IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SHARIF HASSAN, Plaintiff, -versus- CITY OF ATLANTA; ATLANTA POLICE OFFICER FRANCESCA BARBER, ID No. 6428 sued in her individual capacity; JANE AND JOHN DOES Nos. 1-6, all current or former employees of the Atlanta Police Department sued in their individual capacities; JANE AND JOHN DOES Nos. 7-8 all current or former employees of the Atlanta Department of Corrections sued in their individual capacities, Defendants.	Civil Action File No. 1:21-CV-04629-TWT JURY TRIAL DEMANDED

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

COMES NOW Plaintiff Sharif Hassan ("Plaintiff" or "Hassan"), through his undersigned counsel, and hereby files this Memorandum of Law in Opposition to the Motion to Dismiss the Complaint ("Motion") lodged by Defendants City of Atlanta ("City") and Atlanta Police Officer Francesca Barber ("Barber" and collectively, "Defendants"). The Complaint ("Compl.") pleads specific facts that

plausibly state multiple claims for relief. Several of these claims are not correctly identified, let alone addressed, in Defendants' Motion. The claims that Defendants do try to critique readily satisfy the pleading requirements of Fed. R. Civ. P. 8(a), as interpreted by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Defendants' motion should therefore be denied.

STATEMENT OF FACTS

Plaintiff Hassan's claims arise from Defendants' infringement of two fundamental safeguards of free speech and a free press: (1) the right to record public officials carrying out their duties in public, and (2) the prohibition on the government granting selective access rights to some journalists while denying access to others.

In the weeks following the May 2020 murder of George Floyd, hundreds of peaceful protestors took to the streets in Atlanta, and elsewhere, to demonstrate against police injustice. (Compl. ¶¶ 16-17) In response, then-Atlanta Mayor Keshia Lance Bottoms ("the Mayor") declared a state of emergency and issued a series of confusing and overly broad 9-PM-to-sunrise curfew orders ("Curfew Orders" or "Orders"), which were ineffectively relayed to the public. (*Id*. ¶¶ 19-20, 24-24)[1]

[1] Sections 2-181(a) & (b)(6) of the Atlanta City Code state: "[T]he mayor, as chief executive of the city, shall have the emergency power to declare an emergency […] After declaration of such emergency, the mayor, as chief executive, shall have the right to exercise any or all of the following powers […] To impose emergency curfew regulations." (Compl. ¶ 20).

Unlike curfews issued in other cities that summer, the Orders contained no exception for, *inter alia*, media engaged in newsgathering. (*Id*. ¶¶ 21, 25) Rather than amend the Orders to cleanly correct this defect, the Mayor, as the final policy-maker for emergency curfew regulations in the City of Atlanta, approved a policy ("the City Media Policy") of selectively exempting some, but not all, working members of the media from her curfew. (*Id*. ¶¶ 20, 22-23, 26) Select members of the media were informed in writing and otherwise by the City that they were considered exempt, but the City failed to identify other members of the media that were also exempt, and left them open to arrest. (*Id*. ¶¶ 22-23)

Pursuant to the Mayor's overly broad Curfew Orders and the City Media Policy of selective exemption from the curfew, Hassan was arrested shortly after 9 PM on June 1, 2020. (*Id*. ¶¶ 37-51) His arrest occurred moments after he began photographing Atlanta Police Department ("APD") officers tackling and arresting another individual on a public street with no vehicular traffic. (*Id*. ¶¶ 38, 40, 42) Hassan -- who was using a professional grade camera and wearing a hip belt containing his camera lenses -- stood a safe distance away and was not in any way interfering with the arrest. (*Id*. ¶¶ 30, 39) Yet, as soon as Hassan began photographing, an officer blocked his view so that he could no longer record. (*Id*. ¶ 42) Two APD officers, including Defendant Barber, grabbed Hassan, forced him face-down on the ground, and zip-tied his hands. (*Id*. ¶¶ 42-45) Hassan identified

himself to these officers as a journalist, there to take photographs. (*Id*. ¶ 47) But the officers, including Barber, ignored this information and asked no follow up questions. (*Id*. ¶¶ 47-50) They instead continued to seize Hassan, and Barber issued him a citation for an alleged curfew violation. (*Id*. ¶¶ 45, 49) Meanwhile, other journalists in Hassan's immediate vicinity -- who were out after 9 PM but did not stop to document the arrest that Hassan had attempted to photograph -- were allowed to carry on their news-gathering duties. These other journalists were plainly visible and engaging in the same work as Hassan, but were not subjected to arrest or interference with their reporting. (*Id*. ¶ 51)

As a result of the Mayor's overly broad Curfew Orders and the City's Media Policy of selectively exempting some media from the curfew but not others, Hassan spent the night hand-cuffed in a City jail cell, unable to notify anyone of his whereabouts. (*Id*. ⁋⁋ 59-77) His work product, consisting of photographs from the preceding days of protests that were stored on camera memory cards he was carrying in his pocket, was also seized from him at the time of his arrest and never returned. (*Id*. ⁋⁋ 54, 97-101)

After Hassan's arrest, the City finally attempted to correct the constitutionally defective Curfew Orders, announcing that people working after 9 PM, including the media, were not subject to arrest under the curfew. (*Id*. ⁋⁋ 102-103, 120-129, 169) This definitively obviated any purported basis for continuing to

charge working journalist Hassan with a curfew violation. (*Id*. ¶¶ 104, 169-170) Yet the City continued to maliciously prosecute him for over six (6) months, necessitating three court appearances by Hassan, until finally dismissing the case for "evidentiary reasons." (*Id*. ¶¶ 105-108, 171-172) Hassan's unlawful arrest and prosecution impeded his freedom to travel, including for work, and chilled him from documenting political protest events. (*Id*. ¶¶ 106-107, 109-112).

STANDARD OF REVIEW ON MOTION TO DISMISS

Plaintiff Hassan's Complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." F.R.C.P. 8(a)(2). Detailed factual allegations are not required so long as the complaint states a claim "that is plausible on its face," meaning it raises a reasonable expectation that discovery will reveal evidence of liable conduct by the defendants. *Twomby*, 550 U.S. at 555-556. *Accord Iqbal*, 556 U.S. at 678. Plausibility demands more than mere "labels or conclusions" or "a formulaic recitation of the elements" of a claim. *Twombly*, 550 U.S. at 555. But it "does not impose a probability requirement at the pleading stage" that Hasan will ultimately prevail. *Twombly*, 550 U.S. at 555, 556; *Iqbal*, 556 U.S. at 678. That being said, on a motion to dismiss, the Court must accept all facts alleged in the Complaint as true and draw all reasonable inferences in favor of Hassan. *See Est. of Cummings v. Davenport*, 906 F.3d 934, 937 (11th

Cir. 2018). Applying the foregoing standards, the Complaint clearly should proceed to discovery.

LEGAL ARGUMENT AND ANALYSIS

The Complaint asserts seven counts: Counts I and II plead municipal liability against Defendant City of Atlanta for the Mayor's overly broad Curfew Orders and the City's Media Policy of selectively exempting some media from the curfew but not others; Count III pleads interference with and retaliation for Hassan's exercise of his First Amendment right to record; Counts IV and V assert unreasonable and unlawful seizure of Hassan's work product; Count VI asserts unlawful seizure, false arrest and malicious prosecution of Hassan; and Count VII asserts a supplemental state law claim under the Georgia Open Records Act. Defendants' Motion to Dismiss fails to address, or even correctly identify, multiple of these claims.[2]

Before we address each Count in turn, a word about municipal liability:

[2] Defendants' Motion does not address Counts I, II, IV & V (except as concerns the Jane/John Does), or Count VI (except as concerns the false arrest claim against Barber). The Court should disregard new arguments that Defendants attempt to raise for the first time in their Reply. *Conn. State Dental Ass'n v. Anthem Health Plans, Inc.,* 591 F.3d 1337, 1352 n.11 (11th Cir. 2009) (argument waived where it was raised for first time in a Reply); *Inniss v. Aderhold*, 80 F. Supp. 3d 1335, 1359 (N.D. Ga. 2015) ("The Court is not required to consider arguments raised for the first time in a Reply.").

Monell v. New York Dept. of Social Services, 436 U.S. 658 (1978) held that a city is liable under 42 U.S.C. § 1983 when the allegedly unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. "Only those officials who have final policymaking authority may render the municipality liable under § 1983." *Cooper v. Dillon*, 403 F.3d 1208, 1221 (11th Cir. 2005) (citing *Hill v. Clifton*, 74 F.3d 1150, 1152 (11th Cir. 1996)). "'[S]tate and local positive law' determine whether a particular official has final policymaker authority for § 1983 purposes." *Id.* at 1221 (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701) (1986)).

Here, "local positive law" declares the Mayor to be the final policy-maker for issuance and enforcement of emergency curfew regulations. *See* Atlanta City Code §§ 2-181(a) & (b)(6). Hence, if the emergency Curfew Orders or the City Media Policy at issue in Hassan's case are found to be unconstitutional as written or as enforced with the Mayor's approval, that is sufficient to establish the City of Atlanta's municipal liability for violating Hassan's First and Fourteenth Amendment rights. *See Cooper*, 403 F.3d at 1223 (finding municipal liability where final policy-maker enforced unconstitutional statute against journalist plaintiff in violation of his First Amendment rights); *Tisdale v. Gravitt,* 51 F. Supp.3d 1378, 1394-1395 (N.D. Ga. 2014) (finding municipal liability where

mayor, as final policy-maker, issued policy that violated plaintiff's First Amendment right to record).[3]

I. Curfew Orders Were Not Narrowly Tailored and Failed to Leave Open Alternative Channels (COUNT I)[4]

Unlike curfew orders in most other cities and counties during the Summer of 2020, the Mayor's Curfew Orders failed to include any exception for First Amendment-protected activity, including newsgathering. (Comp. ¶¶ 120 – 129). *See Richmond Newspapers Inc. v. Commonwealth of Virginia,* 448 U.S. 555, 577 (1980) ("The right of access to places traditionally open to the public [such as city streets and sidewalks] may be seen as assured by the amalgam of the First Amendment guarantees of speech and press"); *Angelico v. State of La.*, 593 F.2d 585, 588 (5th Cir. 1979) ("legitimate newsgathering [is] an activity protected by the First Amendment").

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[3] Defendants' argue that Hassan fails to show Defendant Barber was a final policy-maker. (Defts MOL at 9-10) But Hassan neither alleges, nor is required to show, that Barber had any policy-making authority. Rather, Barber was executing the City Media Policy and/or Practice of selectively exempting some members of the media, but not others, from the Mayor's Curfew Orders when she arrested and charged Plaintiff for a curfew violation but allowed other media to go about their newsgathering. *See Monell*, 436 U.S. at 694 ("it is when execution of a government's policy . . . inflicts the injury that the government as an entity is responsible under § 1983").

[4] Defendants' Motion references, but does not address, Plaintiff's facial challenge to the Mayor's Curfew Orders. (Defts Memo at 10)

Content-neutral government limitations on the "time, place, or manner" of protected First Amendment activity, like a generally applicable curfew order, "must: (1) be narrowly tailored to serve a significant government interest; and (2) provide ample alternative channels of communication." *Gold Coast Publ'ns v. Corrigan*, 42 F.3d 1336, 1344 (11th Cir. 1994) (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983)). Here, the Mayor's Curfew Orders were not narrowly tailored because they barred *all* persons -- including all reporters -- from being present on public streets or sidewalks after 9 PM, regardless of their purpose or activity. The Orders therefore swept up broad swaths of protected activity, including newsgathering, the barring of which was not narrowly tailored to serve the City's interest in protecting public safety.[5] *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals"); *see also United States v. Stevens*, 559 U.S. 460,

[5] The City essentially conceded the Orders' lack of narrow tailoring when on June 3, 2020, days after the Orders had been issued, the City announced in social media posts that exemptions would apply to "people seeking medical help, *working*, first responders, & homeless." (Compl. ¶ 103) In contrast, the majority of other cities around the country that instituted curfews in May and June 2020 included, from the start, an explicit exemption for members of the media in the text of their curfew orders. *See* Reporters Committee for Freedom of the Press, "Reporters Committee tracks curfew orders in wake of nationwide protests" (last updated June 2020), https://www.rcfp.org/protest-curfew-order-tracker/.

473 (2010) (a statute may be struck down as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep").

Additionally, the Orders failed to leave open "ample alternative channels" for newsgathering on public streets and sidewalks between 9 PM and sunrise.[6] This deprived the public of its eyes and ears in the City of Atlanta for 9½ hours of the 24-hour news cycle during a time of heightened public interest and police activity -- *i.e.*, the historic George Floyd protests of Summer 2020 that coincided with a once-every-hundred-years pandemic (COVID-19). (Compl. ¶ 123)

Thus, the Complaint amply pleads that due to lack of narrow tailoring and the failure to leave open ample alternative channels for communication by the press, the Mayor's Curfew Orders were unconstitutional on their face, rendering their enforcement against working photojournalist Hassan a violation of his First Amendment rights. As noted, the City later realized the Curfew Orders were too broad and attempted to narrow their scope through announcements made on the City's social media. (Compl. ¶ 103) *See, e.g., Baumann v. City of Cumming, Georgia*, No. 2:07-CV-0095-WCO, 2007 WL 9710767, at *6 (N.D. Ga. Nov. 2,

[6] Sunrise in Atlanta from May 29, 2020 to June 4, 2020, the dates of the curfew, ranged from 6:28 AM to 6:29 AM. *See* https://www.sunrise-and-sunset.com/en/sun/united-states/atlanta__ga/2020/.

2007) (plaintiff likely to succeed on merits of First Amendment challenge to time, place, manner restriction that "burdens substantially more speech than is necessary to further the city's legitimate and important interests in public safety").

II. The City's Media Policy Selectively Exempted Some Journalists from the Curfew Orders, But Not Others (COUNT II)[7]

Hassan's second cause of action asserts a City Media Policy, approved by the Mayor as final policy-maker, of unconstitutionally exempting some members of the media from the Mayor's Curfew Orders but not others. (Compl. ¶¶ 22-23, 26, 130-137) The Media Policy's existence is evidenced by the fact that the City told select members of the media they were exempt from the Curfew Orders, yet the City enforced the Curfew Orders as to other members of the media. (*Id*. ¶¶ 22-23) The City's Media Policy was also observed in practice on June 1, 2020. That evening, Hassan was arrested for a curfew violation while engaged in newsgathering and after identifying himself as a journalist. Yet, other members of the media who were engaging in newsgathering after 9 PM in Hassan's immediate vicinity were not stopped or arrested. (*Id*. ¶¶ 34-36, 42-51)

The City's Media Policy was unconstitutional because the First Amendment prohibits the government from restricting the access rights of some journalists

[7] Never addressing Count II, Defendants erroneously characterize the Complaint as pleading "a custom or policy of arresting 'photojournalists' at demonstrations and protests for filming arrests; and isolating arrestees based on their race and ethnicity." (Defts MOL at 10) Nowhere does the Complaint allege such a policy.

while affording access to others. *See Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (court could not grant one television program access to discovery information in an on-going litigation while denying access to other news media); *American Broadcasting Companies, Inc. ("ABC") v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (police could not exclude ABC journalists from post-election activities at campaign headquarters where other members of the press were granted access); *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (Secret Service could not exclude a reporter arbitrarily or for less than compelling reasons from White House press facilities that were publicly available to others); *United Teachers of Dade v. Stierheim*, 213 F.Supp.2d 1368, 1373–74 (S.D. Fla. 2002) (school board could not exclude editor of union newspaper from press room that the board provided for "general-circulation media" who covered its meetings).

"Once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable." *Am. Broadcasting Companies*, 570 F.2d at 1083. Atlanta's federal district court likewise recognized 40 years ago that allowing access to some journalists but not others violates the First Amendment. *Cable News Network, Inc. v. American Broadcasting Companies, Inc.*, 518 F.Supp. 1238, 1245-1246 (N.D. Ga. 1981) (enjoining White

House defendants from excluding television news media from press pool while allowing access to print journalists).

The City's Media Policy also subjected Hassan to unequal treatment compared to his fellow members of the news media. The latter were left alone to continue their newsgathering after 9 PM on June 1, 2020, but Hassan was arrested while engaging in the same activity. (Comp. ¶ 136) This violated Hassan's Fourteenth Amendment right to equal protection. *See ABC*, 570 F.2d at 1084 (issuing restraining order against arrest of ABC journalists to protect them from unequal treatment); *Nicholas v. Bratton*, 376 F.Supp.3d 232, 250, 259, 288 (S.D.N.Y. 2019) (denying summary judgement on photojournalist's equal-protection claim where he was punished for being in a "frozen" police zone while others were not; plaintiff had a "right to gather news on equal terms with his fellow journalists"). Hassan has more than amply pled a claim for relief in Count II.[8]

[8] Defendants contend there is no evidence the City knew or should have known that its policy was unconstitutional. (Defts MOL at 10) Here, Defendants are erroneously referring to the deliberate-indifference standard for municipal liability, which only applies when a final policy-maker fails to correct an unconstitutional situation of which the policy-maker has actual or constructive notice, such as a pattern or practice of city police using excessive force. *See, e.g., Brooks v. Scheib*, 813 F.2d 1191, 1193 (11th Cir. 1987) (cited by Defendants). Hassan's Complaint does not allege municipal liability based on deliberate indifference. Rather, it asserts that the City affirmatively promulgated unconstitutional Curfew Orders and an unconstitutional Policy of selectively exempting some media but not others.

III. Hassan's Arrest Violated His Right to Record (COUNT III)

Hassan has a clearly-established right to photograph police officers carrying out their official duties in public, without police interference. *Bowens v. Superintendent of Miami South Beach Police Dept.*, 557 Fed. Appx. 857, 863 (11th Cir. 2014); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). Hassan's arrest violated both this clearly established right and the APD's own operating procedures.[9] (Compl. ¶¶ 138-145). Indeed, numerous courts have ruled against the City of Atlanta in cases where APD officers interfered with, and often arrested, journalists and citizens filming at protests. *See, e.g.*, *Toole v. City of Atlanta*, 798 Fed.Appx. 381 (11th Cir. 2019) (affirming denial of summary judgment for APD officer); *Toole v. City of Atlanta*, 1:16-CV-02909-CAP-CMS, 2019 WL 13021157 (N.D. Ga. Mar. 26, 2019) (denying summary judgment for APD officer and City of Atlanta); *Anderson v. City of Atlanta*, 1:11-CV-3398-SCJ (N.D. Ga. Mar. 22, 2012) (Settlement Order); *Anderson v. City of Atlanta*, 1:11-CV-3398-SCJ (N.D. Ga. May 12, 2015) (Contempt Order awarding attorneys' fees against City of Atlanta).[10]

[9] APD Standard Operating Procedures, Section 4.4.1, prohibits interfering with a public citizen's recording of police activity so long as the citizen does not physically interfere with officers' ability to carry out their duties. (Compl, ¶ 140)

[10] The *Anderson* Orders are attached as Exhibit A.

Here, Hassan was arrested moments after he began photographing APD officers as they were tackling and arresting another individual on a public street. (*Id*. ¶¶ 34-39) Hassan was photographing from a safe distance away and was not interfering or posing any health or safety threat. (*Id*. ¶¶ 39, 141, 143) Without first directing Hassan to move farther away or disperse, an APD officer blocked his camera view so that he could no longer record. (*Id*. ¶¶ 41-42, 142) Hassan was then grabbed by two officers, including Defendant Barber, forced to lie face-down on the ground, and zip-tied. (*Id*. ¶¶ 43-45)

Prior to Hassan's beginning to photograph the arrest of the other individual, he had been walking in close proximity to APD officers, none of whom had approached or stopped him for a curfew violation. (*Id*. ⁋ 32-36) Only when he began to record officers seizing another civilian did they swiftly and aggressively react to his presence. (*Id*. ¶¶ 34-39, 43-45) Thus, the catalyzing event for Hassan's arrest was his attempt to exercise his First Amendment right to record police activity in a public place. *See Smith* 212 F.3d at 1333. The mere seconds that passed between Hassan's starting to photograph another person's arrest and the two APD officers, including Barber, bringing Hassan to the ground and cuffing him supports the inference that Barber and the other officer wanted to stop him from taking pictures and were retaliating against him for exercising his First Amendment right to record. *See Beach Blitz Co. v. City of Miami Beach, Fla.*, 13

F.4th 1289, 1305 (11th Cir. 2021) (inference of First Amendment retaliation arises from temporal proximity between the protected activity and the adverse action). Hassan's Count III is therefore well-pled.

IV. Hassan's Work Product Unlawfully Seized (COUNTS IV & V)

Counts IV and V of the Complaint allege that the confiscation of Hassan's photographic work product violated both the Fourth Amendment's prohibition on unreasonable seizure and the Federal Privacy Protection Act ("PPA"), 42 U.S.C. § 2000aa, *et seq*.[11] These claims are pled against Defendant Barber and Jane/John Doe Defendants who Plaintiff is not able to identify without discovery. (Compl. ¶¶ 146-161) Defendants do not challenge Counts IV and V other than to assert that they should be dismissed as against the Does. Defendants contend that the Does are not sufficiently identified to allow for service of process. (Defts MOL 16-17) Limited early discovery, not dismissal, is the solution to Defendants' concern regarding the Does, as asserted in Hassan's Motion for Expedited Discovery (Doc. 6) which he is filing simultaneously with this Opposition brief.

Hassan's unreturned camera memory cards, along with his other property, were initially seized at the outdoor processing location where he was taken

[11] Under the PPA, government officers may not "search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." 42 U.S.C. § 2000aa(a).

following his June 1, 2020 arrest. (Compl. ¶¶ 52-54) Hassan retrieved his property the week after he was released from jail, but the memory cards were not included. (*Id*. ¶¶ 97-101) Hassan has no way of knowing the names or physical descriptions of the City employees -- working for either the APD or ADC -- who took custody of his property once it was taken from his person on June 1st, or who were responsible for its safekeeping and return. Hassan's undersigned counsel has made Open Records Act requests to the APD for all records related to Hassan's June 1, 2020 arrest and has been told that no responsive records exist, even after counsel provided the number of Hassan's arrest citation signed by Defendant Barber. (Compl. ¶ 45) Thus, Hassan is not able to independently discover the identities of the City employees who unlawfully failed to return his memory cards. This information can only be obtained through Defendant City and Barber's investigative efforts.[12]

Under such circumstances, the Eleventh Circuit allows the "initial use of an unnamed defendant where discovery would likely uncover that defendant's identity." *Morris v. Hays SP Warden*, 638 F. App'x 880, 881-82 (11th Cir. 2016) (reversing dismissal of Doe defendants who plaintiff identified as the various prison employees who pepper-sprayed and beat him); *see also Quad Int'l, Inc. v.*

[12] The same is true regarding the identity of the Does Defendants in Count VI – i.e., the second officer involved in Hassan's arrest and the APD employees, apart from Barber, responsible for continuing to prosecute him. (Compl. ¶¶ 162-174)

Doe, No. CIV.A. 12-673-N, 2013 WL 105253, at *2–3 (S.D. Ala. Jan. 7, 2013) ("it is the opinion of this court that binding precedent does not foreclose the possibility of recognizing an exception, as has been approved in other Circuits, allowing a plaintiff to name fictitious party defendants where discovery is needed to determine the identity of such persons"); *Plant v. Various John Does*, 19 F. Supp. 2d 1316, 1319-20 (S.D. Fla. 1998) ("Courts generally permit the use of fictitious names when the only way a plaintiff can obtain the name of a defendant who has harmed him is through the discovery process in a case filed against that defendant as an unnamed party.").[13]

Simultaneous with this instant Opposition brief, Hassan is filing a Motion for Expedited Discovery (Doc. 6) seeking permission to serve on Defendants City and Barber, and require responses to, limited-scope Interrogatories that will identify the John/Jane Doe defendants. This information will enable Hassan to move to amend his Complaint to add non-fictitious defendants prior to the expiration of the two-year statute of limitations on June 1, 2022.[14]

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[13] *See also Malibu Media, LLC v. John Does 1-13*, No. 2:12-CV-177-FTM-29, 2012 WL 3962492, at *2 (M.D. Fla. Aug. 1, 2012) (denying motion to dismiss Doe defendants as premature because they have not yet been identified and served and therefore are not yet parties), *report and recommendation adopted*, 2:12-CV-177-FTM-29, 2012 WL 3946018 (M.D. Fla. Sept. 10, 2012).

[14] *See Rozar v. Mullis*, 85 F.3d 556, 561 (11th Cir. 1996) (in Georgia, the statute of limitations for a § 1983 claim is two years); *Henriquez v. Georgia Dep't of Revenue*, No. 1:20-CV-3901-WMR-CMS, 2021 WL 2562421, at *8 (N.D. Ga.

V. Hassan Was Falsely Arrested and Maliciously Prosecuted (COUNT VI)

Count VI of the Complaint is pled against Defendants City, Barber, and Does. It asserts that the Mayor's overly broad Curfew Orders and the City's Media Policy of selectively exempting certain media from the curfew but not others resulted in Hassan's unlawful arrest. (Compl. ¶¶ 162-166) Count VI further asserts that once the City publicly announced that people working after 9 PM were exempt from the Curfew Orders, this obviated any arguable probable cause for Hassan's continued prosecution. Yet, rather than dismiss the baseless charge, Defendants continued to prosecute Hassan for six more months. (Compl. ¶¶ 167-174)[15]

Defendants do not address Count VI's malicious prosecution claim. They only move to dismiss the false arrest claim as against Barber on qualified immunity grounds. They argue that she had probable cause, or at least arguable probable cause, to arrest Hassan because of the 9 PM Curfew Orders, which the Complaint

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Apr. 14, 2021) (applying two-year statute of limitations to PPA claim), *report and recommendation adopted*, No. 1:20-CV-3901-WMR, 2021 WL 3399823 (N.D. Ga. June 30, 2021).

[15] *See Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010) (malicious prosecution claim arises where a criminal prosecution was "instituted or *continued*" by the present defendant without probable cause); *Wood v. Kesler,* 323 F.3d 872, 882 (11th Cir. 2003) ("a criminal prosecution ... *continued* ... without probable cause" can be a malicious prosecution) (emphasis added in both).

challenges as unconstitutional.[16] (Defts MOL 11-16) This argument fails for two reasons.

First, "[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer *at the time of the arrest*." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)) (emphasis added). This means that in order to assess whether Barber had arguable probable cause for Hassan's arrest, it must first be established what knowledge and information Barber possessed at the time of his arrest. For instance, did Barber understand Hassan to be a photojournalist based on his professional camera equipment and his identifying himself as a member of the media? (Compl. at ¶¶ 30, 47-48) What knowledge and training did Barber have of the City's Media Policy of exempting some members of the media from the curfew but not others? (*Id*. ¶¶ 22-26, 130-137) Was Barber executing that Policy? Why did Barber arrest Hassan only after he tried to photograph another individual's arrest and not before? (*Id*. ¶¶ 34, 39-45) These questions of fact must be resolved before any determination as to probable cause can be made. *See Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995) (defendant officer not entitled to qualified immunity for arrest of festival participant who was photographing undercover officers

[16] Defendants also move to dismiss the Doe defendants from Count VI. (Defts MOL 16-17) See Section IV, *supra*, for why this argument should be rejected.

working security detail because defendant lacked knowledge linking festival participant to nefarious use of photos); *Thomas v. Cognasi*, No. 2:13CV575-MHT, 2014 WL 1329244, at *6 (M.D. Ala. Mar. 31, 2014) ("probable cause . . turns on the information known to [the officer] at the time of the [arrest]. . . the Court will not speculate as to any alleged facts known to [the arresting officer]. No proper purpose would be served by penalizing [plaintiff] and dismissing his claim prior to discovery").

Second, it is true that "probable cause should generally defeat a retaliatory arrest claim." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019). But the Supreme Court recognizes an exception to this rule "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id*. The Court provides an example of this exception: where the only person arrested for jaywalking at an intersection is a person who was vocally complaining about police conduct. *See id*. In such a situation, "it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest," because the person jaywalked. *Id*.

The *Nieves* exception to probable cause, illustrated by the jay-walking example, readily applies here. Hassan was arrested and charged with a curfew violation moments after he began exercising his First Amendment right to record

the police. Meanwhile, other media members in the vicinity who did not try to record this arrest, were allowed to carry on with their newsgathering after 9 PM. (Compl. ¶¶ 34-51, 138-145) This is directly analogous to the Supreme Court's jaywalking hypothetical where there existed probable cause to arrest similarly-situated people in the same location for the same offense, but the only person actually arrested was the person engaging in unwelcome First Amendment activity. In such a scenario, the retaliatory arrest claim still moves forward despite the existence of probable cause for the arrest. This is because probable cause would "do[ ] little to . . . disprove the causal connection between [Barber's] animus [against Hassan for exercising his right to record] and injury" in the form of arrest. *Nieves*, 139 S. Ct. at 1727. This *Nieves v. Bartlett* probable-cause exception in certain First Amendment retaliatory arrest cases, such as the instant one, is clearly established by virtue of having been articulated by the U.S. Supreme Court.[17] Thus, Barber is not entitled to qualified immunity for Hassan's arrest, even if it were to be assumed that she could show probable cause of a curfew violation.

[17]"In this circuit, the law can be clearly established for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins by Hall v. Talladega City Bd. of Educ.,* 115 F.3d 821, 826 n. 4 (11th Cir. 1997) (internal quotations omitted).

VI. Court May Properly Exercise Supplemental Jurisdiction (COUNT VII)

Count VII of the Complaint asserts a claim under the Georgia Open Records Act (ORA), O.C.G.A § 50-18-70, *et seq.*, based on the City's improper refusal to produce any records in response to a request for all departmental policies, orders, operating procedures, memos, other documents, or communications regarding: (1) the implementation of any and all 2020 executive orders by the Mayor of Atlanta establishing a City-wide curfew; (2) any exemptions or exceptions to 2020 curfews generally, and any specific exemption for members of the media; and (3) any law enforcement investigations, detentions, or arrests of members of the media between the dates of May 29, 2020 and June 8, 2020. (Compl. ¶¶ 113, 177) Defendants argue that the ORA request is too attenuated from the federal claims in this case for the Court to exercise supplemental jurisdiction. (Defts MOL 18-20). This is simply incorrect.

A federal district court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C.A. § 1367(a). Here, the ORA request concerns the same Curfew Orders and the same City Media Policy of selectively exempting some members of the media from the curfew but not others that gave rise to Hassan's federal claims in this lawsuit. The ORA request is therefore part of the same case and controversy. *See Dunn v. City of Fort*

Valley, 464 F.Supp.3d 1347, 1374 (M.D. Ga. 2020) (rejecting city's argument that the court should decline to exercise supplemental jurisdiction over the plaintiff's ORA claim in a right-to-record retaliatory arrest case).[18]

Defendants also urge dismissal of Count VII on the grounds that it does not request *in camera* review of the withheld documents, which Defendants urge is the only way the Court can reach the claim. (Defts MOL 19-20) To the contrary, the Complaint seeks both injunctive and declaratory relief granting access to the withheld records and barring the City from continued ORA violations. (Compl. ¶ 183). The Complaint also prays that the Court "award such other and further relief as this Court deems just and proper." (Compl. at 33) These broad remedy requests easily encompass *in camera* review of the withheld documents to the extent such is necessary for the Court to adjudicate the ORA claim. Defendants' request to dismiss Count VII should therefore be denied.

[18] Indeed, a court may only decline to exercise supplemental jurisdiction in the following limited circumstances, none of which apply here: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C.A. § 1367(c)

CONCLUSION

Hassan requests that this Court deny Defendants' Motion to Dismiss. In the words of Thomas Jefferson, "Our liberty depends on the freedom of the press, and that cannot be limited without being lost." Letter from Thomas Jefferson, to James Currie (January 28, 1786) (on file with the National Historical Publications and Records Commission). Yet here, Defendants infringed a journalist's freedom of the press by arresting Hassan for exercising his right to record, and selectively granting access rights to some journalists for newsgathering, while denying access to others.

In the wake of *historic* national demonstrations following the murder of George Floyd, media access could not have been more critical to ensure government accountability and to document the demonstrations *for the public*. But the City did not act consistently with the First Amendment. Considering the weight and plausibility of the well-pled allegations in the Complaint and Defendants' failure to address, or even correctly identify, multiple of Hassan's claims, he respectfully requests that Court deny the City's Motion to Dismiss in its entirety.

Respectfully submitted, this 4th day of February, 2022.

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*Thank you to Clinic students Marc Bennett, Ashley Waterfill, Emma Courtney, Liam Wall and Clinic fellow Lindsey Floyd for their contributions to this brief.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on February 4th, 2022, I filed the foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to counsel of record. I also certify this date that the foregoing was prepared in accordance with N.D. Ga. L.R. 5.1, using Times New Roman font, 14 point.

/s/ Clare R. Norins
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