**Appeal No. 24-10086-D**

# UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**RYAN SULLIVAN, *et al.***

*Defendants/Appellants,*

v.

**EMMA JANE PROSPERO**

*Plaintiff/Appellee.*

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Appeal from the United States District Court
for the Southern District of Georgia
No. 2:20-cv-110-LGW-BWC

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## APPELLEE'S RESPONSE BRIEF

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Clare R. Norins*
Georgia Bar No. 575364
First Amendment Clinic
University of Georgia School of Law
Post Office Box 388
Athens, Georgia 30603
(706) 542-1419

*Attorney for Appellee*

*Co-author with Allyson Veile

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1, the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and any other identifiable legal entities related to a party:

| | |
|---|---|
| Brown, Readdick, Bumgartner, Carter, Strickland & Watkins, LLP | Appellants' Attorneys |
| Camden County Sheriff's Office | Appellants' Employer |
| Cheesbro, Benjamin W. | U.S. Magistrate Judge |
| Hancock, Emily | Appellants' Attorney |
| Norins, Clare | Appellee's Attorney |
| Prescott, Russell | Appellant |
| Prospero, Emma Jane | Appellee |
| Sullivan, Ryan | Appellant |
| Szokoly, Amanda | Appellants' Attorney |
| The Travelers Companies, Inc. (TRV) | Appellants' Insurance Carrier |

| | |
|---|---|
| University of Georgia School of Law's First Amendment Clinic | Appellee's Attorneys |
| Veile, Allyson | Clinic Legal Fellow |
| Watkins, Bradley J. | Appellants' Attorney |
| Wood, Lisa G. | U.S. District Judge |

Pursuant to Eleventh Circuit Rule 26.1-3(b), the undersigned hereby certifies that no publicly-traded company or corporation has an interest in the outcome of the above-captioned case or appeal.

*/s/ Clare R. Norins*
Clare R. Norins
Georgia Bar No. 575364
enorins@uga.edu
FIRST AMENDMENT CLINIC
University of Georgia School of Law
Post Office Box 388
Athens, Georgia 30603
Telephone: (706) 542-1419

*Attorney for Appellee*

## STATEMENT REGARDING ORAL ARGUMENT

Plaintiff respectfully requests that the Court hold oral argument. This interlocutory appeal involves First Amendment retaliation and Fourth Amendment malicious-prosecution claims where the applicable, clearly-established law -- both as to the underlying substantive rights and as to qualified immunity -- cannot be applied until myriad points of disputed fact have been resolved. Plaintiff believes the Court will benefit from counsel responding directly to any questions it may have about the multiple factual disputes in this case, and the absence of any legal issue as would afford the Court jurisdiction to review the District Court's ruling.

To the extent the Court finds that this appeal presents any appealable issue of law, the gravity of the constitutional rights and immunity at issue warrant a more thorough discussion than can be accomplished in the parties' briefing. Plaintiff therefore respectfully submits that oral argument would aid the Court in its decisional process and requests that an argument date be set.

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## JURISDICTION

The Court lacks jurisdiction to hear this appeal which, notwithstanding how Defendants have attempted to window dress it, boils down to nothing more than disagreement with the District Court's factual findings and inferences, neither of which are reviewable on an interlocutory appeal of the denial of qualified immunity. *See Johnson v. Jones*, 515 U.S. 304, 319–20 (1995) (stating that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial"); *Nelson v. Tompkins*, 89 F.4th 1289, 1295 (11th Cir. 2024) (holding that this Court "lacks jurisdiction where the only issues appealed are 'evidentiary sufficiency' issues—that is, fact-related disputes about whether the evidence could support a finding that particular conduct occurred") (quotation marks omitted); *Hall v. Flournoy*, 975 F.3d 1269, 1278 (11th Cir. 2020) (holding that this Court lacks jurisdiction to review "simply an argument about the factual inferences the district court drew from a series of circumstances" because to do so "would amount to nothing more than weighing the evidence," which is not permitted at the interlocutory stage.). Plaintiff therefore submits that the Court lacks jurisdiction to review the District Court's ruling and that this interlocutory appeal should be dismissed.

## STATEMENT OF THE ISSUES

1) Whether Defendants' interlocutory appeal of the District Court's denial of qualified immunity presents any issue of law, or whether, at bottom, Defendants' appeal amounts only to disagreement with the District Court's finding of material issues of fact for trial, in which case the appeal must be dismissed for lack of jurisdiction?

If the Court finds it has jurisdiction to hear this appeal:

2) Whether Defendants falsely represent that the District Court failed to consider: (a) knowledge that Defendant Ryan Sullivan alleges he possessed but omitted from his arrest warrant Affidavit, and (b) whether Plaintiff's arrest would have been justified without a warrant when, in fact, the District Court explicitly considered both points (a) and (b) in analyzing probable cause?

3) Whether Defendants falsely represent it to be an undisputed fact that a dispatcher told Sullivan they thought Plaintiff called with intent to disrupt 911 when, in truth, this is one of the most disputed facts in the case?

4) Whether collective knowledge can counter-factually be imputed to Sullivan even though he explicitly denies that collective knowledge played any role in his alleged probable-cause determination, and whether imputing collective knowledge to Sullivan would place qualified immunity further out of reach?

5) Whether Defendants misrepresent the clearly established law at the time of Sullivan's Affidavit concerning reckless misstatements or omissions in a warrant application, and whether there is any live legal issue to be decided in this particular appeal given that there is ample evidence from which a jury could find that Sullivan acted, not just recklessly, but *intentionally* when making material misstatements and omissions?

6) Whether any reasonable officer in Sullivan's position could reasonably have believed Plaintiff's calls for assistance on Thanksgiving Day 2018 were unprotected speech?

## STATEMENT OF THE CASE

### I. Statement of Facts.

On Thanksgiving Day 2018, retired couple Emma Jane Prospero ("Plaintiff") and her now-deceased husband Joseph Prospero (collectively, "the Prosperos") engaged in First Amendment-protected activity by contacting first the Camden County Sheriff's Office ("CCSO")'s non-emergency line and then 911 to petition for assistance in stopping gunshots they believed to be in violation of a local noise ordinance and feared were coming too close to people's homes. During her 2½-minute 911 call, Plaintiff also exercised her First Amendment right to criticize Defendant Ryan Sullivan's refusal to investigate the gunshots. This refusal was based on Sullivan's assuming, from many miles away, that the gunshots were originating on private property and therefore must be safe and lawful, requiring no response. Having never interacted with Plaintiff before, and being completely unaware of her identity, Sullivan described her and her husband as "stupid motherfuckers" for "bitch[ing]" about "people shooting on private property," and stated that he would "let them know how stupid they are." Within two hours of making this retaliatory promise, and possessing no further information about the origin or lawfulness of the reported gunshots, Sullivan sought a warrant for Plaintiff's arrest, accusing her of intending to interfere with or disrupt an emergency telephone service. Sullivan's Affidavit in support of the warrant

contained material factual misstatements and omissions that, if corrected, negate probable cause. Based on Sullivan's Affidavit, Plaintiff was arrested, jailed for two nights, and faced a pending criminal charge for nine months before the prosecutor dismissed.

### A. Thanksgiving Day 2018

On Thanksgiving Day 2018, at 2:42 PM, Plaintiff called CCSO to report a barrage of gunshots behind her home. Doc. 149-5 (2:42 PM Tr.); Ex. 1 (2:42 PM Audio File).[1] She called CCSO's general number—a non-emergency line—and was transferred to the Camden County Dispatch Center ("Dispatch"), which fields both non-emergency and 911 calls. Doc. 127 (Prospero Tr.) at 25:12-18; Doc. 134 (Archibald Tr.) at 21:23-22:25; Doc. 137 (Flowers Tr.) at 19:12-18. Plaintiff spoke with Dispatcher John Archibald. Doc. 149-5. The conversation was brief and cordial. Plaintiff reported: "There's a ton of shots behind the Chevron station over here. They've been shooting for about ten minutes and they're not stopping." *Id.* at 2:3-6. She asked: "Can you get somebody over there to tell them to stop shooting?" *Id.* at 2:6-8. She described, "It's too close to neighbors here." *Id.* Archibald assured

[1] Plaintiff refers to documents filed in the court below by their docket number ("Doc. ###"). Plaintiff refers to the audio recordings submitted to the court below and included in her Supplemental Appendix to this Court as "Ex. 1, 2, 3, etc." Transcript page numbers referenced throughout this brief refer to those numbers assigned by the court reporter who generated the transcript.

her, "We will get somebody out there, okay?" *Id.* at 2:19-20. Plaintiff thanked him, and they hung up. *Id.* at 2:21-22.

Dispatch promptly notified Sullivan of Plaintiff's request for service at 2:44 PM. Doc. 149-10 (2:44 PM Tr.) at 2; Ex. 2 (2:44 PM Audio File). He was told: "Caller is advising she's hearing shots coming from behind [the Chevron]. She wants it to stop so she can enjoy her dinner." Doc. 149-10 at 2:5-9. Sullivan immediately responded: "That's private property. I'm not going to go back there and make somebody stop shooting." *Id.* at 2:13-16. At the time, Sullivan was about a 10-minute drive away from the reported shots and had no knowledge of Plaintiff's identity. Doc. 137 at 89:1-9; Doc. 149-10. He was simply assuming the shots were coming from private property in the general area "behind [the Chevron]." Doc. 136 (Sullivan Tr.) at 40:9-11. He admits he did not know who or how many people were shooting, in what direction or how far the bullets were traveling, or if the shooting was within 50 yards of a public road, all of which impacted whether the gunshots were lawful under Georgia Code §§ 16-11-103, 16-11-104, 16-5-60. Doc. 136 at 58:22-59:2, 65:17-66:5, 67:20-69:7, 216:19-217:25. He simply decided on the spot, from miles away, that no investigation or action was necessary. *Id.* at 40:18-41:5, 42:7-10. This was contrary to CCSO Standard Operating Procedure which discourages deputies from forming definite opinions about a call for service before arriving at the scene. Doc.149-13 at 316 § V.A.2.

At 2:46 PM, Plaintiff's husband called CCSO's general number. Doc. 149-18 (2:46 PM Tr.); Ex. 3 (2:46 PM Audio File). He was also transferred to Dispatch and spoke with Archibald. Doc. 149-18. Mr. Prospero asked that the shooting going on behind the Chevron be stopped. *Id.* at 3:3-18. Archibald told him "the deputies are aware of it." Based on Sullivan's uncorroborated assumption that the shooting was originating on private property, Archibald began referring to the area as a "hunting club," when no business or organization actually exists in that area. *Id.* at 3:19-21; Doc. 167 at ¶¶ 2, 5.

Mr. Prospero protested, saying "It's too close to the neighbor," and "They always stopped it before," but to no avail. *Id.* at 3:23-4:2, 4:5-7. Plaintiff is heard in the background making similar statements and asking if they need to call the governor's office for assistance. *Id.* at 3:23-24, 4:5-6, 4:10-11. Mr. Prospero declined to speak to a deputy, and the call ended cordially with Archibald saying, "Okay, sir, you try and enjoy the rest of your day." *Id.* at 4:12-14, 4:15-16.

At 2:48 PM, still miles away from the shooting, Sullivan contacted Dispatch and spoke to Sergeant Susan "Nikki" Flowers. Doc. 149-14 (2:48 PM Tr.) at 5:9-14, 7:2-19; Ex. 4 (2:48 PM Audio File). Sullivan immediately complained: "What? Do -- people not have anything better to do than to bitch about somebody shooting on private property?" Doc. 149-14 at 5:6-8. Flowers indicated she was familiar with who the callers were, but did not identify them. *Id.* at 5:9-14.

Sullivan repeated his unverified assumption that, "Yeah, it's the Paulks back there shooting on their private property." *Id.* at 5:15-17. Sullivan was referring to Robert Paulk, who owns land that borders three sides of the small lake behind Plaintiff's residence. Doc. 136 at 56:21-57:23; *see also* Doc. 149-16 (Plot Map). Sullivan insisted that he would not go to Paulk's property, referred to Plaintiff and her husband as "stupid motherfuckers," and promised he would "let them know how stupid they are." Doc. 149-14 at 6:5-6, 6:10-13.

Meanwhile, the shooting was continuing with increasing intensity. Plaintiff testified "it sounded like a war over there." She was concerned about shots coming too close to people's homes, and she wanted to let the Sheriff's office "know how serious it was." Doc. 127 (Prospero Tr.) at 220:21-221:7; Doc. 129 (2d Prospero Tr.) 314:1-4. At 2:58 PM, Plaintiff for the first and only time called 911. Doc. 149-20 (911 Tr.); Ex. 5 (911 Audio File). Plaintiff again spoke with Archibald. Doc. 149-20. She reported: "There's tons of shots and they keep going and going and going around the Chevron station." *Id.* at 8:4-7. Archibald again asserted that the shots were coming from "the hunting club back there." *Id.* at 8:8-9. Plaintiff reiterated her concerns that "it's too close to the neighborhood. The shots are coming too close," and that the shots violated noise ordinances. *Id.* at 8:10-12, 8:18-23. Archibald then informed her for the first time that deputies did not plan to respond to her request for assistance, telling her: "they are not going to go out

there." *Id.* She remained on the call briefly thereafter to mildly criticize this decision. *Id.* at 9:7-11:17.

Archibald transferred the call to Flowers who repeated Sullivan's uncorroborated assumption that the shots were coming from "private property" and that the individuals were "well within their rights to shoot on that property." *Id.* at10:2-8. Plaintiff again briefly protested, explaining her concern that the shots were in violation of the noise ordinances and that the shots were coming too close to people's homes. *Id.* at 10:9-18. Flowers informed Plaintiff that a deputy was on his way to her house. *Id.* at 10:19-22. Exasperated, Plaintiff objected to this because she and her husband were "not the ones doing anything wrong." *Id.* at 10:23-11:8. Plaintiff stated she would not answer the door if a deputy came to her house and, "We will call the TV station," before ending the call. *Id.* at 11:16-18.

Plaintiff's 911 call lasted only 2½ minutes and all three of the Prosperos' calls that day totaled less than 5 minutes. Ex. 5; Ex. 1; Ex. 3. No other 911 calls came in to Dispatch during Plaintiff's 911 call and if they had, other dispatchers were available to answer. Doc. 149-4 (Call Log); Doc. 134 at 97:18-21. Archibald and Flowers could identify no work-related tasks that Plaintiff's 911 call kept them from doing. Doc. 134 at 105:1-4; Doc. 137 at 103:18-21.

Though Plaintiff had expressed that she did not want contact with a deputy, Sullivan arrived at her address at about 3:15 PM. Doc. 136 at 102:12-21. He

reports he did not hear gunshots while there. *Id.* at 103:3-5. He believes he knocked on Plaintiff's door and no one answered. *Id.* at 105:11-21. Sullivan had Dispatch call Plaintiff's number twice, and it rang to voicemail both times. *Id.* at 108:25-109:4.

Determined to show Plaintiff and her husband "how stupid they are," at 3:26 PM Sullivan asked Dispatch to run Plaintiff's criminal history. Doc. 149-2 (911 CAD). At 3:28 PM, he asked Dispatch to print the two Computer-Aided Dispatch ("CAD") reports for her calls that day. Doc. 149-28 (3:28 PM Tr.) at 15:8-9 & 15:14-15; Ex. 6 (3:28 PM Audio File).[2] Sullivan testified that by this time, he "knew there was enough there for an offense." Doc. 136 at 125:2-5.

Sullivan then left Plaintiff's address and attempted to visit Paulk, but the gate to Paulk's property was locked. *Id.* at 57:19-23, 111:10-112:8. Sullivan did no further investigation and never confirmed with Paulk if he had been shooting or if the shooting was safe and lawful. *Id.* at 112:16-113:10. In July 2023—nearly five years after Sullivan sought a warrant for Plaintiff's arrest —Paulk submitted a declaration stating that he has a shooting range on his property, and that while he does not remember the details, he "believe[s]" he was shooting there for a brief period of time on Thanksgiving Day 2018. Doc. 167 at ¶¶ 4-5.

[2] *See* Doc. 149-9 (Non-emergency CAD); Doc. 149-2 (911 CAD).

Sullivan called Dispatch again at 4:00 PM and spoke with Dispatcher Heather Sievers. He asked, "did Mrs. Prospero curse at anybody or use offensive or obscene language?" Doc. 149-22 (4:00 PM Tr.) at 16:5-7; Ex. 7 (4:00 PM Audio File). He was told she did not. Doc. 149-22 at 16:8-9. Sievers told him that according to "Nikki" Flowers, Plaintiff just "wanted y'all to get it [i.e., the shots] taken care of." *Id.* at 16:11-13. Sullivan replied "Oh, it's taken care of." *Id.* at 16:14-15.

At 4:12 PM, Sullivan called Dispatch again and spoke with Flowers. Doc. 149-24 (4:12 PM Tr.); Ex. 8 (4:12 PM Audio File). He asked whether Plaintiff called two or three times. Doc.149-24 at 3:15-16. Flowers told him that Plaintiff had called twice and that her husband had called once, two times on the non-emergency line and once to 911. *Id.* at 3:17-20. Sullivan asked for the time Mr. Prospero had called. *Id.* at 3:21-22. Flowers responded that she would "have to go back and look." *Id.* at 3:23-24. Sullivan put her off, saying "that's all right. I'll just say it was right before the 911 call." *Id.* at 5:15-18. Sullivan testified that he would have "probably been documenting" the narrative portion of his report during this call. Doc. 136 at 158:5-17. His report narrative is identical to what he put in his arrest warrant Affidavit, which he shortly thereafter submitted to the magistrate judge. Doc. 135-8 (Report) at 7-8; Doc. 149-30 (Affidavit) at 157-58.

Meanwhile, Sullivan's supervisor, Defendant Russell Prescott, separately called Dispatch at 4:13 PM, while Sullivan was still speaking to Flowers. Doc. 149-26 (4:13 PM Tr.); Ex. 9 (4:13 PM Audio File). Prescott spoke with Dispatcher Sievers, telling her, "I'm sitting over here with Ryan [Sullivan] just aggravating y'all." Doc. 149-26 at 7:13-14. Sievers replied, "I don't know why you have to aggravate us. If y'all want to know something, come listen to the damn tape [of Plaintiff's calls]. That's what I was trying to tell [Sullivan]. . . Tell him to come listen to the tape. He can hear. I'll play it back for him." *Id.* at 7:15-24. Prescott described, "[W]e're trying to get our timeframe down so that we can actually charge her." *Id.* at 8:13-15.

### B. Sullivan's Affidavit and Plaintiff's Arrest

Sullivan's efforts to punish Plaintiff for "bitch[ing]" about "shooting on private property" culminated in his submitting an arrest warrant Affidavit that falsely accused her of calling 9-1-1 "*for the purpose* of interfering or disrupting an emergency telephone service" in violation of O.C.G.A. § 16-11-39.2(b)(2).[3] Doc. 149-30 at 157. Although the audio-recordings of the Prosperos' calls from that day were readily available to him, Sullivan declined to listen to them because he simply "didn't want to." Doc. 134 at 107:4-108:2; Doc. 136 at 151:17-22, 152:14-15. He admitted there was no time exigency preventing him from doing so. Doc.

[3] The full text of O.C.G.A. § 16-11-39.2 is included in the Addendum to this brief.

136 at 142:11-19. Archibald testified that deputies commonly ask to hear play-back of Dispatch Center calls. Doc. 134 at 107:17-18. Flowers testified it would have taken only "about five minutes" for her to pull the recordings of the Prosperos' calls to play for Sullivan over the phone while he was in the field. Doc. 137 at 140:20-141:4, 141:20-142:3.

Sullivan testified that, in lieu of listening to the calls, he preferred to rely for his Affidavit on what Dispatch told him and that he also "would have looked at" the CAD reports. Doc. 136 at 159:10-161:7. Sullivan claims that after he already "knew there was enough there for an offense," which was when he requested the CAD reports at 3:28 PM, and before Sievers told him at 4:00 PM that Plaintiff "just . . . wanted y'all to get it taken care of," he had an in-person conversation with a dispatcher at the Dispatch Center who advised him that Plaintiff "was intentionally being disruptive to dispatch to get the services that she wanted at a faster response time." *Id.* at 125:2-5, 125:20-126:2, 132:6-20; Doc. 149-22 at 16:11-13. There is no record of this conversation, and nothing about it appears in Sullivan's Affidavit despite his testifying that he included in his Affidavit everything he believed supported probable cause and "tr[ied] to be as detailed as possible." *Id*. at 162:17-24; Doc. 149-30. Sullivan does not recall who told him this information, but thought it may have been Archibald or Flowers. Doc. 136 at 126:4-5. Archibald denied having any conversation whatsoever with Sullivan, or

overhearing Flowers have one. Doc. 134 at 106:12-24. Flowers now claims she told Sullivan she thought Plaintiff was intending to disrupt, but does not recall if it was in person or by some other mode. Doc. 228 at ¶¶ 5-6.

Sullivan's Affidavit for Plaintiff's arrest warrant included numerous material factual misrepresentations which, taken together, paint an altogether misleading picture of her calls on Thanksgiving Day 2018. He avers that:

- CCSO had "**received a call for alleged emergency service**" at 2:42 PM, when in fact Plaintiff's first call at 2:42 PM was to CCSO's general number, not to the emergency 911 line. Doc. 149-30 at 157; Doc. 127 (Prospero Tr.) at 25:12-18.

- Plaintiff contacted CCSO to report "shots being fired from behind her residence **in the area of the hunting club**" and later, that she reported that "she wanted the **shooting from the hunting club** to stop," when in fact Plaintiff never mentioned a "hunting club," nor referenced Paulk in her calls. She only described the calls as coming from "behind the Chevron." Doc. 149-30 at 157; Doc. 149-5; Doc. 149-20.

- The shots reported by Plaintiff and her husband "**were being fired from private property in which the individuals shooting were well within their rights to be shooting**," when Sullivan only assumed but never corroborated where the shots were originating or if they were lawful and safe. Doc. 149-30 at 157; Doc. 136 at 41:24-43:16; 112:16-113:10.

- That Plaintiff "**ended [her initial non-emergency] phone call by hanging up after refusing to give any further information**," when the call actually ended with Dispatcher Archibald stating, "I understand. We will get somebody out there, okay?" and Plaintiff saying, "Thank you," and they both hung up. Doc. 149-30 at 157; Doc. 149-5.

- That Plaintiff contacted 911 "**after first contacting the non-emergency number twice**," when in fact Plaintiff had only contacted the non-emergency number once. Her husband had separately contacted the non-

emergency number the second time. Doc. 149-30 at 158; Doc. 149-5; Doc. 149-18; Doc. 149-24 at 3:17-20.

- That Plaintiff made a "**911 Call on November 22, 2018 at 2:58 PM to November 22, 2018 at 3:30 PM**," a span of **32 minutes**, when the call was only 2½ minutes. Doc. 149-30 at 157; Doc. 136 at 155:4-6.

Sullivan's Affidavit (Doc. 149-30) also omitted the following material exculpatory information that was known or should have been known to him:

- Siever's statement to him that, according to Flowers, Plaintiff's purpose for calling was **she just "wanted y'all to get it [the gunshots] taken care of."** Doc. 136 at 148:4-11; Doc. 149-22 at 16:8-13.
- Plaintiff and her husband's repeated statements during all three of their calls that they believed the **gunshots were coming "too close" to people's homes**. Doc. 149-5 at 2:6-8; Doc. 149-18 at 3:23-4:2; Doc. 149-20 at 8:10-12, 10:16-18.

Based on Sullivan's Affidavit, the warrant issued at 5:02 PM. Doc. 149-30 at 157. Plaintiff was not arrested until two months later. Doc. 149-34 (Booking Card). She was detained for two nights in the Camden County Jail. Doc. 149-35 (Release Report). She faced a pending criminal charge for over nine months, until the District Attorney's Office declined to prosecute. Doc. 149-36 (Dismissal Order).

### C. Plaintiff's Prior Contacts with CCSO

Prior to Thanksgiving Day 2018, Plaintiff and her husband had requested, even begged for, help from CCSO for valid reasons which Defendants obscure because their sole strategy is to wrongfully dismiss Plaintiff as a "serial caller."

However, each time Plaintiff initiated contact with CCSO between 2011 and 2018 she was engaging in good-faith and protected speech.

Contrary to Defendants' assertion that Plaintiff regularly called 911, she almost always used the non-emergency line, often being instructed to call back multiple times before she could speak with someone. Doc. 127 (Prospero Tr.) at 12:18-19, 137:1-3; 138:2-7; Doc. 130 (3d Prospero Tr.) at 37:6-13.

Some of Plaintiff's prior contacts concerned shooting in her housing development, including shots fired through her yard, endangering her and others and breaking her windows. See Doc. 127-7 (Incident Reports) at 198-209; Doc. 127 at 42-43, 48-49; Doc. 202-6 (receipt for window pane replacements). But in none of these prior incidents were Paulk or any "hunting club" ever identified as the source. Doc. 127-7 at 198-209.

Contrary to Defendants' false claim, on no prior occasion was Plaintiff ever warned not to call about gunshots. *See id*. (incident reports containing no indication that Plaintiff told not to call). Quite the opposite: CCSO's chief deputy provided Plaintiff a letter outlining multiple reasons why shooting on private property can be dangerous or unlawful, and CCSO had specifically advised Plaintiff she *should call* to report gunshots. Doc. 127-3 (Byerly Letter); Doc. 127 at 8:19-10:16; 11:10-19. Dispatcher Archibald also testified that other people

besides the Prosperos had called to complain about shooting in the same area, evidencing the reasonableness of Plaintiff's concerns. Doc.134 at 82:18-83:12.

Other of Plaintiff's prior contacts with CCSO were the result of trespass, property damage, poisoned pets, and even physical assault by her neighbors, against one of whom Plaintiff ultimately obtained a civil no-contact order ("good behavior bond"). See Doc. 202-7 (no-contact order); Doc. 127-7 at 195-97 (poisoned koi fish), 200-201 (missing and vandalized property), 218-219 (neighbor calling Plaintiff despite no-contact order), 224-225 (neighbor's 30 ducks trespassing in her yard), 232-233 (description of harassment and physical assault by neighbor). And, many times, Plaintiff's interactions with CCSO were initiated, not by her, but by her neighbors making fantastical and even terroristic claims about her. Doc. 127-7 at 210-212, 215-216 (CCSO reports debunking false accusations of Plaintiff imprisoning a missing juvenile, soliciting underage sex, and creating child pornography).

In sum, nothing about Plaintiff's prior contacts suggests an unlawful desire to interfere with or harass CCSO. Moreover, Sullivan was not involved in, and had no specific knowledge of, Plaintiff's prior contacts. He testified they played no part in his seeking an arrest warrant for Plaintiff's single 911 call on Thanksgiving Day and his Affidavit does not mention them. Doc. 136 at 156:9-157:11; Doc. 149-30.

## II. Procedural History

Plaintiff filed this lawsuit on October 15, 2020, asserting claims against Sullivan and Prescott for First Amendment retaliation, false arrest, malicious prosecution, and intentional infliction of emotional distress. Doc. 1 at 29-34. Plaintiff later amended her complaint to add a claim for deliberate indifference in hiring against Sheriff James Proctor, *see* Doc. 45 at 46. In March 2022, the District Court dismissed Plaintiff's false arrest claim in an Order otherwise denying Defendants' Motion to Dismiss her Complaint. Doc. 66 at 14-15. Plaintiff later voluntarily dismissed her claim for intentional infliction of emotional distress. Doc. 110.

At close of discovery, Plaintiff moved for partial summary judgment on probable cause and malicious prosecution. Doc. 149. Defendants opposed and cross-moved on all claims, Doc. 171, Doc. 175. They also submitted a declaration from Camden County Magistrate Judge Jennifer Lewis, who had signed Plaintiff's arrest warrant. Doc. 165. Plaintiff moved to exclude this declaration and to preclude Lewis from testifying at trial. Doc. 200. This motion remains pending without decision in the court below.

The District Court denied Plaintiff's summary judgment motion but found that disputes of fact preclude summary judgment for Sullivan on Plaintiff's First

Amendment retaliation claim (albeit judgment was granted for Prescott), and preclude summary judgment for either Sullivan or Prescott on Plaintiff's malicious prosecution claim. Doc. 234. at 42-55, 66-76. The District Court granted summary judgment to Proctor on deliberate indifference in hiring. *Id.* at 86-87.

## STANDARD OF REVIEW

This Court reviews "de novo the District Court's disposition of a summary judgment motion based on qualified immunity, resolving all issues of material fact in favor of [the Plaintiff] and then answering the legal question of whether Defendants are entitled to qualified immunity under that version of the facts." *Case v. Eslinger*, 555 F.3d 1317, 1324–25 (11th Cir. 2009) (internal quotations omitted). Additionally, for this Court to have jurisdiction, the appeal must present "a legal question concerning a clearly established federal right that can be decided apart from considering sufficiency of the evidence." *Johnson v. Jones*, 515 U.S. 304, 313 (1995). Otherwise, "this Court cannot review a District Court's determination of the facts alone at the interlocutory stage." *Hall v. Flournoy*, 975 F.3d 1269, 1277 (11th Cir. 2020).

## SUMMARY OF THE ARGUMENT

Defendants essentially make only one argument: that the District Court erred in finding that questions of fact preclude summary judgment for Defendants on qualified immunity. This argument provides no basis for interlocutory appellate jurisdiction, and in any event, is utterly without merit.

Defendants begin with three fundamental misrepresentations. First, they claim that it is an undisputed fact that a dispatcher told Sullivan they thought Plaintiff called with intent to disrupt 911 to get the gunshots she was reporting

stopped more quickly when, in truth, this is a deeply contested fact, as the District Court recognized. Second, Defendants claim that when analyzing arguable probable cause, the District Court failed to consider Sullivan's testimony that a dispatcher told him they thought Plaintiff called with intent to disrupt, which was not mentioned in his arrest warrant Affidavit. However, the District Court considered at length the evidence about Sullivan's purported conversation with the dispatcher, and found that it only created disputed questions of fact. Third, Defendants claim that the District Court failed to consider whether Plaintiff's arrest would have been justified by arguable probable cause without legal process. In fact, the District Court explicitly considered this possibility and found that credibility determinations, weighing of the evidence, and drawing of factual inferences--which only a jury can do--are necessary to determine if there was arguable probable cause for a warrantless arrest.

With respect to probable cause, the collective knowledge doctrine provides no refuge for Defendants. Sullivan explicitly denied that collective knowledge played any part in his decision to seek a warrant. Application of the collective knowledge doctrine would therefore be completely counter-factual in this case, which is an approach this Court has repeatedly rejected. Moreover, even if the doctrine were applied, it would require imputing exculpatory knowledge to

Sullivan that would only serve to place arguable probable cause further out of reach.

Awash in a sea of factual disputes, Defendants attempt to manufacture a single legal issue by claiming that at the time of Sullivan's 2018 Affidavit, the law was not clearly established that reckless as well as intentional material misstatements in a warrant application would violate the Fourth Amendment. This is a red herring because the law was clearly established in 2018, and remains so today, that either reckless or intentional material misrepresentations violate a malicious-prosecution plaintiff's constitutional rights. In any event, no live legal issue exists in this case since there is ample evidence from which a jury could find that Sullivan made *intentional*, and not just reckless, material misstatements and omissions of fact in his Affidavit.

Finally, Sullivan contends he is entitled to immunity on Plaintiff's First Amendment retaliation claim because he reasonably believed her calls on Thanksgiving Day 2018 constituted a crime, and therefore were unprotected speech. This is simply a re-tread of Sullivan's probable cause argument, where the District Court found that questions of fact preclude granting qualified immunity. Moreover, no reasonable officer could have reasonably believed that Plaintiffs short 911 call, asking for assistance and mildly criticizing Sullivan's refusal to respond, was unprotected by the First Amendment. Defendants' appeal fails.

## ARGUMENT AND CITATION OF AUTHORITY

### I. DISAGREEMENT WITH FINDING THAT FACTUAL QUESTIONS EXIST ON PROBABLE CAUSE PROVIDES NO BASIS FOR APPELLATE REVIEW AND IS WITHOUT MERIT.

Defendants blatantly misrepresent the District Court's probable-cause analysis, and quibble with the lower court's finding that questions of fact preclude granting qualified immunity. Defts Br. (App. Doc. 15) at 20-33. On these points, Defendants do not even pretend to raise any issue of law. They just repeatedly complain that the District Court's assessment of the evidentiary record was wrong. This Court lacks jurisdiction to hear or resolve such complaints. *See Hall*, 975 F.3d at 1277 (holding that without a legal issue, "we cannot review a trial court's determination of the facts alone at the interlocutory stage"); *Nelson v. Tompkins*, 89 F.4th 1289, 1295 (11th Cir. 2024) ("We lack jurisdiction where the only issues appealed are 'evidentiary sufficiency' issues—that is, fact-related disputes about whether the evidence could support a finding that particular conduct occurred." (quotation marks omitted)). Notwithstanding, if the Court chooses to engage with Defendants' arguments, they wholly lack merit.

### A. Defendants Blatantly Misrepresent the Trial Court's Analysis.

Defendants claim that when analyzing probable cause, the District Court only considered the information contained in Sullivan's Affidavit, and not other information Sullivan claimed to possess. Defendants are chiefly concerned that the lower court did not give appropriate deference (in their view) to Sullivan's testimony that a dispatcher told him they thought Plaintiff called with intent to disrupt 911. Defts Br. at 20-22. *But compare to id*. at 30-31 (admitting District Court actually *did* consider this information). Defendants also claim the District Court failed to analyze whether Plaintiff could have been lawfully arrested without a warrant. *Id*. at 20, 22-24. Neither complaint about the District Court's analysis is even remotely true.

The District Court recognized that qualified immunity applies where "a reasonable officer in the same circumstances *and possessing the same information as the defendant officer* could have believed that probable cause existed." Doc. 234 (Summary Judgment Order) at 64 (emphasis added). The District Court then considered Sullivan's testimony that a dispatcher told him they thought Plaintiff called 911 with intent to disrupt. *See id*. at 49-55. The District Court concluded that disputed facts about this alleged communication, as well as about other aspects of Sullivan's probable cause theory, precluded finding that Plaintiff's arrest would have been justified without a warrant. *See id*. at 50 ("significant factual disputes exist that prevent the Court from deciding whether Deputy Sullivan had probable cause,"

including questions as to "how Deputy Sullivan learned [from a dispatcher] that Plaintiff was allegedly being disruptive or harassing"); *id*. at 73, 75 (finding a "genuine dispute of fact" as to whether, *inter alia*, "Plaintiff's detention was justified as a warrantless arrest"). Qualified immunity is therefore unavailable to Defendants. *See Kingsland v. City of Miami*, 382 F. 3d 1220, 1233 (11th Cir. 2004) (denying qualified immunity because "there are questions of fact" regarding "the evidence which is to form the basis of an arguable probable cause determination").

**B. Defendants Falsely Assert That Contested Facts Are "Undisputed."**

Defendants assert that probable cause entitles them to qualified immunity because they claim "*it is undisputed* that a 911 dispatcher, on whom Sullivan was entitled to reply, told Sullivan during his investigation that Prospero intentionally disrupted the 911 Center." Defts Br. at 18 (emphasis added); *see also id*. at 30-31 ("*there is no dispute* about whether Sullivan was informed by Flowers that [Plaintiff] was purposefully disruptive during her calls" (emphasis added)). To the contrary, this is one of the most hotly disputed facts in the entire case. This Court is therefore required to resolve this factual dispute in Plaintiff's favor and assume that no such information was communicated to Sullivan before conducting any qualified immunity analysis. *See Eslinger*, 555 F.3d at 1324-25. This means that every immunity argument premised on this alleged conversation between Sullivan and Flowers having taken place must fail.

The myriad reasons this purported conversation is disputed, and a jury could find it did not occur, are as follows: First, Sullivan's Affidavit says nothing about a dispatcher telling him they thought Plaintiff intended to disrupt 911, even though Sullivan testified that he included in his Affidavit all of the information that he believed supported probable cause. Doc. 136 at 162:17-24; Doc. 149-30. Second, Archibald denies having any conversation with Sullivan or overhearing Flowers have one. Doc. 134 at 106:12-24. Third, Flowers does not remember having an in-person conversation with Sullivan as Sullivan claims occurred (although he could not remember with who), stating only that she believes she told Sullivan that Plaintiff was being disruptive. However, Flowers never said this in any of her recorded communications with Sullivan on that day. *Compare* Doc. 137 at 145:17-21 *with* Doc. 228 at ¶ 6; Doc. 149-14; Doc. 149-24. Flowers' credibility about what she told Sullivan in an unrecorded conversation is a jury question, particularly in light of her confessed bias. Doc. 137 at 89:23-90:18 (testifying that, regarding her relationship with Sullivan, "it's all one big family, ma'am, in that we all have each other's back," and "it's a culture"). Fourth, the District Court found that the recorded conversations between Sullivan and the dispatchers on Thanksgiving Day 2018 "offer nothing to indicate that Plaintiff was being intentionally disruptive or harassing." Doc. 234 at 50-51. Docs. 149-10, 149-14, 149-22, 149-24, 149-28. Indeed, Dispatcher Sievers told Sullivan that, according to Flowers, Plaintiff "just was not a happy camper and

she wanted y'all [i.e., Sullivan and Prescott] to get [the gunshots] taken care of." Doc. 149-22 at 16:11-13. *See* Doc. 137 at 127:7-21 (Flowers confirming she believed Plaintiff's purpose for calling was to address the gunshots). Fifth, no scintilla of disruption resulted from Plaintiff's 2½-minute 911 call.[4] Given the foregoing evidence, a jury could readily conclude -- and therefore this Court must assume for purposes of this appeal -- that on Thanksgiving Day 2018 no dispatcher told Sullivan that they thought Plaintiff called 911 with intent to disrupt. Sullivan's testimony to the contrary does not entitle Defendants to qualified immunity.[5]

[4] No other calls came into Dispatch during Plaintiff's 911 call, and if one had, other dispatchers were available to answer it. Doc. 149-4; Doc. 134 at 97:18-21. Neither Archibald nor Flowers could identify any job-related task that Plaintiff's 911 call prevented them from doing. Doc. 134 at 105:1-4; Doc. 137 at 103:18-21.

[5] Even if a jury were to believe that Flowers told Sullivan she thought Plaintiff intended to disrupt 911, dispatchers have no special powers to divine criminal intent such that their opinions should substitute for objective probable cause. Consider, for example, if 911 receives a call from a woman who reports her husband has just been shot. The dispatcher who answers the call tells the investigating officer, "I know she's had it out for her husband for years and I think she shot him because she sounded oddly calm." By no means would the dispatcher's opinion about the woman's culpability create probable cause to arrest the woman for murder. The same holds true here: Flowers' purported opinion that Plaintiff intended to disrupt would not, standing alone, give rise to probable cause.

### C. Defendants' "Collective Knowledge" Theory Is Counter-Factual and, If Applied, Only Further Removes Qualified Immunity.

*1. Sullivan disavows reliance on collective knowledge.*

Defendants ask this Court to impute to Sullivan knowledge purportedly held by Prescott and Flowers relating to Plaintiff's prior contacts with CCSO even though there is no evidence that Prescott or Flowers relayed such information to Sullivan and Sullivan has explicitly disavowed possessing or relying on such information. Defts Br. at 25-27.

Sullivan testified that prior to Thanksgiving Day 2018, he had never interacted with Plaintiff or responded to any calls from her. Doc. 136 at 124:21-22; 156:9-18. Dispatch did not relay information to Sullivan about Plaintiff's prior contacts during any of their recorded conversations that day. Docs. 149-10, 149-14, 149-22, 149-24, 149-28. Sullivan testified that by 3:28 p.m. when he requested the CAD reports for Plaintiff's two calls that day -- which was before he spoke to Prescott around 4:13 pm or to anyone in-person at the Dispatch Center (i.e., before he could have received collective knowledge via an in-person conversation)[6] -- he already "knew there was enough there for an offense." Doc. 136 at 124:24-125:5. In other words, Sullivan had already made his probable cause determination before anyone had the opportunity to tell him about Plaintiff's prior contacts. Sullivan

[6] See Doc. 136 at 125:2-5, 125:20-126:2, 132:6-20, Doc.149-26 at 7:12-14.

further testified he had no recollection of anything he and Prescott talked about.[7] He knew only that Plaintiff had had some previous contact with CCSO but he did not recall the incidents, the details, or who had told him this.[8] He disavowed that this vague awareness played any part in his decision to seek a warrant for Plaintiff's arrest based on her and her husband's Thanksgiving Day 2018 calls. Doc.136 at 125:11-15; 128:2-129:7, 156:19-157:11. Consistent with this, Sullivan's Affidavit – wherein he testified he included everything relevant to probable cause – mentions no prior contacts by Plaintiff. Doc. 149-30; Doc. 136 at 162:17-24.

It would therefore be a complete and utter fiction (truly an alternate reality) to find probable cause existed based on Plaintiff's pre-Thanksgiving Day contacts

[7] Prescott could not confirm if he spoke to Sullivan before or after Sullivan had already decided to seek a warrant or even if he told Sullivan about Plaintiff's prior contacts. Doc.135 (Prescott Tr.) at 110:20-111:14. Prescott's scant knowledge would not have contributed to probable cause. He testified he did not remember the details of any of the Prosperos' prior calls. *See id*. at 57:7-13. He testified he had "never known exactly where" the gunshots reported in those prior calls were originating, except that there was a man who lived a few doors down from Prospero, who might not still be alive (i.e., not Paulk). *Id.* at 58: 15-25.

[8] Flowers did not convey any information about Plaintiff's prior calls to Sullivan in their recorded conversations on Thanksgiving Day 2018. Doc. 149-14; Doc. 149-24. Her testimony reveals how little she actually knew on this subject. While she initially conflated *all* of Plaintiff's prior calls about shooting as being about the Paulks, upon further probing, she admitted she did not know if *any* of those calls concerned the Paulks. Doc. 137 at 81:19-84:14. And, indeed, they did not. Doc. 127-7 (CCSO reports). Meanwhile, Archibald had never handled a call from Plaintiff prior to Thanksgiving Day 2018. Doc. 134 at 83:11-12.

with CCSO when Sullivan denies having any such knowledge, and denies that prior contacts were a factor in his seeking an arrest warrant. *See Jones v. Cannon*, 174 F.3d 1271, 1283 n.4 (11th Cir. 1999) ("what counts for qualified immunity purposes relating to probable cause to arrest is the information known to the defendant officer[ ] . . . at the time of [his] conduct").

It is clear that this Court does not endorse counter-factual application of "collective knowledge" because it has repeatedly rejected such a theory in situations where the facts render it impossible for the information to have been transferred between officers. *See, e.g.*, *Garcia v. Casey*, 75 F.4th 1176, 1188 (11th Cir. 2023) (holding that "collective knowledge" doctrine is not available if the officers did not actually communicate during the probable cause investigation); *United States v. Willis*, 759 F.2d 1486, 1494 (11th Cir. 1985) (same).[9] Similarly, here, the theory cannot be applied because Sullivan alone made the probable cause determination. Doc. 135 at 114:8-11; Doc. 136 at 128:2-4. And he disavows that he possessed or relied on collective knowledge of Plaintiff's prior CCSO contacts. Doc. 136 at 156:19-157:11. Prescott and Flowers' scant knowledge regarding Plaintiff's prior calls therefore cannot be imputed to Sullivan. *See, e.g., Sharp v. Fisher*, No. 406-CV-020, 2007 WL 2177123, at *5 (S.D. Ga. 2007) (declining to

[9] For this reason, Defendants cannot argue that knowledge possessed by Sheriff Proctor or Chief Deputy Byerly should be imputed to Sullivan as he did not speak to either of them on Thanksgiving Day 2018. Doc. 136 at 129:8-23.

impute collective knowledge to a defendant officer because it was "conceded that such knowledge was not communicated to" defendant). *See also United States v. Blair*, 524 F.3d 740, 751-52 (6th Cir. 2008) (declining to impute collective knowledge where first officer did not communicate to second officer, who was sued for making an unconstitutional *Terry* stop, that first officer had witnessed defendant make a hand-to-hand transaction until after the stop occurred).

*2. "Collective Knowledge" Further Removes Qualified Immunity.*

Applying "collective knowledge" in this case only further eliminates qualified immunity for Defendants. This is for two reasons. First, Prescott knew from responding to some of Plaintiff's prior reports of gunshots -- none of which involved Paulk or any so-called "hunting club" -- that it was necessary to go to the scene to investigate before determining whether the reported gunshots were safe and lawful. Doc. 127-7 at 200-201; Doc. 135 at 58:15-20; *see also* Doc.149-13 at 316 § V.A.2. Sullivan, in contrast, assumed from miles away and with no investigation that the gunshots Plaintiff and her husband reported on Thanksgiving Day 2018 were lawful, immediately telling Dispatch that he was taking no action and would not be responding to the scene. Doc. 149-10. It was this non-response by Sullivan that, in turn, prompted Plaintiff to call 911. Had Sullivan possessed Prescott's knowledge of how to properly respond to a report of gunshots, he would have gone to the scene and investigated after Plaintiff's first call, obviating the

need for her to call 911. *See* Doc. 149-20 at 9:7-11 (Plaintiff asking during 911 call, "Why is this different today?"). Imputing Prescott's knowledge to Sullivan therefore only further highlights that Sullivan had no probable cause to believe Plaintiff's purpose in calling was to disrupt 911 when it was Sullivan's own dereliction of duty that necessitated her call.

Second, imputing Dispatch's knowledge to Sullivan would include imputing knowledge of Plaintiff's multiple exculpatory statements about her purpose for calling that she made during both her non-emergency call and her 911 call – i.e., that she wanted the gunshots stopped because she believed they violated noise ordinances, she was worried about the shots coming too close to people's homes, and she wanted to know why CCSO's response to a report of gunshots was different that day than in the past. Doc. 149-5 at 2:6-8, Doc. 149-20 at 8:10-12, 8:18-23, 9:7-11, 10:9-18. All of these statements made during her calls with Dispatch, which would have to be imputed to Sullivan under Defendant' collective-knowledge theory, make it even more impossible for any reasonable officer to believe her intent was to disrupt, further removing qualified immunity.[10]

[10] Absent imputation, Sullivan still reasonably should have known that Plaintiff made these exculpatory statements. The recordings of Plaintiff's calls were readily available to be played back for him in a matter of minutes. Doc. 137 at 138:6-11. Dispatch encouraged that he listen to the calls. Doc. 149-26 at 7:15-18. And he admits there were no exigent circumstances preventing him from doing so. Doc. 136 at 142:11-19. *See Cozzi v. Birmingham*, 892 F.3d 1288, 1294 (11th Cir. 2018) ("an officer may not unreasonably disregard certain pieces of evidence by choosing

*Tuggle v. Hill*, 280 F. App'x 898 (11th Cir. 2008) clearly establishes that Sullivan's knowledge of Plaintiff's exculpatory statements about her reasons for calling – whether this knowledge is imputed to him or is something he reasonably should have known – defeats arguable probable cause for him to have believed she called to disrupt. In *Tuggle*, the plaintiff called the sheriff's office twice within a three-minute span, both times stating that he wanted to speak to, or to set up a meeting with, the sheriff. *See id*. at 899. Because Tuggle plainly stated his reason for calling each time, this Circuit found no arguable probable cause to believe he called "for the purpose of . . . harassing" the sheriff, which was the offense for which he was arrested. *See id*. Similarly, here, there was no arguable probable cause to believe Plaintiff called with the intent to disrupt 911 when, during both her non-emergency call and her 911 call, she stated she wanted the gunshots stopped due to noise and concern that the shots were coming too close, and she asked why the deputy (Sullivan) was refusing to investigate.

Finally, to dispatch two off-point, unpublished cases cited by Defendants: In *Al-Hakim v. Roberts*, No. 8:08–cv–01370, 2009 WL 2147062, (M.D. Fla. Jul. 13, 2009), the plaintiff was arrested for calling 911 for a third time that day to request

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to ignore information that has been offered to him or her or electing not to obtain easily discoverable facts that might tend to exculpate a suspect."); *Kingsland*, 382 F.3d at 1229 ("an officer may not choose to ignore information that has been offered to him or her" or "elect not to obtain easily discoverable facts").

that a captain be sent to his home, even though an officer and a corporal were already there with him. *Id*. at *2, *6-7. Al-Hakim admitted to the officers at the scene that he called 911 for an unauthorized purpose. *Id*. These facts bear no resemblance to Plaintiff's single 911 call to report gunshots where the assigned deputy (Sullivan) was refusing to investigate. And unlike Al-Hakim, who admitted to unlawful conduct, Plaintiff strongly disputes that she called 911 for an unauthorized purpose. Doc. 127 at 248:4-7. In *Scott v. Escambia County Sheriff's Office*, No. 3:19–cv–03539, 2019 WL 6831447 (N.D. Fla. Oct. 28, 2019), the plaintiff called 911 twelve times, including to raise several false alarms about medical emergencies. *Id*. at *1, *3. Here, Plaintiff called 911 only once, and she is not accused of making a false report. *See* Doc. 149-30. Neither *Al-Hakim* nor *Scott* lend one iota of support for finding probable cause in this case. *Tuttle* is the controlling precedent here.

**D. Defendants Continue to Disagree with Lower Court's Fact Finding.**

Defendants continue to argue "there are not factual disputes that preclude a determination that Sullivan had arguable probable cause" to arrest Plaintiff. Defts Br. at 30-34 (claiming lack of dispute that: (1) Flowers told Sullivan that Plaintiff was being purposefully disruptive, and (2) that Sullivan believed shots reported by Plaintiff and her husband were lawful). This Court has no jurisdiction to review the District Court's finding of genuine disputes of fact as to these points. *See Johnson*,

515 U.S. at 319–20 ("a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial").

Defendants' points are also wholly unpersuasive. As discussed in Section I.B above, it is deeply disputed that Flowers told Sullivan that Plaintiff was being purposefully disruptive. It is also sharply contested that, absent investigation, Sullivan had any factual basis for believing that the shots reported by Plaintiff and her husband were lawful, even if, as he believed, they were originating on private property. *See* Doc. 127-3 (CCSO letter explaining how shooting on private property may still be dangerous and unlawful). For purposes of probable cause, it is irrelevant that five years after Sullivan sought the warrant Paulk submitted a declaration (Doc. 167) saying he believes he was shooting on his property on Thanksgiving Day 2018 and would have been doing so safely since Sullivan did not possess any such information from Paulk when he submitted his Affidavit to the magistrate. Doc. 136 at 112:16-113:10. "We [the court] do not use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act." *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002) (internal citation omitted).

Finally, it is true that Sullivan had no affirmative evidence that the gunshots were unlawful since the shooting had stopped by the time he belatedly arrived, and he never obtained any information from the shooter(s). Doc. 136 at 103:3-5, 112:16-113:10. But *Garmon v. Lumpkin Cnty., Ga.*, 878 F.2d 1406 (11th Cir. 1989) establishes that this was not sufficient to create arguable probable cause that Plaintiff herself had committed a crime by reporting the shots. *See id*. at 1407-08, 1410 (denying qualified immunity to Sheriff who charged plaintiff with falsely reporting she had been kidnapped after officers found no physical evidence of kidnapping; "law enforcement authorities' inability to find evidence of [plaintiff]'s alleged abduction cannot reasonably be said to constitute affirmative evidence that she [committed] a crime" by reporting the abduction).

## II. DISAGREEMENT WITH FINDING THAT FACTUAL QUESTIONS EXIST REGARDING THE CONTENTS OF SULLIVAN'S WARRANT AFFIDAVIT PROVIDES NO BASIS FOR APPELLATE REVIEW AND IS WITHOUT MERIT.

Defendants claim the District Court erred in finding questions of fact as to whether Sullivan's warrant affidavit contained reckless or intentional material misstatements and omissions of fact that if corrected would defeat probable cause. Defts Br. at 34-39. Disagreement with the lower court's determination of whether or not the pretrial record sets forth a genuine issue of fact for trial provides no basis for appellate review. *Johnson*, 515 U.S. at 319–20; *Nelson*, 89 F.4th at 1295; *Hall*,

975 F.3d at 1278. Defendants' gesturing toward an imagined legal issue does not cure this jurisdictional defect.

**A. There is No Legal Issue to be Decided Here.**

Defendants attempt to interject a legal issue of whether reckless, rather than intentional, misstatements and omissions in a warrant affidavit violate clearly established law. Defts. Br. at 34-36. The law was clearly established in 2018 when Sullivan sought Plaintiff's arrest warrant, and remains clearly established today, that either reckless or intentional material misrepresentations in a warrant application violates the Fourth Amendment. *See Holmes v. Kucynda*, 321 F.3d 1069, 1083 (11th Cir. 2003) ("If 'a reasonable police officer would have known that [his] testimony was *not just negligently false, but recklessly so,'* then [the officer] is not entitled to qualified immunity." (emphasis added)); *Madiwale v. Savaiko*, 117 F.3d 1321, 1326-27 (11th Cir. 1997) ("[A] warrant affidavit violates the Fourth Amendment when it contains omissions *made intentionally or with a reckless disregard for the accuracy* of the affidavit." (emphasis added, quotations omitted)); *Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994) ("[T]he Constitution prohibits an officer from making *perjurious or recklessly false* statements in support of a warrant." (emphasis added, citations omitted)).

Contrary to Defendants' argument, *Kelly* did not alter this standard. *Kelly* simply clarified that liability only attaches to *reckless* misstatements and

omissions, not to *negligent* ones. 21 F.3d at 1554. And this Circuit's rulings after *Kelly*, but before Sullivan's November 2018 Affidavit, continued to hold that reckless as well as intentional material misstatements or omissions in a warrant application violate the Fourth Amendment. *See Holmes*, 321 F.3d at 1083; *Madiwale*, 117 F.3d at 1326-27. Recent decisions from this Court further recognize that this law was clearly established at the time of Sullivan's 2018 Affidavit. *See Butler v. Smith*, 85 F.4th 1102, 1109-10, 1112 (11th Cir. 2023) (holding with respect to a September 2017 warrant application that "it was and is clearly established that intentionally or recklessly omitting material information from a warrant affidavit violates the Fourth Amendment" and reversing grant of summary judgment for defendant officer);[11] *Sylvester v. Fulton Cnty. Jail*, 94 F.4th 1324, 1330 (11th Cir. 2024) (holding that qualified immunity was not available for defendant's 2018 warrant application "because we have previously held that any officer who intentionally or recklessly submits an affidavit plagued by material misstatements or omissions violates clearly established law").[12] Thus, clearly established law in November 2018 put Sullivan squarely on notice that reckless or

[11] *See id*. at 1112 n. 1 ("We are unmoved by [the defendant's] argument that recklessness isn't enough.").

[12] *See Sylvester v. Barnett,* No. 1:19-CV-4300-LMM-JKL, 2022 WL 6411654, at *4 (N.D. Ga. July 12, 2022) (providing warrant application date).

intentional misrepresentations or omissions in his Affidavit would violate the Fourth Amendment. There is no new legal issue to be decided here.

There is further no live legal issue here because even if (contrary to clearly established law) recklessness were off the table, there is ample evidence from which a jury could find that Sullivan's misstatements and omissions in his Affidavit were, not just reckless, but intentional. This includes: Sullivan's calling Plaintiff and her husband "stupid motherfuckers" for "bitch[ing]" about the gunshots; stating that he would "let them know how stupid they are"; and then immediately seeking an arrest warrant with virtually no investigation (i.e., he obtained no information about who was shooting or in what manner, and he declined to listen to the readily-available recordings of Plaintiff's calls). Doc. 136 at 112:16-113:10, 151:17-152:16; Doc. 149-14 at 5:7, 6:5-6, 6:10-13. Taken together, the foregoing evidence supports an inference that Sullivan intentionally misrepresented and omitted facts in his Affidavit because he wanted to punish Plaintiff for her protected speech by prosecuting her without probable cause. *See, e.g., Butler*, 85 F.4th at 1120 (finding that a reasonable inference of "malice" – i.e., intentional wrongdoing – existed where defendant officer "felt disrespected at being called a "bitch" by [plaintiff], she sought the arrest warrants very soon

thereafter, seemingly without substantial additional investigation, and she inexplicably omitted material exculpatory information from her affidavits").[13]

Sullivan's explicit expressions of animus (i.e., "stupid motherfuckers," "I'll let them know how stupid they are") also distinguishes this case from the per curium decision in *Carter v. Gore*, 557 F. App'x 904 (11th Cir. 2014). *Gore* held that the plaintiff could not proceed on a theory that the warrant contained material misrepresentations because the plaintiff had pled only conclusory allegations that the defendant officer "fabricated evidence" without pleading facts to suggest that the officer was lying or had a motive to lie. *Id*. at 910. Here, by contrast, the District Court found questions of fact exist as to whether Sullivan misrepresented and omitted material facts in his Affidavit. Doc. 234 at 50-54, 70-71, 73.

[13] Evidence of a defendant officer's "actual knowledge" of information is also sufficient to conclude that the officer's misrepresenting or omitting that information was intentional. *See Sylvester*, 94 F.4th at 1332. Here, Sullivan knew he had not investigated the lawfulness or safety of the gunshots but he repeatedly represented as bedrock fact in his Affidavit that the gunshots required no law enforcement response. Doc. 136 at 63:10-66:5, 67:9-69:7, 112:16-113:10. Sullivan knew from the CAD report for Plaintiff's 911 call that the call lasted at most 7 minutes (it actually only lasted 2½ minutes), yet he represented in his Affidavit that it lasted 32 minutes. Doc. 136 at 159:10-161:7; Doc. 149-2. Sullivan knew Dispatch had told him Plaintiff called because "she just was not a happy camper and she wanted y'all [Sullivan] to get it [the gunshots] taken care of," but he did not include this exculpatory information in his Affidavit where he accused her of calling for the purpose of disrupting 911. Doc. 136 at 148:4-11; Doc. 149-22 at 16:8-13. These misrepresentations and omissions of information Sullivan undisputedly had "actual knowledge" of would further support a finding that he acted intentionally and with malice.

Additionally, Sullivan's statements of animus towards Plaintiff and expressed desire to retaliate are evidence of his motive to lie. *Gore* therefore would not entitle Defendants to judgment, even were it binding.[14]

In sum, Defendants' teeth gnashing over reckless-versus-intentional provides no basis to disturb the District Court's denial of summary judgment since, even if--hypothetically--recklessness were removed from the analysis, there would still remain the jury question of whether Sullivan acted intentionally. Thus, there is no live legal issue to be decided in this appeal.

**B. Sullivan's Misstatements and Omissions Are Material.**

Should this Court choose to delve into the District Court's factual determinations before a final judgment has been reached, Sullivan's Affidavit contains the following misrepresentations and omissions which, considered collectively, would certainly defeat probable cause if corrected and are therefore material. *See Butler*, 85 F.4th at 1114 ("We discuss each omission [from the warrant application] in turn, but consider them, as we must, in their totality.").

(1) Misstatements about Plaintiff's initial call to the CCSO non-emergency line in order to falsely portray Plaintiff as uncooperative,

[14] In addition to being unpublished, *see* 11th Cir. Local Rule 36-2 ("Unpublished opinions are not considered binding precedent"), *Gore* did not involve any issue of recklessness to be analyzed. Accordingly, the language on which Defendants rely, *see* Defts Br. at 35-36, was dicta that is "not binding on anyone for any purpose." *See Edwards v. Prime, Inc*., 602 F.3d 1276, 1298 (11th Cir. 2010).

disruptive, and seeking emergency assistance for gunshots she described as coming from a hunting club (when she did and said no such thing)[15];

(2) Representing that the gunshots reported by Plaintiff and her husband were lawful, safe, and non-actionable when these were only uncorroborated assumptions. Doc. 136 at 41:24-43:16, 63:10-66:5, 67:9-69:7, 112:16-113:10, 216:19-217:25[16];

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[15] *See* Doc.149-30 (Affidavit) at 157 ¶¶ 3-4 ("On November 22nd, 2018 at approximately 1442 hours, the Camden County Public Safety Complex received a call for alleged emergency service [**Plaintiff actually called the non-emergency line, Doc. 137 at 19:12-18**] in reference to shots being fired in the area of 84 Magna Carta Drive. The call was taken by correctional staff and forwarded the call to the Camden County Emergency Dispatch Center [**which handles both non-emergency and emergency calls, Doc. 134 at 15:4-13**]. The caller, later identified as Ms. Emma J. Prospero, advised the Camden County Emergency Dispatch Center that she heard shots being fired from behind her residence in the area of the hunting club **[Plaintiff never mentioned a hunting club, Doc 149-5]** behind the Chevron Truck Stop. Ms. Prospero advised dispatcher that she did not want contact from law enforcement but she wanted the shooting to be stopped. She stated the shooting needed to be stopped so she could enjoy her Thanksgiving dinner. Ms. Prospero ended the phone call by hanging up after refusing to give any further information. **[The call actually ended with Dispatcher stating, "I understand. We will get somebody out there, okay?" and Plaintiff saying, "Thank you," and they both hung up, Doc. 149-5.]** . . . After receiving the call for service, I advised the Camden County Dispatch Center **[of his uncorroborated assumption, Doc. 136 at 112:16-113:10]** that the subjects allegedly shooting had every right to do so on the private property of a hunting club which is the location Ms. Prospero stated the shots were coming from. **[Plaintiff never mentioned a hunting club, Doc. 149-5.]**").

[16] *See* Doc. 149-30 (Affidavit) at 157 ¶ 4 ("Being from the immediate area, I knew **[when he really just presumed]** the shots were being fired from private property in which **[he presumed]** the individuals shooting were well in their rights to be shooting. . . I advised the Camden County Dispatch Center **[of his presumption]** that the subjects allegedly shooting had every right to do so."); *id*. at ¶ 5

(3) Misrepresenting that Plaintiff contacted 911 "after first contacting the non-emergency number twice," when in fact Plaintiff only contacted the non-emergency number once; her husband called the second time. Doc. 149-30 at 158; Doc. 149-5; Doc. 149-18; Doc. 149-24 at 3:17-20.

(4) Misrepresenting Plaintiff's 911 call as lasting 32 minutes when the CAD report Sullivan says he would have reviewed states that the 911 call had ended 25 minutes sooner[17];

(5) Equating 911 calling for a "non-emergency" reason to calling for the purpose of interfering with or disrupting 911, and thereby falsely

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("Dispatchers relayed [to Mrs. Prospero's husband] the **[presumed but uncorroborated]** information given by me stating **[his presumption]** that the subjects shooting were within their rights to do so. . . ."); *id*. (during Plaintiff's 911 call, she "was given the same information that was given to husband in reference to **[Sullivan's presumption of]** the subjects being within their rights to be shooting firearms on private property.").

[17] *See* Doc.149-30 (Affidavit) at 157 ¶ 1 ("Personally came Ryan Sullivan, who on oath says that, to the best of his/her knowledge and belief **Emma Jane Prospero did, commit the offense of, 16-11-39.2 Misdemeanor, Unlawful Conduct during 911 Call on November 22, 2018 at 02:58 PM to November 22, 2018 at 03:30 PM**, in Camden County, Georgia; the place of occurrence of said offense being 84 Magna Carta Drive . . ."); Doc. 149-2 (911 CAD) (Plaintiff "disconnected" from 2:58 PM 911 call by 3:05 PM); Doc 136 at 161:3-7 (would have reviewed CAD).

suggesting that Georgia Criminal Code, O.C.G.A. § 16-11-39.2, prohibits calling 911 for non-emergency service, when it does not[18];

(6) Omitting Dispatcher Siever's exculpatory statement that, according to Flowers, Plaintiff's purpose for calling 911 was she "just was not a happy camper and she wanted y'all [meaning Sullivan] to get it taken care of," referring to the gunshots[19]; and

(7) Omitting readily-available exculpatory information from the audio-recordings of Plaintiff and her husband's calls -- to which Dispatch encouraged that Sullivan listen -- wherein Plaintiff stated that she believed the gunshots were coming "too close" to people's homes, and that she did not understand why CCSO's response was different on that day than in the past.[20]

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[18] *See* Doc.149-30 (Affidavit) at 157 ¶ 2 (stating that Plaintiff committed a violation of O.C.G.A. § 16-11-39.2 "when he/she unlawfully contacted 9-1-1, an emergency telephone service **in reference to an incident that was not a true emergency** for the purpose of interfering or disrupting an emergency telephone service."); *id*. at 158 ¶ 1 (concluding that "Mrs. Prospero disrupted an emergency telephone service **for service that was not an emergency**," but failing to allege that her purpose was to disrupt, as required by O.C.G.A. § 16-11-39.2(b)); *see also* Addendum (O.C.G.A. § 16-11-39.2) (containing no prohibition on contacting 911 for non-emergency service).

[19] *See* Doc. 149-22 at 16:8-18; Doc. 136 at 138:4-12; Doc. 137 at 127:7-21.

[20] *See* Doc. 149-5 at 2:6-8; Doc. 149-18 at 3:23-4:2; Doc. 149-20 at 8:10-12, 10:16-18; Doc. 137 at 138:6-11; Doc. 149-26 at 7:15-18.

That Sullivan disputes that some of the foregoing were misstatements or omissions, or that he made them intentionally or recklessly, or that they impacted whether his Affidavit presented probable cause (Defts Br. at 37-49) only proves the District Court's point that there are multiple issues of fact for trial. *See* Doc. 234 at 50-54 (outlining alleged misstatements and omissions); *Id*. at 71 (finding that whether Sullivan's Affidavit contains intentional or reckless material misstatements and omissions requires a fact-finder "to weigh evidence, make honesty and credibility determinations, and draw factual inferences").

Trying to bolster their doomed materiality claim, Defendants protest that the District Court did not consider the testimony of County Magistrate Judge Jennifer Lewis, who signed Plaintiff's arrest warrant. Defts Br. at 39, 48-49. Lewis' testimony is subject to a pending motion to exclude for a host of reasons pursuant to Federal Rule of Civil Procedure 37 and Federal Rules of Evidence 401, 402, 403, 701 and 702. *See* Doc. 200; Doc. 225. Until the District Court has ruled on this motion, this Court lacks jurisdiction to review the admissibility of Lewis' testimony for abuse of discretion. *See McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001) (noting that abuse-of-discretion standard for appellate review of evidentiary rulings "recognizes that . . . there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment we

will not reverse even if we would have gone the other way had the choice been ours to make").

## III. DISAGREEMENT WITH FINDING THAT QUESTIONS OF FACT EXIST REGARDING WHETHER PLAINTIFF'S SPEECH WAS PROTECTED PROVIDES NO BASIS FOR APPELLATE REVIEW AND IS WITHOUT MERIT.

Turning to Plaintiff's First Amendment retaliation claim, Sullivan argues that the District Court erred in finding questions of fact as to whether Plaintiff's calls on Thanksgiving Day 2018 were protected speech because it is sufficient for immunity purposes that he believed her speech was unprotected. Defts Br. at 50-54. He contends that the only salient question is "whether [he] reasonably believed that the motivation for Prospero's calls was to disrupt the 911 Center to attain the result she wanted" of stopping the gunshots. *Id*. at 52-53. The District Court found that whether a reasonable officer walking in Sullivan's shoes could have believed Plaintiff's calls amounted to purposeful disruption of the 911 service involves questions of fact that must be resolved by a jury. Doc. 234 at 50-54. Thus, Sullivan's protected-speech argument is, at bottom, only a repeat of Sullivan's probable cause argument and provides no issue of law to review. He is simply asking this Court to disagree with the lower court's finding of genuine issues of fact for trial regarding whether he reasonably believed Plaintiff's speech constituted a crime. This the Court cannot do. *See Johnson*, 515 U.S. at 319–20; *Scroggins v. Richardson*, No. 22-12122, 2023 WL 4624480, at *2 (11th Cir. July 19, 2023) (on interlocutory appeal of denial of

qualified immunity, "we are barred from preliminarily reviewing whether or not the pretrial record sets forth a 'genuine' issue of fact for trial").

In addition to presenting no legal issue, Sullivan's perception of Plaintiff's speech does not entitle him to qualified immunity. This is because all of Plaintiff's speech on Thanksgiving Day 2018 was constitutionally protected under clearly established law and no reasonable officer could have concluded otherwise.

The right to petition the government for redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). This includes oral as well as written grievances. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 394 (2011). "[T]he right to petition extends to all departments of the Government," including police departments. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *see Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000) (noting that after *Cal. Motor Transp. Co*., the submission of complaints to "public agencies like a police department constitutes petitioning activity protected by the petition clause"). The First Amendment also "protects a significant amount of verbal criticism and challenge directed at police officers." *Houston v. Hill*, 482 U.S. 451, 461 (1987). This is because "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63.

Plaintiff's calling 911 to request assistance with stopping gunshots near her home that she believed to be in violation of noise ordinances and coming too close to people's houses was thus plainly protected. *See Cal. Motor Transp. Co.*, 404 U.S. at 510; *see also Curry v. State*, 811 So.2d 736, 743 (Fla. Dist. Ct. App. 2002) (explaining that calling 911 to report alleged unlawful activity by a former neighbor with whom Curry was engaged in a long-running feud was protected because Curry "had the constitutional right to convince governmental agencies to enforce laws within their jurisdiction").

Plaintiff's questioning, during her 911 call, Sullivan's refusal to investigate her complaint about the gunshots was also clearly protected. *See Houston*, 482 U.S. at 461; *Garcia v. City of Trenton*, 348 F.3d 726, 727 (8th Cir. 2003) (affirming jury verdict for plaintiff who was issued parking tickets in retaliation for complaining about police's non-enforcement of sidewalk ordinance); *Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998) (denying qualified immunity to sheriff who released humiliating details of a rape following victim's criticizing his investigation because "the First Amendment right to criticize public officials is well-established").

In *Skop v. City of Atlanta*, 485 F.3d 1130 (11th Cir. 2007), this Court confirmed that requesting assistance from police is constitutionally protected. There, an officer arrested a woman for obstruction after she requested that he move his patrol car which was blocking her driveway. *Id.* at 1133-36. The Court held that the

officer lacked probable cause, explaining he was not "permitted to arrest her just for asking, altogether reasonably, that he move his car." *Id.* at 1140. This was true regardless of whether or not the officer subjectively understood that he was blocking the plaintiff's driveway. *Id.* As the Court explained: "the idea that [plaintiff's] brief inquiry to the officer somehow provided a basis for arrest collides head-on with the First Amendment." *Id.* at 1139. As in *Skop*, Plaintiff's brief 911 call for assistance stopping the gunshots and her mild criticism of Sullivan's refusal to respond was protected, regardless of whether Sullivan subjectively thought her call was unwarranted.

Sullivan nevertheless requests immunity because he asserts that he "reasonably believed that the motivation for Prospero's calls was to disrupt the 911 Center to attain the result she wanted, i.e., a cessation of the shooting noise." Defts Br. at 52-53. This argument gets Sullivan nowhere. He admits that Plaintiff was calling to get the shooting stopped. Under O.C.G.A. § 16-11-39.2, this is not an unlawful purpose for calling 911. *Post hoc* attempts to characterize Plaintiff as intentionally disruptive to achieve her lawful purpose – when, as the District Court observed, Dispatch's communications to Sullivan on the day-of suggest nothing about Plaintiff being disruptive (Doc. 234 at 50-51) -- does not render either her purpose or her speech unprotected. If it did, the officer in *Skop* could have avoided liability by testifying that he viewed the plaintiff as being obstructive in order to

achieve her desired result of getting him to move his car so she could pull into her driveway. Probable cause cannot be manufactured this way. *See* 485 F.3d at 1138 ("[T]he suggestion that a citizen asking an officer to assist her thereby provides him with probable cause or even arguable probable cause to arrest her is without foundation in our law.").

True, some cases involving First Amendment retaliation in the employment context have evaluated whether speech is protected from the perspective of the alleged retaliator, rather than from the speaker. *See Waters v. Churchill*, 511 U.S. 661, 677 (1994) (plurality opinion); *see also Heffernan v. City of Paterson, N.J.*, 578 U.S. 266, 272 (2016).[21] However, these cases underscore that the alleged retaliator's assessment of whether the speech is protected must be made "in good faith, rather than as a pretext," and that the retaliator must have reached their conclusion "reasonably." *Waters*, 511 U.S. at 677; *see also Sims v. Metro. Dade Cnty.*, 972 F.2d 1230, 1235 (11th Cir. 1992) (explaining that whether employment retaliation claim

[21] Evaluating the situation from the perspective of the retaliator includes considering the facts as perceived by the retaliator, even when that benefits the speaker. *See Heffernan*, 578 U.S. at 272 (explaining that even where employee had not engaged in protected speech, but employer believed that she had, the employer was still liable because "the government's reason for [retaliation] is what counts"). Thus, when Sullivan testifies that he had no knowledge of the facts of Plaintiff's prior contacts with CCSO, and that his decision to seek a warrant was based solely on her Thanksgiving Day calls, Doc. 136 at 125:11-15; 156:9-157:11, those are the facts that govern. This renders irrelevant Defendants' efforts to smear Plaintiff as a "serial 911 caller." *See generally*, Defts Br. at 4-10.

survived depended on "whether an objectively reasonable official could believe" the statements at issue were unprotected).

Here, a jury could readily conclude that Sullivan pretextually accused Plaintiff of intending to disrupt 911 because he wanted to punish her for her viewpoint about the gunshots, and that he did not actually believe that her speech was unprotected. At 2:44 PM on Thanksgiving Day 2018, Sullivan was told by Dispatch: "2040 Ga Spur 25 by the Chevron. Caller is advising she's hearing shots coming from behind there. She wants it to stop so she can enjoy her dinner." Doc. 149-10. Sullivan instantly assumed the shots were originating from "private property" and decided he was "not going to go back there and make somebody stop shooting." *Id.* At the time, he was miles away and had no idea of the precise origin of the gunshots or whether they were lawful. Doc. 136 at 41:24-43:16; Doc. 137 at 89:1-9. Dispatch also did not tell Sullivan the identity of the "caller," Doc. 149-10, undermining Defendants' theory that Sullivan's actions were somehow justified based on Plaintiff's prior calls. In violation of CCSO standard operating procedure, he simply assumed without going to the scene that the call for assistance was unwarranted and declined to investigate.

Minutes later, Sullivan called Dispatch. Still having no idea of Plaintiff's identity and before Plaintiff had even called 911, Sullivan complained: "What? Do -- people not have anything better to do than to bitch about somebody shooting on

private property?" Doc. 149-14 at 5:6-12. Sullivan then referred to Plaintiff and her husband as "stupid motherfuckers," and promised that he would "let them know how stupid they are" for "bitch[ing]" about gunshots. *Id*. at 6:5-6, 6:10-13. That Sullivan threatened to take retaliatory action against Plaintiff, not knowing who she was and before her purported crime had even occurred, is strong evidence that the offense he later accused her of was pretext for retaliation and not a good faith effort to enforce the law.

Sullivan then went to Plaintiff's address at 3:15 PM, where he did not hear gunshots so he could not corroborate his assumption that they had been coming from Paulk's property. Doc. 136 at 102:12-21, 103:3-5; Doc. 149-2 at 15:17:15. At 3:28 PM, while still in Plaintiff's driveway, Sullivan asked Dispatch to print the CAD reports for her calls. Doc.149-28 at 15:8-9. Sullivan testified that at that point he "knew there was enough there for an offense." Doc. 136 at 125:2-5. He then drove to Paulk's property, but the gate was locked. *Id.* at 57:19-23, 111:10-112:8. Sullivan investigated no further, never confirming if it was Paulk who had been shooting or if it had been lawful, and never listening to the recordings of Plaintiff's calls before he filed for an arrest warrant. *Id.* at 112:16-113:10, 151:17-22. Again, taken as a whole, a jury could readily conclude from these facts that Sullivan sought the warrant, not because he reasonably believed Plaintiff's speech was unprotected but because he disliked her viewpoint – i.e., her complaining about gunshots—and

wanted to punish her for it. Thus, Sullivan's purported perception of Plaintiff's speech does not entitle him to qualified immunity. *See Waters*, 511 U.S. at 677 (retaliator's assessment of whether speech is protected must be made "in good faith, rather than as a pretext").

Alternatively, a jury could find that Sullivan *did* subjectively believe Plaintiff's speech was unprotected, but *unreasonably* so, because he refused to listen to the readily-available recordings of her actual calls where she made multiple exculpatory statements about her lawful purpose for calling, choosing to rely on hearsay from Dispatch, and then ignoring Dispatch's statement that Plaintiff "just . . . wanted y'all to get it [i.e. the gunshots] taken care of." Doc. 149-22 at 16:8-13. A finding that Sullivan *unreasonably* believed Plaintiff's speech was unprotected would also preclude qualified immunity. *See Waters*, 511 U.S. at 677 (not reasonable for employer to conclude employee wrote an improper letter to the editor where, instead of reading the actual letter, the employer decided what the letter said based on hearsay); *Cozzi*, 892 F.3d at 1294 ("an officer may not unreasonably disregard certain pieces of evidence by choosing to ignore information that has been offered to him or her or electing not to obtain easily discoverable facts that might tend to exculpate a suspect."); *Kingsland*, 382 F.3d at 1231 (denying qualified immunity where there were genuine issues of fact as to whether the "defendants failed to

conduct a reasonable investigation," and "ignored certain facts within their knowledge").

It makes no difference if Sullivan had a conversation with a dispatcher who told him "the purpose of [Plaintiff's] call was to interfere with their job duties in order to have the results she wanted at a faster pace than what she was getting." Doc. 136 at 192:25, 193:1-4. Whether such a conversation occurred at all is a disputed fact and for purposes of this appeal, the Court must resolve that dispute in Plaintiff's favor (i.e., assume there was no such conversation). *See* Section I.B, *supra*. But even if a jury found the conversation did occur, they could still find that Sullivan charged Plaintiff as a pretext for retaliation given his earlier promise to "let them [Plaintiff and her husband] know how stupid they are" for "bitch[ing]" about gunshots, and given that, before the alleged conversation with a dispatcher took place, Sullivan had already decided that he had probable cause to arrest. Doc. 149-14 at 6:5-6, 6:10-13; Doc. 136 at 125:2-5.

Finally, *Czapiewski v. Russell*, 15-CV-208-BBC, 2016 WL 3920503 (W.D. Wis. July 18, 2016), on which Defendants rely, was a false-report case where the court found that prison staff "reasonably believed plaintiff was lying" about his need for assistance, and therefore found his speech to be unprotected. *Id*. at *3. Here, Plaintiff is not accused of lying or making a false report. *Czapiewski* has no purchase.

## CONCLUSION

Defendants' appeal presents no issues of law for this Court to review, but merely quibbles, without merit, with the District Court's finding that genuine issues of fact as to arguable probable cause and as to reckless or intentional material misstatements and omissions in Sullivan's warrant Affidavit preclude qualified immunity. This Court should either dismiss this appeal for lack of jurisdiction or affirm the District Court's determination that this case must proceed to trial.

Respectfully submitted this 5th of July, 2024.

*/s/ Clare R. Norins*
Clare R. Norins*
Georgia Bar No. 575364
cnorins@uga.edu
FIRST AMENDMENT CLINIC
University of Georgia School of Law
Post Office Box 388
Athens, Georgia 30603
Telephone: (706) 542-1419

*Attorney for Appellee*

*Co-author with Allyson Veile

# ADDENDUM

**O.C.G.A. § 16-11-39.2. Unlawful conduct during a 9-1-1 call**

(a) As used in this Code section, the term:
(1) "Call" shall have the same meaning as set forth in paragraph (2.1) of Code Section 46-5-122.
(2) "False report" means the. fabrication of an incident or crime or of material information relating to an incident or crime which the person making the report knows to be false at the time of making the report.
(3) "Harass" means to knowingly and willingly engage in any conduct directed toward a communications officer that is likely to impede or interfere with such communications officer's duties, that threatens such communication officer or any member of his or her family, or that places any member of the public served or to be served by 9-1-1 service in danger of injury or delayed assistance.
(4) "Harassing" means the willful use of opprobrious and abusive language which has no legitimate purpose in relation to imparting information relevant to an emergency call.
(5) "9-1-1" means a public safety answering point as defined in paragraph (15) of Code Section 46-5-122. The term "9-1-1" also means the digits, address, Internet Protocol address, or other information used to access or initiate a call to a public safety answering point.
(b) A person commits the offense of unlawful conduct during a 9-1-1 telephone call if he or she:
(1) Without provocation, uses obscene, vulgar, or profane language with the intent to intimidate or harass a 9-1-1 communications officer;
(2) Calls or otherwise contacts 9-1-1, whether or not conversation ensues, for the purpose of annoying, harassing, or molesting a 9-1-1 communications officer or for the purpose of interfering with or disrupting emergency telephone service;
(3) Calls or otherwise contacts 9-1-1 and fails to hang up or disengage the connection for the intended purpose of interfering with or disrupting emergency service;
(4) Calls or otherwise contacts 9-1-1 with the intention to harass a communications officer; or
(5) Calls or otherwise contacts 9-1-1 and makes a false report.
(c) Any person who violates subsection (b) of this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $500.00 or 12 months in jail, or both.

(d) Any violation of subsection (b) of this Code section shall be considered to have been committed in any county where such call to or contact with 9-1-1 originated or in any county where the call to or contact with 9-1-1 was received.

## CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitations set forth in FRAP 32(a)(4)-(6) and FRAP 32(a)(7)(B). Pursuant to FRAP 32(g)(1), the brief contains 12,888 words, exclusive of those portions which are not considered for word count purposes as per 11th Cir. R. 32-4, as measured by the word count function of the Microsoft Word processing system used to prepare the brief. The type size and styled used is 14-point Times New Roman.

Respectfully submitted this 5th day of July, 2024.

*/s/ Clare R. Norins*
Clare R. Norins
Georgia Bar No. 575364
cnorins@uga.edu
FIRST AMENDMENT CLINIC
University of Georgia School of Law
Post Office Box 388
Athens, Georgia 30603
Telephone: (706) 542-1419

*Attorney for Appellee*

## CERTIFICATE OF SERVICE

I certify that on July 5, 2024, I filed the foregoing **APPELLEE'S RESPONSE BRIEF** by filing it on ECF in the United States Court of Appeals for the Eleventh Circuit which caused electronic copies to be served on:

**Bradley J. Watkins**
bwatkins@brbcsw.com
**Emily R. Hancock**
ehancock@brbcsw.com
**Amanda L. Szokoly**
aszokoly@brbcsw.com
Brown, Readdick, Bumgartner,
Carter, Strickland & Watkins, LLP
5 Glynn Avenue
Brunswick, GA 31520

*Attorneys for Appellants*

*/s/ Clare R. Norins*
Clare R. Norins
Georgia Bar No. 575364