rather, judicial precedent demands that a high standard of proof be satisfied before liability may be imposed against a municipality. *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745 (5th Cir. 1993). Moreover, the Fifth Circuit has warned that strict observance of this standard is necessary "where a court fails to adhere to [the] rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability." *Snyder v. Trep-*

agnier, 142 F.3d 791, 796 (5th Cir. 1998). Therefore, § 1983 liability will attach "only where the municipality itself causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

a. Plaintiff Fails to Identify a Policy, Custom, or Pattern which was the Moving Force Behind her Alleged Constitutional Deprivation

6. To protect a municipality against *respondeat superior*-type claims, municipal liability under § 1983 requires a plaintiff to make a prima facie showing of three elements: (1) an official policy or custom, of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a violation of constitutional rights whose "moving force" is the policy or custom. *Pineda*, 291 F.3d at 328; *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001), *cert. denied,* 534 U.S. 820 (2001); *Fraire v. Arlington*, 957 F.2d 1268, 1277 (5th Cir. 1992). This standard requires a plaintiff seeking relief under § 1983 to prove both municipal culpability and a direct causal link between the municipal policy and the constitutional deprivation. *Piotrowski*, 237 F.3d at 580.

7. A "policy," as defined by case law, is a rule or decision that is officially adopted and promulgated by the governing body. *Monell*, 436 U.S. at 690. "Policy" implies a course of action "consciously chosen from among various alternatives." *Stokes v. Bullins*, 844 F.2d 269, 273 (5th Cir. 1988) (citation omitted). A "custom" or "practice" is persistent, widespread practice that has become so permanent and well-settled as to constitute a custom or usage with the force of law. *Monell*, 436 U.S. at 690. Allegations of an isolated incident are not sufficient to show the existence of a custom or policy. *Bennett v. City of Slidell*, 768 F.2d 762, 768 (5th Cir. 1984, *cert. denied*, 472 U.S. 1016 (1985) ("isolated violations are not the persistent, often repeated constant violations that constitute custom or policy."); *Piotrowski*, 237 F.3d at 578; *see also Pineda*, 291 F.3d at 329. To demonstrate a municipal

custom or policy under § 1983, a plaintiff must at the very least allege a pattern of similar incidents in which citizens' constitutional rights were violated by intentional or negligent state action or that serious incompetence or misbehavior was general or widespread throughout the culpable agency. *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

8. As applied to the case at hand, Plaintiff's Complaint does not allege any unconstitutional act by a specific policymaker, therefore she must at least allege that there was a pattern of conduct by non-policymaker(s) that "occurred for so long and with such frequency that the course of conduct demonstrates the governing body's knowledge and acceptance of the disputed conduct. *Webster*, 735 F.3d at 842. The Fifth Circuit has held that allegations sufficient to establish a pattern require similarity and specificity; prior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question. *See Peterson v. City of Fort Worth*, 588 F.3d 838, 851 (5th Cir. 2009). Furthermore, a pattern requires "sufficiently numerous prior incidents" and not just "isolated incidents." *Id.* The Fifth Circuit has set the bar very high for the number of prior incidents necessary for a finding of municipal liability. *Saenz v. Dallas County Comm. Coll. Dist.*, 2011 WL 1935742 at *7, (N.D. Tex May 16, 2011). Notice of a pattern of similar violations that point to the specific violation in question is required. *See Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir.2005); see also *Bryan County v. Brown*, 520 U.S. 397, 411 (1997).

9. Plaintiff's pleading is void of any facts or allegations of a City policy or pattern that permits its Officers to falsely arrest, maliciously prosecute, unlawfully search and seize, or violate the First Amendment. Plaintiff does not even attempt to plead a pattern, but rather,

and in not following the pleading standard set forth in *Iqbal*, just recites conclusory statements unsupported by any factual allegations. *See* D.E. 1, para. 11. Plaintiff's pleading is compromised solely of her own allegations of misconduct arising from her arrest, however as argued above, an isolated incident is not sufficient to show the existence of a custom or policy to which municipal liability can attach. Therefore, since Plaintiff has failed to sufficiently plead a *Monell* claim against the City on any of her § 1983 claims, municipal liability cannot attach, and Plaintiff's Complaint must be dismissed.

III. 42 U.S.C. § 1983 Standing Alone Does Not Provide for a Claim for Malicious Prosecution.

10. As stated above, Plaintiff's Complaint contains a cause of action for malicious prosecution under §1983. (D.E. 1, para 14). Plaintiff does not have an independently cognizable claim for malicious prosecution under § 1983. In *Castellano v. Fragazo*, the Fifth Circuit held that "malicious prosecution" standing alone is no violation of the United States Constitution. 352 F.3d 939, 942 (5th Cir. 2004). The Fifth Circuit held that a freestanding 42 U.S.C. § 1983 claim based solely on malicious prosecution was not viable. *Id*. at 942. Federal law does not recognize an independent constitutional claim of malicious prosecution. *See Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 812-13 (5th Cir. 2010); *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (en banc). The claimant must instead allege "that officials violated specific constitutional rights in connection with a malicious prosecution." *Cuadra*, 626 F.3d at 812 (internal quotation marks and citation omitted); *Deville v. Marcantel*, 567 F.3d 156, 169 (5th Cir. 2009). While a malicious prosecution claim alone is not cognizable under § 1983, "additional government acts that may attend the initiation of a criminal charge could give rise to claims of constitutional deprivation." *Castellano*, 352 F.3d at 953. To prevail, a § 1983 plaintiff must identify specific constitutional rights which were

violated in connection with a malicious prosecution. *Cuadra*, 626 F.3d at 812.

11. As applied to the case at bar, Plaintiff asserts a § 1983 claim by alleging violations of his 4th and 5th Amendment Rights. Specifically, Plaintiff claims she was falsely arrested/imprisoned, subject to an unreasonable search and seizure, and suffered First Amendment violations of her right to free speech. (D.E. 1, para. 10 and 12). As argued above, Plaintiff has not sufficiently pled a claim against the City for false arrest, unreasonable search and seizure, and/or First Amendment free speech violations; therefore, she does not have an independent constitutional claim for which she could bring in connection with her malicious prosecution claim. Following the rulings in *Castellano* and other Fifth Circuit cases, Plaintiff cannot bring an independently cognizable claim for malicious prosecution under § 1983 therefore her claim for malicious prosecution should be dismissed.

IV. Plaintiff's Fifth Amendment Claim, if any, Fails as a Matter of Law because the City is not a Federal Actor.

12. After reviewing Plaintiff's Complaint, specifically paragraph 10, the City is unsure whether Plaintiff pled a violation of her Fifth Amendment rights, so out of an abundance of caution the City will address any possible claim in this motion. Assuming Plaintiff alleges a deprivation of her rights, privileges, and immunities secured by the Fifth Amendment to the Constitution she offers no further specifics as to how the City or Defendant Officer Jacob O'Sullivan violated her Fifth Amendment Rights.

13. The Fifth Amendment's "due process" guarantee applies only to the action of the federal government, and not to the actions of individuals or of a municipal government as in the present case. *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2003) (*citing Morin v. Caire*, 77 F.3d. 116, 120 (5th Cir. 1996); see also, e.g., *Bell v. City of El Paso*, No. EP–08–

CA–331–FM, 2009WL10700184 at *6 (W.D. Tex. Feb. 13, 2009) (holding plaintiffs could not allege Fifth Amendment claim against city or its officers because they were not federal actors, or acting with the federal government's authority).

14. As applied to the case at hand, neither the City or Officer Jacob O'Sullivan are federal actors, and Plaintiff has not alleged the City was acting on behalf of the federal government. As such, Plaintiff's claim for Fifth Amendment violations, if any, fails to state a claim upon which relief may be granted and should be dismissed with Prejudice.

C. CONCLUSION AND PRAYER

15. As demonstrated above, the Court should dismiss Plaintiff's claims against Defendant City of Corpus Christi under Rule 12(b)(6) for failure to plead any facts which, if proven, would entitle her to relief.

16. WHEREFORE, PREMISES CONSIDERED, Defendant City of Corpus Christi, prays that the Court will Court dismiss Plaintiff's claims with prejudice, and that Defendant City of Corpus Christi be awarded costs and fees expended herein, together with all such other and further relief to which it may be justly entitled.

Respectfully submitted,

/s/ Lilia K. Castro
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