16-3555

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MATTHEW STEPHEN AKINS, Plaintiff-Appellant, vs. DANIEL KNIGHT, in his official and individual capacity, and STEVEN BERRY, in his official and individual capacity, and BRENT NELSON, in his official and individual capacity, and KENNETH BURTON, in his official and individual capacity, and ROB SANDERS, in his official and individual capacity, and ERIC HUGHES, in his official and individual capacity, ROGER SCHLUDE, in his official and individual capacity, and MICHAEL PALMER, in his official and individual capacity, and BOONE COUNTY, State of Missouri, and CITY OF COLUMBIA State of Missouri, et, al., Defendants- Appellees.	)	Appeal from United States District Court for the Western Dist. MO., Central Division Honorable Nanette Laughrey, Judge Presiding Case No.: 2:15cv04096-NKL

APPELLANT'S REPLY BRIEF

Respectfully submitted,

/s/ Stephen Wyse

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Admitted before the U.S. Court of Appeals for the Eighth Circuit

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REPLY POINTS I & II

On appeal City of Columbia raises for the first time its argument, "Mr. Akins has failed to plead this Facebook claim." Page 14. *See Aaron v. Target Corp.*, 357 F.3d 768, 779 (8th Cir.2004) ("Arguments and issues raised for the first time on appeal are generally not considered, and no good reason has been advanced to depart from that rule."). Akins' Facebook claim was pled and responded to in summary judgment (App pp. 623-630, 722-768, 782-827, 857-942) before the Court and so adjudicated (App. 1066-1102). City of Columbia is a named defendant and is a "person" subject for actions taken in its name. Akins' claim is that City through the Columbia Police Department (CPD) Facebook page engaged unconstitutional policy, practice and/or custom by illegally censoring Matt Akins posts of his Citizens For Justice (CFJ) reports. When the City removed six of his reports that had been posted over a multi-month period in 2011 and thereafter prohibited Akins or any other citizen from using the now removed "**post by others**" option to post on the CPD Facebook page. This post by others options was part of the City's actions by which the social media platform for a Police Facebook page was designated a public forum and as specified by the page's own disclaimer (App. P 777). A forum that had permitted a marketplace of ideas regarding police operations and policies before the violation of that policy and the censorship of Akins' reports during a critical debate whether to limit the Citizens'

Police Review Board's (CPRB) oversight ability over the police department, a position advocated by Chief Burton. After Matt Akins posted his sixth CFJ report on the CPD Facebook page. Regarding testimony before the Citizens Police Review Board (CPRB) about Officer Simpson's recording policy breach. Promptly thereafter, all of Akins reports were removed from the CPD Facebook page. This final CFJ report posted by Akins' was during the time of a debate about the CFRB's oversight of the police department. This posted then deleted video was (App video supplement) "Ex. 21 Officer Lori Simpson testifies why she turned off her body mic during Derrick Billups incident".

https://www.youtube.com/watch?v=yHmZ11Rf5Ts

Further, the City's CPD Facebook disclaimer states, "Welcome to the official Columbia Police Department Facebook page. We welcome your input and comments about CPD. Thanks for your support! . . . This Facebook page was created by the City to share information about the Police with the general public. . . ." (App p. 777) (emphasis added)

The City argues that it cannot be liable for a uniformed police department employee ordering Matt Akins to stop filming Marlon Jordan file his police misconduct complaint in the CPD Lobby. This order was pursuant to Chief Burton's policy that the lobby was non-public forum. City Ord. Sec. 21-22 grants the Chief of Police, Defendant Burton, power to supervise all city property. The

District Court erred in holding "*Neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public*" (App. P. 1099) Free flow of information about the criminal justice system ultimately "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. See U.S. Supreme Court in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 560 (1976). While limits on recording police (including time, place and manner restrictions) may be justified in certain circumstances, defendants did not offer any justification here for retaliating against the plaintiff for recording them. As was the case in Akins no justification was offered for uniformed with badge departmental employee ordering an end to Akins filming. Except for Chief Burton's designation that CPD Lobby, designated point for the petitioning of the government for a redress of grievances, (ie., misconduct complaints against police officers) was a non-public forum. Therefore, CPD ordered Akins to stop filming Mr. Jordan file his misconduct complaint by a dept. employee executing the Chief's order supervising City property. (App. Video Supp #34 Not Allowed to film in public lobby)

In *Monell*, the Supreme Court held that municipalities may be held liable as "persons" under 42 U.S.C. § 1983, but cautioned that a municipality may not be held liable for the unconstitutional acts of its employees solely on a respondeat superior

theory. 436 U.S. at 691. Supreme Court has "required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403(1997) (citing *Monell*, 436 U.S. at 694; *Pembaur v. Cincinnati*, 475 U.S. 469, 480–81(1986); *City of Canton v. Harris*, 489 U.S. 378, 389(1989)). In justifying the imposition of liability for a municipal custom, the Supreme Court has noted that "an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Id.* at 404 (citing *Monell*, 436 U.S. at 690–91). See also, *Hunter v. County of Sacramento*, 652 F.3d 1225, 1233-34 (9th Cir. 2011)

Under *Monell* each plaintiff is to prove that (1) "one or more of Defendant's employees violated a federally protected right of Plaintiff in violation of the Constitution; (2) "that in so doing, Defendant's employee or employees acted pursuant to a long-standing practice or custom of Defendant"; (3) "that Plaintiff was injured"; and (4) "that Defendant's longstanding practice or custom was so closely related to Plaintiff's injury that it was the moving force causing Plaintiff's injury."

The 9th Circuit in *Hunter*'s definition applied *Monell*, and recognized that "[l]iability for improper custom may not be predicated on isolated or sporadic

incidents" and that "[t]he custom must be so 'persistent and widespread' that it constitutes a 'permanent and well settled city policy.' " *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.1996) (quoting *Monell*, 436 U.S. at 691); *see also Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 964 (9th Cir.2008) (holding that municipal liability may be established "by showing 'a longstanding practice or custom which constitutes the standard operating procedure of the local government entity' " (quoting *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 984–85 (9th Cir.2002))." *Hunter* at 1233

The Supreme Court in *City of St. Louis v Praprotnik*, 485 U.S. 112, 127 (1988) stated, "First, whatever analysis is used to identify municipal policymakers, egregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded by a separate doctrine. Relying on the language of § 1983, the Court has long recognized that a plaintiff may be able to prove the existence of a ***widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a 'custom or usage' with the force of law***." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970). That principle, which has not been affected by *Monell* or subsequent cases, ensures that most deliberate municipal evasions of the Constitution will be sharply limited.

Second, as the *Pembaur* plurality recognized, the authority to make municipal policy is necessarily the authority to make *final* policy. 475 U.S., at 481-484. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." (emphasis added)

On remand this Circuit in *Praprotnik v City of St. Louis,* 879 F.2d 1573 (8th 1989) held, "**First**, * * * municipalities may be held liable under Sec. 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." **Second**, only those municipal officials who have "final policymaking authority" may by their actions subject the government to Sec. 1983 liability. **Third**, whether a official has "final policymaking authority" is a question of state law. **Fourth**, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." *Id*., at 1574 (emphasis added) Once the plaintiff has demonstrated that a custom existed, the plaintiff need

not also demonstrate that "official policy-makers had actual knowledge of the practice at issue." Navarro v. Block, 72. F.3d 712, 714-16 (9th Cir. 1996). *But see Blair v City of Ponoma, 223 F.3d 1074, 1080 (9th Cir. 2000)* ("open to the [municipality] to show that the custom was not known to the policy-makers").

Deputy Chief Jill Schlude (formerly Weineke) purported in her deposition to have no memory of Matt Akins of CFJ posting video reports on the CPD Facebook page and the City's decision to remove the posts and stop permitting new posts (App 545-546) in the CFJ Report Ex. #22 Sgt. Jill Weineke CPRB Proposal Interview: Final Questions (App. Video supplement) beginning at the 8:24 minute mark end at 11:30 https://youtu.be/7QPXlINbraI admits that change was pursuant to the advice of the City's attorneys that they are only permitting new posts by the City Police and only pushing out the police message. Which conflicts with the City's Official Social media policy (Ex 91-4) (App. 693-695 and CPD's Facebook policy App. p 777). See Akin's 2d Affidavit (App. 637-638) on the social media policy and his report postings. Deputy Chief Jill Schlude's 2d affidavit admits that she administered the CPD Facebook page and at some point in 2011 through 2016 the policy of this page was, "*We encourage you to submit comments, but please note this is not a public forum.*" (App. P. 947)

City of Columbia, Missouri ordinances vest authority in the Chief. **Sec. 21-22. - Supervision over city property.** The **chief of police shall have general**

supervision over all city property, and he and his subordinates shall have authority to arrest any trespasser on city property . . . . (Code 1964, § 7.255) https://www.municode.com/library/mo/columbia/codes/code_of_ordinances?nodeId=COORCOMI_CH21PO

CPD policies provide: 200.3.3 ORDERS Members shall respond to and make a good faith and reasonable effort to comply with lawful orders of superior officers and other proper authority. http://www.como.gov/police/cpd-policies/

FAILURE TO TRAIN

Plaintiff may also establish municipal liability by demonstrating that the alleged constitutional violation was caused by a failure to train municipal employees adequately. *See City of Canton v Harris, 489 U.S. 378, 388-91 (1989).*

PLEADINGS

The City's instant response purports that Akins Facebook claim was "un-pled" (page 21). An argument raised by the City for the first time on this appeal and that was not raised by them in their opposition to Akins' summary judgment motion. An argument which ignores Akins' Amended Complaint (App pp. 14-53) more specifically paragraphs 84, 90, 92, 93, 94 and 105 and his motion for summary judgment (App pp 623-630) more specifically paragraph 6 and his suggestions in support of that motion (App. 722-768). Further the District Court's

order (App. P. 1080-81) found the issue sufficiently presented to enter its ruling on the Facebook claim.

This Court in *Bowles v. Osmore Utilities Svc, Inc*., 443 F.3d 671, 675 (8th Cir. 2006) said, "The Federal Rules of Civil Procedure establish a simplified standard for pleading in civil actions. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513-14 (2002). Chief among the values that the Rules promote is notice: "The essential function of notice pleading `is to give the opposing party fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved.'" *Northern States Power Co. v. Federal Transit Admin.*, 358 F.3d 1050, 1056-57 (8th Cir. 2004). Here, Mr. Bowles filed a document three weeks before trial that explicitly notified Osmose of his intention to seek punitive damages. *Cf. Scutieri v. Paige*, 808 F.2d 785, 790-92 (11th Cir.1987). This provided Osmose with adequate time to conform its defense to the plaintiff's announced objectives, and serves to distinguish this case from *Anheuser-Busch, Inc. v. John Labatt, Ltd.*, 89 F.3d 1339, 1350 (8th Cir.1996)." *Id.*, at 675.

In the instant matter Akins' claim regarding CPD Facebook page was specifically made in his motion for summary judgment and fully responded to by the City. Akins' Facebook claim was not made for the first time in opposition to the City's motion for summary judgment, as was the case in *N. States Power Co. v Fed.*

Transit Admin., 358 F.3d 1050, 1057 (8th Cir. 2004) authority cited by the City in their response is inapplicable to this case.

FIRST AMENDMENT

Lambert v. *Polk Cnty.*, 723 F. Supp. 128 (S.D. Iowa 1989) a court of this circuit found that the seizure and refusal to return a video tape violated plaintiff's First Amendment rights and issued an injunction against same. In *Lambert*, the court said, "There is clearly a threat of irreparable harm to Lambert if he does not promptly get his videotape back. Lambert has a right to use the tape under the First Amendment to the United States Constitution. *Heller v. State of New York*, 413 U.S. 483, 93 S.Ct. 2789(1973); *Art Theatre. v. Parrish*, 503 F.2d 133 (6th Cir.1974). The First Amendment is applicable to the states through the Fourteenth Amendment, *Joseph Burstyn. v. Wilson*, 343 U.S. 495, 500-02(1952). Supreme Court stated: "**The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.**" *Elrod v. Burns*, 427 U.S. 347, 373 (1976)." Id., at 134-5 (emphasis added)

First Amendment protects pure communication whether it is active or passive and encompasses "the right to *receive* information and ideas." *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-763 (1972) "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail .

. .. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged" *Id*., at 763

The Supreme Court's decision in *Heffernan* v. *City of Paterson*, 136 S. Ct. 1412 (2016). There, the Court held that an appropriate First Amendment analysis must consider the *consequences* of government suppression, rather than the subjective, expressive intent of the speaker. See *id*. at 1418-1419. As the Court explained, "the First Amendment begins by focusing upon the activity of the Government" and not of an individual. *Id*. at 1418. The Court held that a local government violated an employee's First Amendment rights by firing him for *perceived* political activity, even though the employee was not politically engaged when he was observed picking up a campaign sign as an errand for his bedridden mother. *Id*. at 1416, 1418.

Gathering of public information is protected because it enables critical commentary on public affairs. "[W]ithout some protection for seeking out the news," the Supreme Court has explained, "freedom of the press could be eviscerated." *Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972). Especially in modern times, recording is a first step in "seeking out the news." See *ibid*. It often serves as "the front end of the speech process" by documenting and preserving events the

speaker intends to evaluate and criticize. See *American Civil Liberties Union of Ill.* v. *Alvarez*, 679 F.3d 583, 596 (7th Cir.).

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966); see also *Snyder* v. *Phelps*, 562 U.S. 443, 451-452 (2011) explaining "[s]peech on matters of public concern * * * occupies the highest rung of the hierarchy of First Amendment values" and lies "at the heart of the First Amendment's protection" The 9th Circuit in *Adkins* v. *Limtiaco*, 537 F. App'x 721, 722 (2013), it cited *Fordyce* as showing that a bystander's right to photograph police activity was clearly established. An officer may act when circumstances justify restrictions, such as when "the filming itself is interfering, or is about to interfere, with his duties." *Gericke* v. *Begin*, 753 F.3d 1, 8 (1st Cir. 2014).

The First Amendment's protections for newsgathering are tied to ensuring the proper functioning of our democracy. *See Richmond Newspapers*, 448 U.S. at 585-87 (1980) (Brennan, J., concurring) (observing that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government") (emphasis in original); Id. at

584 (Stevens, J., concurring) ("the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government"). Thus newsgatherers' access to criminal trials and criminal judicial proceedings is protected because it implicates the ability of ordinary citizens to hold their public officials accountable. *Id. See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (finding unconstitutional a state statute excluding the public during cases involving minors and sex crimes).

The Supreme Court has provided two principles for determining when the access right exists: a historic "tradition of accessibility," and "whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589. These two prongs of "logic and experience" have long been applied by lower courts cases where the court considers whether to allow newsgatherers access to a non-public forum.

Recording a uniformed police employee performing public duties in a public location is squarely situated within the newsgathering right. This is not a traditional access assessment, as public fora have historically been open to the public "time out of mind." See *Hague v. CIO*, 307 U.S. 496, 515 (1939). As in access cases, however, recording a police officer serving his or her public function is crucial for improving that government function. Spontaneous videos of police officers can have significant real-world impact, "sparking outrage and dialogue about police

practices throughout the nation." Jocelyn Simonson *Copwatching*, 104 CALIF. L. 16 REV. 391, 410 (2016). Calvert, *The First Amendment Right to Record Images of Police in Public Places*, 3 TEX. A&M L. REV. at 132-33. The practice of organized "copwatching"—where organized groups of neighborhood residents monitor and video police conduct—"deters unconstitutional conduct and promotes positive interactions… contribut[ing] to the accountability of police departments through both formal institutions and the informal public sphere." Simonson, 104 CALIF. L. REV. at 409. The central goal of organized copwatching is in fact to improve the institution of policing. Id. at 411.

Observation and video recording can serve to deter misconduct in real time, improving a government institution even as recording occurs. Id. at 415; Kreimer, 159 U. PA. L. REV. at 347. And while police across the country have recently been adopting body-worn cameras, copwatching "has the potential to be a more powerful deterrent… because the cameras and footage remain in the control of civilians rather than the state." Simonson, 104 CALIF. L. REV at 416.

The City cites *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) but fundamentally misapplies its holding. The *Bowman* correctly cites the requirement for fora analysis as a first step for the court and no such analysis was conducted by the Court in *Akins*. "[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct.

2338, 33 L.Ed.2d 266 (1972). However, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (internal quotations omitted). "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Id.* at 44, 103 S.Ct. 948. To this end, the Supreme Court uses a forum analysis for evaluating restrictions of speech on government property. *See id.* at 45-46, 103 S.Ct. 948. The forum analysis initially requires a court to determine whether a property is a traditional public forum, a designated public forum, or a nonpublic forum. *Families Achieving Independence & Respect v. Neb. Dep't of Soc. Servs.*, 111 F.3d 1408, 1418 (8th Cir.1997). Once a court makes a determination on the nature of the forum, it then applies the appropriate standard of scrutiny to decide whether a restriction on speech passes constitutional muster. *See, e.g., Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 677-683, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (hereinafter "Forbes"); *United States v. Kokinda,* 497 U.S. 720, 726-27, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990). Thus, the extent to which access to, and the character of speech upon, government property may be limited depends upon the nature of the forum in which the speech takes place. *Burnham v. Ianni,* 119 F.3d 668, 675 (8th Cir.1997)." *Id*. 975-6,

"*Designated Public Forum* . . . is a nonpublic forum the government intentionally opens to expressive activity for a limited purpose such as use by certain groups or use for discussion of certain subjects. *Perry*, 460 U.S. at 46, 103 S.Ct. 948. "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." *Forbes*, 523 U.S. at 677, 118 S.Ct. 1633 (internal quotations omitted) (alteration in original). Arguably because of the inherently expressive nature of the social media platform Facebook or the public CPD Lobby where citizens go to petition the government for a redress of grievances by filing a misconduct complaints against a Columbia Police Officer. Either forum qualifies as a traditional public forum, much like the speakers' circle of times past which has evolved by technical innovation into Facebook designed for shared communication.

The government's ability to restrict speech is most circumscribed in a traditional public forum. *Perry*, 460 U.S. at 45, 103 S.Ct. 948 ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed."). A traditional public forum is a type of property that "has the physical characteristics of a public thoroughfare, ... the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, [and] historical[ly] and traditional[ly] has been used for expressive conduct...."

Warren v. Fairfax County, 196 F.3d 186, 191 (4th Cir.1999) (citations omitted). "`[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be `public forums.'" *United States v. Grace,* 461 U.S. 171, 177(1983).

A content-based restriction on speech within a traditional public forum must be necessary to serve a compelling government interest and be narrowly drawn to achieve that interest. *Perry,* 460 U.S. at 45.

Despite this direction from the Supreme Court, our Circuit's analysis of what constitutes a "designated public forum," like our sister Circuits', is far from lucid. Substantial confusion exists regarding what distinction, if any, exists between a "designated public forum" and a "limited public forum." *See generally, Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 345-46 & nn. 10-12 (5th Cir.2001). As the First Circuit pointed out in a footnote in *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 n. 4 (1st Cir.2004), "The phrase `limited public forum' has been used in different ways.'" The First Circuit accurately states that the phrase has been used as a synonym for the term "designated public forum" and also for the phrase "nonpublic forum." *Id.* The Second Circuit has articulated the view that the phrases "designated public forum" and "limited public forum" are not synonyms. *See, e.g., N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 128 & n. 2 (2d Cir.1998)

(describing a limited public forum as a "sub-category of the designated public forum, where the government `opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.'" (quoting *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir.1991))); *see also Chiu*, 260 F.3d at 346 n. 12. A designated public forum can be classified as either "of a limited or unlimited character." *Van Bergen v. Minnesota*, 59 F.3d 1541, 1553 n. 8 (8th Cir.1995)." *Id.*, 975-6.

In this instant matter the City's choice to permit the CPD Facebook page to have a "**post by others**" option where citizens could engage in debate and post reports and comments about the CPD created at a minimum a designated public forum, if not a traditional public forum. Akins availed himself of that permission to post his six reports generated for CFJ in the spring and early summer of 2011. This was in keeping with this forum's design. Specifically by permitting Akins to post his CFJ reports: 1. This is How Officers Should React to you Video Taping them; 2. Another Spotlight Shined at CFJ Camera; 3. Officer Steve Wilmouth Uses a TASER to Subdue a Man on Providence Road; 4. Careless and Imprudent Driving ? CPD Police Car Swerves Multiple Times in Front of CFJ Camera; 5. Police Standoff: CFJ's Camera Vs. a Patrol Cruiser Spotlight; 6. Officer Lori Simpson testifies why she turned off her body mic off during Derek Billups incident. The timing of the censorship of these videos relates to Burton's drive to amend the

authorization for the Citizens Police Review Board (CPRB) oversight authority regarding Columbia Police Officers. Akins' last posted video report of Officer Simpson's testimony before the CPRB of her violation of department policy undercut the Chief's argument. When Simpson violated CPD policy and turned off her body camera during the Derek Billups incident the oversight benefits of the CPRB were established. Censorship of Matt Akins' video reports on the CPD Facebook page were to counter the response to public awareness created of the benefits of the CPRB. This censorship raised an inference that this was not a content neutral decision, but a suppression of a disfavored viewpoint. Under the Supreme Court and this Circuit's precedents the City needed to posit a compelling justification narrowly tailored to accomplish a legitimate state interest. This suppression of political speech prevented the City from meeting that burden.

POINT III

This Circuit in *McGhee v. Pottawattamie County*, 547 F.3d 922 (8th Cir. 2008) held, "**C. Absolute Immunity and Probable Cause** Before the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 274, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.")" *Id*., 929

The U.S. Supreme Court in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) said, "In our system, **so long as the prosecutor has probable cause** to the believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before the grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses." Id., at 364. (emphasis added) The *Bordenkircher* Court also said, "To punish a person because he has done what the law plainly allows is a **due process** violation of the most basic sort.... and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional" *Id*., at 363 (emphasis added)

Prosecutor Steven Berry charged Matt Akins, D.O.B. 09/22/1988, on May 09, 2010, for unlawfully concealing a Bersa 380 firearm on his person in violation of RSMo 571.030.1(1) (App p 217) when the attached and incorporated probable cause statement established this seizure occurred at a DUI Checkpoint and that Akins was the driver of the vehicle. (App. P 218). RSMo. 571.030.3 provides, *Subdivision (1) of subsection 1 of this section does not apply to any person twenty-one years of age or older . . . transporting a concealable firearm in the passenger compartment of a motor vehicle, so long as such concealable firearm is otherwise lawfully possessed***,** . . . . RSMO 571.030.3 (2009). The letter of Missouri law

authorized Matt Akins to lawfully conceal his pistol on his person. The seizure by Officer Hughes and removal from Akins' vehicle did not change the nature of his entitlement since a seizure is judged from its inception.

Prosecutor Brent Nelson charged Matt Akins with a felony that on September 11, 2012, he unlawfully possessed a "switchblade knife" in violation of RSMo 571.020.1(6)(d) for having a butterfly style pocket knife with a blade less than four inches in his pocket. RSMo 571.010(12) defines pocketknife, with no blade more than four inches, and permits such knifes may be lawfully concealed (App. P 226) and further defines (20) "switchblade knife" (App 226-7). Akins knife had a blade less than four inches (App p 223) and therefore was lawfully permitted to be carried in his pocket and this knife with the locking latch that prevented its opening by inertia, so that it did not fall within Missouri's statutory definition of a "switchblade."

The CPD maintained possession of Matt Akins Bersa 380 from its seizure on 05/09/2010, even after the nolle prosequi of the underlying charges on 11/16/2010, the District Court found that the Boone County prosecutors' recommendations were in part why the seizure was maintained (App. 1069-70) until 04/15/2013. The prosecutors are not entitled to immunity for this deprivation of property in violation of MO. state law and due process requirements of the 14th Amendment

REPLY POINT IV- V

Phantom marihuana related to the 05/09/2010, seizure by Officer Hughes. Akins has throughout this litigation disputed there was any smell of marihuana in his vehicle on 05/09/2010. Akins has also disputed that he possessed marihuana on this date. Officer Hughes' dashcam video of the incident vanished. Officer Hughes never in any of his police report(s) provided any weight for this phantom marihuana (App. P 706) he put the value of the marihuana at zero. Hughes' police report states, "*While Officer Irey was searching the vehicle he located a plastic baggie containing marijuana under the front driver seat of the vehicle. Officer Irey relinquished the marijuana to me at the scene*". (App. P 708) Officer Hughes' Affidavit of 06/17/ 2016, contradicts the preceding and states that he found the phantom marihuana, "*24. Under the front driver seat of Mr. Akins' vehicle, I found a plastic bag which contained marijuana*." (App. p 589) Officer Hughes never conducted a field test or sent this phantom marihuana to the lab for testing. The only other document that purports that there was any marihuana related to this 05/09/2010, seizure ever existed was the circuit court's order of destruction. The Court ignored the commands of Columbia Ordinance 16-255.2 (App. P 855) to Columbia Police Officer Hughes that prohibited him from using City resources, including his time, to make an arrest of Akins for a misdemeanor amount of marihuana unless another crime was involved. In Akins' case where no marihuana was involved and Officer Hughes never purported that the phantom marihuana was

more than 35 grams necessary to remove it from the City of Columbia's restriction on the exercise of his authority as a Columbia Police Officer to authorize a marihuana arrest of Akins.

The Court seemed caught in a causality loop where the phantom marihuana smell abrogated Akins entitlement to the statutory authorization to carry a concealed firearm in his vehicle. Whereby the District Court concluded that Akins' wrongful arrest for the lawful possession of the weapon also made the arrest for marihuana possession reasonable under the Fourth Amendment by Columbia Police Officer Hughes. The objective reasonableness of Columbia Police Officer Hughes must be judged in the light of the authority granted to him by his employing agency. Which specifically prohibited a CPD stand-alone misdemeanor marihuana arrest for citizens in Akins' situation.

The City has focused its arguments in their response on Akins admission that Hughes arrested him for misdemeanor marihuana possession and that Akins admitted that during this period in his life he occasionally smoked marihuana. And Akins could not rule out the possibility that somehow marihuana was in proximity to Akins, his passenger or his vehicle. Ignoring that Akins vehemently disputed that there was any smell associated with marihuana in his vehicle during this seizure or that he was in possession as reflected in the Court's findings. (App. p 1067-8)

The Court posited Akins failure to resist the Officer Hughes' seizure from the car long enough to inform him that he was armed made the discovery of the firearm outside the car reasonable to conclude that Akins was not entitled the statutory vehicle exception for concealing a firearm.

In addition, the City tries to justify the June 2010, seizure of Akins for over 24 minutes in handcuffs while his vehicle was searched by Sgt. Roger Schlude. Akins was with Arch Brooks (CFJ website designer) and Kenneth Jones. All of them were seized during this traffic stop for an illegal turn. The City cites to *Meuhler v. Mena*, 544 U.S. 93 (2005) for the proposition that after the traffic stop for an illegal turn. That the subsequent 24-minute detention in handcuffs and search of the motor vehicle was objectively reasonable under the Fourth Amendment. *Meuhler* was not vehicle search case as represented by the City. Instead it was a premise's search pursuant to a warrant where the detained were on the premises during the search. The City also cites *U.S. v. Stewart*, 613 F.3d 453, 457 (8th Cir. 2011) but fundamentally misapplies its holding. The only reasonable suspicion articulated on behalf of Sgt. Schlude's seizure was that Akins had completed an illegal turn and the presence of 10/22 rifle in the vehicle. The illegal turn was a fully completed crime by the time the traffic stop was performed and provided no probable cause of any other offense. The presence of a 10/22 rifle is indicative of no crime. No articulable facts were offered to make this detention, search and seizure reasonable.

REPLY POINT X

City of Columbia and Boone County are both parties and are 'persons' under civil rights laws. As pled in Akins' Amended Complaint 12 of Army veteran Robert Franklin's firearms were seized on 12/15/2008, and maintained jointly by CPD and Boone Prosecutors until 08/20/2012. Only one of these firearms was used in the prosecution of Raymond Franklin, a felon, alleging he unlawfully possessed his father's 45 pistol from North Carolina by a piece of mail with his name on it being across the room from his Dad's pistol. Further, on 08/13/2011, ten firearms were seized from Dr. Allan Rodgers' property, three of which belonged to his son Greg Rodgers and these firearms were deprived from their owners, although unrelated to any criminal case. These firearms were held by the City and released over the prosecutor's objection to Dr. Rodgers on 09/21/2012, and to Greg Rodgers on 10/22/2012. A 9mm pistol seized from Gregory Rodgers on 10/12/2011, was related to a criminal case for unlawfully concealing a firearm on his property despite his concealed carry permit and that seizure was maintained even after the court dismissed the criminal charge of 02/10/2012. This seizure was maintained until 02/07/2014, without a post-deprivation due process hearing. Gregory Rodgers' internal affairs complaint against CPD was admitted in deposition by Detective Liebhart as the "catalyst" for his CPD's actions against the Rodgers. Robert Franklin's refusal to consent to the search of his home was the motivation

for his son Raymond's arrest for possessing his father's pistol from a 1000 miles away due to its proximity to Raymond's mail.

Akins pistol was seized on 05/09/2010, and the case dismissed on 11/16/2010, and the seizure maintained until 04/15/2013. Akins pocket knife was seized and subsequently destroyed by CPD without a court order in violation of Missouri law.

REPLY POINTS XIII & XIV

Prosecutors and by incorporation the City argues Akins' affidavit on his 2d motion to disqualify fails to comply with the requirements of 28 U.S.C. Section 144, which requires the affidavit: ". . . The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case**. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith**" (emphasis added)

Akins' affidavit states, "*I, Stephen Wyse, hereby attest that declarations of fact contained in the above paragraphs 4, 6 through 11 are true and accurate statements of fact and law according to my best information and belief and are subject to the penalties of perjury for any knowing misstatement of fact as attested by my below signature. _/s/ Stephen Wyse___ Stephen Wyse, MO Bar# 49717*" (App Volume 5, p 1112, see also pp 1107-1119)

Presumably appellees are arguing "***best information and belief***" does not satisfy the "good faith" requirement in an absurd hyper-technical argument.

Appellees never respond to the allegation of bias against Judge Laughrey made by the editor of the Columbia Heartbeat, a local news outlet, concerning another City of Columbia case involving Judge Laughrey during the pendency of the Akins' case. Both cases occurred during a timeframe when the judge's husband, Chris Kelly, served as an agent of the Columbia Mayor related to infrastructure development by the Defendant City.

CONCLUSION

For the points not specifically replied to herein, Appellant's brief sufficiently addressed and is fully reincorporated into this reply. 28 U.S.C. § 144 was properly invoked and required Judge Laughrey to assign the 2d Motion to Disqualify her to a different judge. Judge's failure to comply with the commands requires her decisions be vacated and remanded. Further Akins in his first and second motions to disqualify raised sufficient allegations of bias to establish to a reasonable person, at least an appearance of bias existed and therefore Judge Laughrey should have disqualified herself from presiding. Further Akins has established as a matter of law that his rights under the First, Second, Fourth and Fourteenth Amendments were violated and entitlement to a judgment against Appellees and for such other relief as this Honorable Court deems just.

Respectfully submitted,

/s/ Stephen Wyse

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CERTIFICATE OF SERVICE

The above and foregoing was filed with the Court by ECF transmission and served upon counsel for all parties on this 23rd Day of March 2017.

/s/ Stephen Wyse

Stephen Wyse, MO Bar # 49717

RULE 32(a) (7) AND L. R. 28 A (d) CERTIFICATE OF COMPLIANCE

As required by F.R.A.P. Rule 32(a) (7) and Local Rule 28 (A) (d) the undersigned certifies that: 1.This reply brief contains no more than 6,500 words presumed limit; 2.There are 6,496 words in the reply brief (including headings and quotations, but not including the cover, table of contents, table of citations, statement with respect to oral argument, the addendum and the certificates of counsel regarding service, filing and compliance with F.R.A.P. 32 (a)(7) and Local Rule 28 (A)(d) as determined by the word count function of Word 10; and 3. This document is virus free. */s/ Stephen Wyse*

Stephen Wyse, MO Bar # 49717