20-3644

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL FRIEND,
Plaintiff-Appellant,
v.
RICHARD GASPARINO and CITY OF STAMFORD
Defendant-Appellees.

On Appeal from the United States District Court
for the District of Connecticut, No. 18-cv-1736

REPLY BRIEF OF APPELLANT

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1. The grab-bag of arguments Gasparino advances in favor of punishing sidewalk speech about the police is unavailing.

1.1. Friend's sidewalk speech about the police was expression on a matter of public concern, based on its paradigmatically public location and subject matter.

Friend's speech on the Hope Street sidewalk was guarded by two independent, strict scrutiny protections: (1) for publication of lawfully obtained information on a matter of public concern, *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001), and, (2) against content-based discrimination. Under either doctrine, what Gasparino did would have to meet strict scrutiny. In his brief, Gasparino addresses only the first, and even then, quibbles only with whether Friend's signs communicated a message of public concern.[1] His argument on the sub-point is that although Friend's speech was about the activities of the police, a prototypical matter of public concern in this Court's jurisprudence, *see* Friend Br. 17–18 (collecting cases), it nonetheless did not "cut it." Rather, Gasparino seeks impose new

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[1] Like the district court, Gasparino ignores the second basis for strict scrutiny: content-based discrimination. Government actions "that target speech based on its communicative content [] are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). It is undisputed that Gasparino confiscated Friend's signs because of their message, and had no other reason to object to Friend's presence on the sidewalk. That warrants strict scrutiny, separate and apart from the public character of Friend's message.

prerequisites for speech on matters of public concern, mandating that it be phrased in a particular way, or have been voiced to some other people at some other time, or be a subject of general communal debate.

There is no support for these assertions, and Gasparino does not identify any. Gasparino Br. 6–7. This is because there is no "phrasing" requirement in the First Amendment. Speech can be on a matter of public concern even if the "messages may fall short of refined social or political commentary." *Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (identifying messages like "Pope in Hell" and "Not Blessed Just Cursed" as addressing matters of public concern). Of course, speech can also concern the public even if the issue at hand has not "been a matter of debate in the approximate 10 years it has been practiced," Gasparino Br. 3; as *Snyder* explains, even extremely disfavored, "fringe" opinions far outside mainstream debate may constitute speech on matters of public concern. Finally, a speaker need not show some threshold "evidence that he ever complained about [the issue] to any public official, governmental agency, private group, or person," *id.* at 7. All the speech need do is address a topic not of sole, private interest to the speaker alone. *Compare, e.g.*, *Reuland v. Hynes*, 460 F.3d 409, 411–12, 418 (2d Cir. 2006) (finding public concern in prosecutor's informal comment to reporter that "Brooklyn is the best place

to be a homicide prosecutor" because "[w]e've got more dead bodies per square inch than anyplace else") (alteration in original) *with City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (finding no public concern in police employee's eBay sales of in-uniform masturbation videos because they "did nothing to inform the public about any aspect of the [police department]'s functioning or operation").

Notwithstanding the criteria Gasparino attempts to impose, whether speech deals with a matter of public concern is evidenced by the "content, form, and context of a given statement." *Jackler v. Byrne*, 658 F.3d 225, 235 (2d Cir. 2011). In this case, Friend was holding written signs on a public sidewalk next to a busy public street, the "quintessential forum for the exercise of First Amendment rights." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). When speech is uttered on a public street, there is a strong implication that "what is at issue is an effort to communicate to the public . . . on matters of public concern." *Snyder*, 562 U.S. at 456 n.4. Accordingly, Friend did not need to hold aloft a polished thesis on the pros and cons of cellphone stings for his speech to garner protection.

1.2. Gasparino's decision to stop enforcing the distracted driving statute and instead silence Friend's sidewalk speech ran directly counter to his professed interest in reducing motorists' cellphone use.

As he did below, Gasparino argues that his censorship was in service of a compelling state interest: making people obey the law and not use their cellphones while driving. The absurdity of this stance is that *Friend's sign furthered this interest*. He got people to obey the law and put down their phones.

Government action flunks narrow tailoring when the "means chosen may be insufficiently related to the ends they purportedly serve." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 600 (2001) (Stevens, J., concurring). By that measure, Gasparino's speech-silencing was perpendicular to his purported goal of reducing cellphone usage by motorists. While he asserts that "the only way in which [he] could fulfill the objectives of the enforcement action was to remove Friend and his signs from the adjacent area," and "[t]he operation could only effectively continue without Friend's interference," Gasparino Br. at 10, it was precisely the opposite: Friend was assisting Gasparino in his objective, telling people there were "Cops Ahead" so that they were aware of the "Distracted Driving High Visibility Enforcement" initiative and would comply with the law.

If anything, Friend's speech went to the heart of the program Mr. Gasparino was implementing. Far from a covert, undercover affair, the program's entire objective was to make enforcement as public as possible, including by conducting it during daylight hours and drumming up media attention. Friend's "Cops Ahead" sign did exactly that—it publicized what the police were doing and urged compliance. By silencing Friend, Gasparino undercut his own proffered objective.

In terms of inducing compliance with the traffic code, Friend's sign was no different than one such as "Don't text and drive," "Slow Down!" or, "Every time you break a traffic law, you risk getting a ticket." Nonetheless, Gasparino attempts to persuade this Court that speech convincing people to abide by the law constitutes interference with law enforcement. Ultimately, Gasparino's real interest in silencing Friend boiled down not to saving lives, but to issuing the maximal number of traffic tickets.

Worse, narrow tailoring requires the "least restrictive means to achieve its ends," *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 246 (2d Cir. 2014), but Gasparino chose the most restrictive. As he admits, he left Friend with two options: "Friend could have remained in the area without displaying warnings to passing motorists"—that is, not speaking at all—or returning hours later once the object of his protest was gone.

Gasparino Br. 10. Given that narrow tailoring involves limiting speech in a minimal way, a complete bar or ban is frequently "too sweeping to pass constitutional muster." *Bery v. City of New York*, 97 F.3d 689, 697 (2d Cir. 1996). And, most obviously, Gasparino's actions fail narrow tailoring because he had a ready means of reducing distracted driving that would not silence speech at all: staying put and enforcing the traffic code. *See* Conn. Gen. Stat. § 14-296aa. His decision to stop doing so and instead, punish Friend for his sidewalk speech, prevents any other conclusion but that the District of Connecticut's judgment must be reversed. *See Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.").

1.3. Retaliation was not pleaded, and its principles are irrelevant here.

Gasparino's argument on the subject of First Amendment retaliation claims at pages 11–12 of his brief is a *non sequitur*, because Friend has not pleaded any. His two speech claims (Counts One and Two of the amended complaint) contend that Gasparino directly ended his speech.

In direct First Amendment claims, the plaintiff alleges that the defendant's actions are the immediate, direct cause of a speech prohibition.

See generally Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Washington Indus. Dev. Agency, 77 F.3d 26, 31–32 (2d Cir. 1996) (distinguishing "affirmative First Amendment claims" from retaliation ones). Direct First Amendment claims require no proof that the defendant acted with any purpose to squelch speech, because the cause and effect between the challenged government action and resulting restriction are contiguous.

First Amendment retaliation claims, by contrast, use intent to bridge a gap between cause (protected speech) and effect (adverse action). Generally, the adverse action against a retaliation plaintiff comes later in time from the protected speech, is levied as a punishment for the past speech, and often would not by itself violate the First Amendment. *E.g.*, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1949 (2018) (plaintiff arrested five months after filing open meetings lawsuit against municipality); *Hayes v. Dahlke*, 976 F.3d 259, 273 (2d Cir. 2020) (one month between incarcerated plaintiff's allegation of sexual assault and defendant's sending him to keeplock); *Ragbir v. Homan*, 923 F.3d 53, 59–60 (2d Cir. 2019), *vacated on other grounds sub nom. Pham v. Ragbir*, 141 S. Ct. 227 (2020) (ICE moved to enforce removal order ten months after plaintiff appeared at scheduled check-in with elected officials, resulting in

news coverage). A First Amendment retaliation claims allows such a wronged person to show that cause and later effect should be considered linked, such that the government agency has "by withdrawal of . . . privileges" placed "limitations upon the freedom of speech which if directly attempted would be unconstitutional." *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

Here, Friend has proven that Gasparino "directly attempted," *id.*, to stop his speech on two occasions: first, by confiscating his sign (Count One) and then, by physically apprehending him and having him brought to the police station (Count Two). Retaliation and its analyses have no part in this dispute.

1.4. It is impossible under Connecticut law to have probable cause to believe that protected speech interferes with the police, and, decades of federal authority forecloses police self-generation of probable cause via stop-talking orders.

On Count Three, Gasparino argues that he had probable cause to believe that Friend violated Connecticut's police interference statute, Conn. Gen. Stat. § 53a-167a, because Friend "was told that he was interfering and that he would be arrested if he returned and displayed another sign." Gasparino Br. 15–16. Gasparino is wrong for two reasons. First,

Connecticut's high court has made § 53a-167a off-limits to use against protected speech, and hence, as a matter of law, Friend could never have been "interfering" by holding a sign. Second, twin lines of Supreme Court authority forbid police from generating probable cause merely by commanding a speaker to stop speaking.

Prior to the Connecticut Supreme Court's authoritative narrowing of § 53a-167a in 1987, the U.S. Supreme Court decided a string of cases in which it held that the First Amendment forbids punishment for speech critical of the police. In *City of Houston v. Hill*, the plaintiff saw a friend get approached by police on a busy street, and shouted at them: "Why don't you pick on somebody your own size?" 482 U.S. 451, 453–54 (1987). After one of the police employees asked, "Are you interrupting me in my official capacity as a Houston police officer?" Hill again shouted, "Yes, why don't you pick on somebody my size?" *Id.* at 454. At that point, he was arrested for violating an ordinance forbidding Houstonians to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." *Id.* at 455 (internal quotation omitted).

The Supreme Court struck the Houston ordinance. It reasoned that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers," *id.* at 461, and critically, that the

"Constitution does not allow such speech"—that is, "speech that in any manner . . . interrupts an officer"—"to be made a crime." *Id.* at 462 Notably, it rejected Houston's suggestion that these facts bore any resemblance to *Colten v. Kentucky*, which Gasparino suggests controls here, *see* Gasparino Br. 16–17.[2]

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[2] *Colten* undermines Gasparino's argument. There, the Supreme Court found no overbreadth in a disorderly conduct statute whose authoritative state interpretation was that an offense could only occur in the absence of any "bona fide intention to exercise a constitutional right." *Colten v. Kentucky*, 407 U.S. 104, 111 (1972). Moreover, Colten pulled over to the side of a road to insert himself into an ongoing traffic stop, and was standing feet from the police employee issuing the ticket as he "made some effort to enter into a conversation about the summons" being issued. *Id.* at 106. Friend, by contrast, was two blocks away from the activity he was protesting when Gasparino first traveled to him and stopped his speech. *See* JA94:8–17 (testifying that the police he suspected of conducting a sting were standing around the corner of Hope and Greenway Streets); JA31 ¶ 11 (admitting that Friend stood near intersection of Hope and Cushing while holding his first sign). The second time Gasparino silenced Friend, Friend was three blocks away. *See* JA105:10–12, JA106:2–7, 107:15–19 (testifying that he walked up Hope Street from his first encounter with Gasparino to a convenience store called the Food Bag, and stood outside displaying his second sign); JA32 ¶ 18 (admitting that the Food Bag is three blocks south of where police were stopping motorists). And both times, Friend was standing on a sidewalk; he was not pulled over to "a roadside strip, crowded with persons and automobiles" on which a traffic stop was occurring. *Colten*, 407 U.S. at 109. *See generally* JA187 (map of the relevant area); JA189 ¶¶ 2–4 (Friend declaration authenticating map). Gasparino did not file a Fed. R. Civ. P. 56(c)(1) statement disputing any of the material facts supporting Friend's motion for summary judgment, which are reproduced at JA79–88.

State v. Williams applied *Hill* to § 53a-167a, restricting its ambit to situations in which a person is *not* exercising a constitutionally protected right. Therefore, while Gasparino is correct that the words of the statute may "have a broad scope," Gasparino Br. 17, he is dead wrong that they have no limit. *Hill* and *Williams* are quite clear on where that limit is: § 53a-167a may be applied only to "'core criminal conduct' *that is not constitutionally protected*." 534 A.2d 230, 239 (Conn. 1987) (citing *Hill*, 482 U.S. at 468) (emphasis added). Hence, since 1987, it is legally impossible to possess probable cause to believe that someone violated § 53a-167a by engaging in protected speech.

Moreover, Gasparino's "I-told-you-not-to" trapdoor was long ago nailed shut by two lines of speech cases forbidding cops from using stop-talking orders to punish protected expression. The first of these is the constellation of cases limiting when police may stop demonstrations. In the very first case to incorporate the First Amendment against the States, the Supreme Court taught that protests may not be shut down by the government absent underlying lawbreaking, *i.e.*, "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order." *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). *See also, e.g.*, *Jones v. Parmley*, 465

F.3d 46, 57–58 (2d Cir. 2006) (collecting cases, and affirming denial of qualified immunity for police who stopped peaceful demonstration not reaching *Cantwell*'s threshold).

The second line of cases applies the First Amendment's vagueness safeguard to forbid enforcement of loitering and disorderly conduct measures turning on standardless 'move along' orders. In *Shuttlesworth v. City of Birmingham*, for example, the Supreme Court deemed an ordinance forbidding anyone "'to stand . . . upon any street or sidewalk . . . after having been requested by any police officer to move on'" to exemplify "constitutional vice . . . need[ing] no demonstration," since it meant that a person could be on the sidewalk "only at the whim of any police officer." 382 U.S. 87, 90 (1965) (reversing conviction of a man standing outside of a department store and peacefully engaging in a boycott). And in *City of Chicago v. Morales*, the court affirmed the striking of a gang ordinance outlawing "loitering in any public place with one or more other persons" after a dispersal order. 527 U.S. 41, 65 (1999) (internal quotations omitted). The vagueness problem, said the court, was that standing around in public is constitutionally protected, *e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972), but the Chicago ordinance allowed police to issue dispersal orders absent any underlying illegality. "If the loitering is in fact

harmless and innocent, *the dispersal order itself* is an unjustified impairment of liberty." *Morales*, 527 U.S. at 58 (emphasis added). *Cf. Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black & Douglas, JJ., concurring) ("To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws.").

To hear him tell it, Gasparino and every other police employee in Connecticut would be free to stop protected speech by simply ordering it to stop, and arresting anyone who does not comply. But the Supreme Court has long held the opposite. This Court must reverse.

1.5. This Court should refuse Gasparino's request to decide qualified immunity in the first instance.

Lastly, the pile of cases dooming Gasparino's actions makes his plea for a first-time decision on qualified immunity doubly confounding. Gasparino Br. 21–25. This Court typically abstains from deciding issues not decided below. *Eng v. Coughlin*, 858 F.2d 889, 895 (2d Cir. 1988) ("It is our practice in this Circuit when a district court fails to address the qualified immunity defense to remand for such a ruling."). *Accord Tillmon v. Douglas County*, 817 F. App'x 586, 589 (10th Cir. 2020) ("[I]f a . . . district court declines to rule on the defense, then we typically remand and

direct the district court to decide qualified immunity."); *In Re: J & S Properties, LLC*, 872 F.3d 138, 148 (3d Cir. 2017) (refusing to decide qualified immunity when district court had ruled on another basis, as "the issue is not properly before us") (Fisher, J., concurring); *Robinson v. Mericle*, 56 F.3d 946, 947 (8th Cir. 1995) (per curiam) (finding that "we lack jurisdiction because the district court made no reference to the qualified immunity issue in its order"). Moreover, this is Friend's appeal, not Gasparino's. *Cf. Ford v. Moore*, 237 F.3d 156, 161–62 (2d Cir. 2001) (reaching qualified immunity for first time on defendants' appeal, but cautioning that its doing so "should not be interpreted by future litigants and district judges as an invitation to modify the longstanding rule that district courts promptly adjudicate properly presented qualified immunity defenses in the first instance"). Notwithstanding that the district court considered none of this, and notwithstanding that he is an appellee who did not file a cross-appeal, Gasparino asks this Court to determine clearly established law for each of the three claims against him (none of which he identifies), as well as consider whether it was objectively reasonable for Gasparino to believe that probable cause existed. Those should be considered on remand.

2. Stamford's decades-long declination to constrain or supervise bail-setting means it is liable for the unconstitutional decisions of the employees to whom it gave carte blanche authority.

The defendant to Counts Four and Five of the amended complaint, JA16, is the municipality of Stamford, Connecticut. In 1995, Stamford decided that there would be no rules around bail-setting, and it left its employees to develop their own oral tradition around it. Twenty-three years later, when Michael Friend walked into its police station, that oral tradition had ripened into a practice by which each supervisor setting bail had complete freedom to do whatever he wanted. One veteran supervisor, when asked how employees know what bail amount is appropriate to ensure a person's appearance at court, summed it up thusly: "We don't." JA230:3–10.

There is little factual dispute between the parties on the facts of bail-setting in the city, courtesy of the record assembled by Friend below. The dispute surrounds the significance of that record. Document discovery established that:

- the sole document promulgated by Stamford on the subject of bail-setting is Police Procedure 120, entitled "Desk Supervisor[] Duties and Responsibilities," and has been in force since 1995. JA192–194.

- Procedure 120 includes just one sentence dealing with bail-setting: employees working the desk sergeant job are "responsible for setting reasonable bonds to assure the prisoner's appearance in court, as well as ensuring that court set bonds are properly posted." JA192–3.

Meanwhile, deposition testimony (including that of Stamford's Fed. R. Civ. P. 30(b)(6) witness) admitted that the city does not:

- "give any formal training on setting bail." JA236:21–25.
- provide employees with any written materials about how to do so, other than "state statute," JA237:19–23, and a copy of Procedure 120. JA237:24–JA238:2.
- have a written document setting out the factors employees are to consider when setting bail. JA268:6–10; *see also* JA271:9–14 (same).
- require its employees to record the reasons behind any of their bail-setting decisions. JA285:19–22.
- require employees working the desk sergeant job to review bails set by other supervisory employees. JA225:3–11; JA213:14–22.
- require employees supervising bail-setting employees to review the bails set by those employees. JA282:2–4.
- train employees how to tell whether an arrestee for whom they have set bail actually appears in court. JA238:7–13.

- track whether the arrestees for whom it sets bail appear in court. JA278:13–18.
- track the occasions on which a state bail commissioner modifies a bail set by city employees. JA276:12–14.
- evaluate its employees' job performance on bail-setting. JA235:11–16.

Unable to counter those facts, Stamford tries to recharacterize their effect. It contends that the lack of written materials beyond Procedure 120 demonstrates that the city never formally delegated bail policymaking authority to anyone below the police chief, Stamford Br. 11–13; that its reliance on employees orally telling each other how to set bail comprises "unwritten procedures and training," Stamford Br. 17; and, that the employee who set bail for Friend properly did so. Stamford Br. 9–10.

Stamford's unusual gloss on the record requires the Court to reward the city for contradictory positions. The bulk of Stamford's brief claims that nothing is something: that the decades-long absence of rules, training requirements, monitoring, or evaluation signifies that the city has silently reserved bail policymaking to itself—and not, as common sense would dictate, delegated the subject entirely to its front-line supervisors. The rest of its brief does a headstand and contends that something is nothing: that the very same absence empowers Stamford to disclaim any constitutional

infirmity in a bail decision as the deviant act of an employee, and thus, avoid *Monell* liability. Stamford Br. 19–21. Neither contention is tenable, and so the Court must reverse for the consideration of the merits on Counts Four and Five.

2.1. Twenty-three years of absence on bail-setting rules, formal training, monitoring, or evaluation conclusively demonstrates that Stamford delegated all bail-setting actions—from big to small—to its employees.

The city contends that neither Gasparino nor Steve Perrotta (the employee performing the desk supervisor job that evening) committed misdeeds attributable to it, because neither of them had been delegated the power to make Stamford's policy on bail-setting. The city elides, however, that the complete absence of any rules, training, or evaluation by it demonstrates that it long ago delegated policymaking authority to the employees who set bail. Once Stamford decided to leave all bail practices up to the employees, it also made itself liable for any constitutional violations they wrought.

For *Monell* purposes, devolution of policymaking power need not be formal. "Delegation may be express, as by a formal job description, or implied from a continuing course of knowing acquiescence . . . in the

exercise of policymaking authority by an agency or official." *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987) (internal citation omitted). Here, the record shows that Stamford informally ceded all aspects of bail-setting to its first-line supervisors (sergeants and desk sergeants): first, by charging them with making bail decisions, and then by consistently declining to guide or limit their decisions, train them on how to make decisions, or track and evaluate them once made.

Stamford asks the Court to bless the precise hypothetical that the Supreme Court forbade: permitting municipal officials to "insulate the government from liability simply by delegating their policymaking authority to others." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988). Although it is rare to find a municipality fitting the *reductio ad absurdum* of *Praprotnik*'s one-way delegation limit, examples exist. In each—as here—the decision against enacting rules or monitoring practices compelled the conclusion that the municipality ceded authority on the subject to its employees.

In *Hunter v. Town of Mocksville*, the defendant municipality had repealed all personnel policies constraining the town manager's firing decisions, "declin[ed] to promulgate new ones," and "maintained no formal review process for evaluating [her] termination decisions." 897 F.3d 538,

557 (4th Cir. 2018). Although state law empowered the town to set the rules around when and how its employees could be fired—and to create a review process for terminations—the town did not. The Fourth Circuit concluded that the town's declination was, for *Monell* purposes, a decision to grant the town manager "carte blanche authority to make formal or informal *ad hoc* policy choices or decisions," rendering the town liable for her termination decisions. *Id.* (internal quotation omitted).

A similar illustration comes from the Ninth Circuit in *Hyland v. Wonder*. There, San Francisco's city charter vested its juvenile probation board with departmental termination decisions. But the members of the board testified that they "left the internal management of the . . . Department to" a supervisory employee, and "did not formulate any policy concerning employees." 117 F.3d 405, 415 (9th Cir. 1997) (internal quotations omitted). While the city argued that, on paper, the board retained final authority over termination decisions, the Ninth Circuit concluded the opposite. The board's decision (1) to leave employee management to a supervisor, and (2) not to promulgate any policies constraining that supervisor's termination decisions, made the supervisor the *Monell* policymaker. *Id.*

A final example comes from the Tenth Circuit. In *Randle v. City of Aurora*, the absence of evidence of whether the municipality had ever promulgated rules constraining terminations required the reversal of summary judgment for the city. 69 F.3d 441, 449–50 (10th Cir. 1995). The defendant contended that the city manager's bad acts could not be imputed to it because the city charter vested termination decisions with the city council. But the court of appeals found it dispositive that the charter permitted the city manager to fire employees "subject to the personnel regulations of the city adopted by the council," while the record was silent as to whether the city council had "in fact, enacted such regulations or whether they provide[d] a meaningful constraint on" the decision to terminate the plaintiff. *Id.* (internal citation omitted).

The absence of oversight, rules, and formal training leaves Stamford in the same stead as the municipal defendants in *Hunter*, *Hyland*, and *Randle*. As there, Stamford "may not avoid attribution of policy to itself simply by officially retaining unexercised ultimate authority to countermand." *Spell*, 824 F.2d at 1386. The fact that the police chief has not exercised any oversight over bail-setting since 1995 confirms that his is "only a paper, formal authority, never effectively exercised . . . to curb or

countermand the authority in fact being exercised" by Stamford's sergeants. *Id.* at 1397.

In its brief, Stamford does not explain why it should be permitted to bury municipal liability as *Praprotnik* warned against, by handing off all aspects of bail-setting while reserving the option to duck liability for the resulting feral practices. Instead, it cites a scant few cases of plaintiffs who sued municipalities in the face of state statutes and extensive written policies, and who claimed that minor gaps in those laws and policies left room for a wrongdoer to assume implicit authority.

In *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), a county legislature had promulgated rules for social media usage. One of the defendants, Randall, was alleged to have violated the plaintiff's First Amendment rights when acting in an area on which those rules were silent: employees' official Facebook pages. Davison contended that the absence of regulation silently delegated that portion of conduct to each employee, but failed to show that the county even "knew of" the Facebook page in dispute, "let alone that it acquiesced in" the defendant's administration of it. 912 F.3d at 690 (internal citation omitted).

Agosto v. New York City Dep't of Education, 982 F.3d 86 (2d Cir. 2020), is a variation of the theme found in *Davison*. There, a fired New

York City public schoolteacher was swimming against the tide of a statute granting the schools chancellor final word on teacher firings, another granting the same officeholder responsibility to conduct and resolve "disciplinary proceedings brought against teachers," and yet another setting out specifics of how teacher discipline occurs. *Id.* at 99. Notwithstanding those statutes, Agosto sued the district, contending that his treatment and firing by his boss (one of hundreds of city principals) was attributable to it.

Notably, Agosto *disclaimed* that his boss's actions were the result of custom or acquiescence, *i.e.*, "unwritten practice that is so widespread as to have the force of law." *Id.* at 98 (internal quotation omitted). Instead, he claimed that his supervisor had accreted policymaking authority in the interstices of state law because the performance reviews and disciplinary letters the supervisor issued were, in Agosto's view, unreviewable. *Id.* at 100. But, of course, they were reviewable through the statutory teacher termination proceedings, and Agosto "raise[d] no challenge to" the relevant statute. *Id.* at 99.

Although it had disposed of the issue, the Court went on to quote *Praprotnik*'s aside that a municipality's "'going along with discretionary decisions made by [its] subordinates'" does not comprise delegation. *Id.* at 100 (quoting *Prapronik*, 485 U.S. at 130) (alteration in *Agosto*). The Court

did not, however, reproduce the proviso that follows: "It would also be a different matter if a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware." *Praprotnik*, 485 U.S. at 130.

The difference between *Davison* and *Agosto* on one hand, and this case on the other, is the size of the void in which delegation occurs. The plaintiffs in *Agosto* and *Davison* attempted to locate narrow policymaking authority in the smallest lacunae between existing statutes and policies, respectively—and in Agosto's case, tried to do so while disclaiming delegation.[3] Here, there is an abyss: Stamford has no material on bail-setting. And, of course, Stamford was aware that its employees were routinely making decisions about bail, since it affirmatively made them responsible for doing so via Procedure 120.

[3] *Thomas v. Roberts*, 261 F.3d 1160, 1172–73 (11th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 2653 (2002) is of no assistance, either. That case dealt with strip searching schoolchildren against the backdrop of a policy that permitted such only in the presence of reasonable suspicion. The phrase is a term of art in Fourth Amendment case law, and the school administrator charged with staying within its bounds could identify what it means by consulting, for example, *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). Not so with bail-setting, which is bounded by Due Process and Equal Protection concepts and does not turn on a single term of art. *See Bearden v. Georgia*, 461 U.S. 660, 665 (1993).

A brief thought experiment suffices to demonstrate how wrong Stamford's position is. Suppose Stamford issued its employees a piece of paper simply stating that, among other duties, they were to "be responsible for using reasonable force to assure a suspect's detention." The city decided against making any rules constraining or even defining "reasonable force," did not provide any classroom training on it, did not provide any written training materials on it, did not require annual training on it, did not track uses of force, and did not evaluate employees in whole or in part based upon whether their uses of force were "reasonable." Although state law empowered Stamford to make rules on the subject and insist on training and monitoring, the city simply let employees tell each other what they thought reasonable force was and called it "unwritten procedures and training." Stamford Br. 17. Twenty-three years later, an employee shot and killed a motorist for having run a red light and testified that all he knew about the subject of shooting people he learned orally from co-workers over the years, and that in his view, shooting was appropriate in situations like red light-running given his experience and understanding of the oral history. In that circumstance, it would be impossible to conclude that Stamford's decades-long shrug on the subject should reward it with

ineligibility as a § 1983 defendant merely because, post-shooting, it proclaimed to never have ceded complete authority on the subject.

Further, *Agosto* is of far less utility in this dispute than Stamford would have it. Although *Agosto* synthesized cases to apply a neat dividing line between employees who make decisions versus those who make policy, 982 F.3d at 98, the line between 'decision' and 'policy' has bedeviled courts and resulted in a tangle of case law that is of little use as a navigational aid. *Compare, e.g.*, *id.* (insisting upon evidence of the "adopt[ion of] rules for the conduct of the municipal government") *with Amnesty America v. West Hartford*, 361 F.3d 113, 126 (2d Cir. 2004) (accepting "a single action" by an employee with "authority to establish municipal policy with respect to the action ordered") (internal quotation omitted).

Agosto's record and the one before the Court here are thus studies in extremes. Set against the backdrop of a thorough employment regulation system, Agosto's contention that the slivers of discretion given school principals could bind the municipality caused the Court concern over creating a chute to *respondeat superior*. 982 F.3d at 100–01. But in the rare factual situation like Stamford's, the opposite concern hovers: that, by promulgating a single-sentence job duty description and leaving the rest to

chance, *Monell* could be a dead letter. *See Praprotnik*, 485 U.S. at 126–7 (noting "this conundrum").

Here, moreover, a principled distinction between the magnitude of employee actions is impossible to apply in the rearview mirror. Stamford has given its employees just one sentence on bail-setting since 1995, and conducts no monitoring or review of whether and how they do the job. It is impossible to reconstruct a record showing whether the employees wielding bail-setting authority ever made "discrete, consciously adopted courses of governmental action," *Spell*, 824 F.2d at 1387, in the course of exercising their "discretion to make a decision" unsupervised for years on end. *Agosto*, 982 F.2d at 98.

Practically speaking, it is hard to believe that, over the course of years, Stamford supervisors failed to arrive at individual or collective general guideposts to be applied to bail-setting which, if written down, a court would be tempted to call 'policy.' They might have decided over the years that nighttime break-ins should be treated differently than daytime ones, or that "domestics, they're a little different" when it comes to bail. JA278:17–25. But since Stamford does not require training, recording of bail-setting reasons, or any monitoring of bail-setting, no court will ever get to the bottom of it when trying to divine whether the employees' acts

retroactively bore sufficient weight of 'policy.' The most that is possible to say here is that the chief of police has remained silent since 1995.

In this case, the municipality's silence, and absence of recordkeeping, is evidence that Stamford handed its bail choices—big and small, 'policies' and 'decisions'—to its employees, and left them there. The judgment of the district court should be reversed.

2.2. Stamford may not withhold rules, guidance, training, and evaluation on bail for decades and then in hindsight decree an employee to have violated that which it never wrote down, trained, or monitored.

Stamford's companion argument is equally wily. According to the city, if Richard Gasparino violated the Constitution when holding Friend for want of $25,000, he would now in hindsight "be in violation of" unwritten policy and training, and therefore be the only correct defendant to Counts Four and Five. Stamford Br. 21. In addition to being a convenient dead-end,[4] the argument compels reversal and remand.

[4] This Court has granted Connecticut police employees absolute immunity for their bail-setting behavior, *Walczyk v. Rio*, 496 F.3d 139, 165 (2d Cir. 2007). Thus, a conclusion that Gasparino was the only tortfeasor here means no one may be held to account for Friend's unlawful overnight detention.

Stamford's contention again requires the redefinition of the word "nothing." In discovery, Friend demonstrated that there is no 'policy' to measure Gasparino's compliance by. All that exists is a group of employees who have made their own rules based on their own experiences. The result of the free-for-all is a compendium of dart-throws in which arrestees with varying criminal histories and flight risks got lower bails than Friend. For example, in the year preceding Friend's arrest, Stamford set financial conditions of release at less than $25,000 for sixteen people charged with interference *and* additional crimes, even though Friend was charged only with interference.[5] And in that same period, three people arrested for interference alone—like Friend—were given bails of $10,000, $10,000, and $500.[6]

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[5] JA286, rows with InterviewID value of 25292, 2867, 2866, 4917, 7693, 15798, 24208, 14968, 19149, 21623, 16649, 21222, 21963, 5315, 11221, 16236, 4595, 12467, and 24883. Stamford objected in the district court that the Connecticut judiciary database in which this data exists was hearsay and not authenticated, but Fed. R. Civ. P. 56(c)(2) now only permits such an objection if the evidence "cannot be presented in a form that *would be* admissible in evidence," so as to eliminate motion practice over authentication as business records that could easily be done by declaration. On remand, Friend would readily present a declaration from the relevant state judicial records custodian establishing its authenticity and maintenance in the regular course of business.

[6] JA286, rows with Interview ID value of 2866, 2867, and 12467.

Worse for Stamford is its reliance on the affidavit of Steve Perrotta. To believe Perrotta, the immense bail put on Friend perfectly comported with Stamford 'policy.' In the affidavit, Perrotta enumerates factors he considers in reviewing a bail decision, and avers that if, upon his review, he believes that "the bail set is not reasonable," he discusses the matter with the bail-setter and they together "determine what a reasonable bail amount is." JA482–3. Perrotta concludes by swearing he is "sure [he] would have engaged in this process when . . . Gasparino set Mr. Friend's bail on April 12, 2018." JA483.

The only implication of Perrotta's affidavit, therefore, is that he thought Gasparino's setting $25,000 bail for Friend comported with Stamford's oral tradition on bail. Which puts the city in a bind: if Perrotta is to be believed, either both employees Stamford entrusted to set bail that night (a) acted in conformance with customary practices and detained Friend for want of $25,000, or, (b) there were no rules constraining bail-setting, and the employees were free to pick a number. Either conclusion makes Stamford liable for violating Friend's constitutional rights.

In the end, Stamford is wrong to contend that it may *both* withhold rules, policy, training, and evaluation on bail, *and* make a later litigation choice to characterize an employee's action as imputable to the city or not.

In its formulation, nothing is the best defense: without any rules, training, or monitoring, a municipality can never be said to have caused a constitutional violation, since all employee actions can later be disavowed as the mere "individual act" of a wayward employee. Stamford Br. 21.[7] The Court must reject the city's position and reverse for consideration of the merits on Counts Four and Five.

[7] Moreover, it does no good for Stamford to compare its bail-setting practices to the standard of its lone writing on the subject, Procedure 120, rather than the Constitution. No one is litigating the former. Were the standard the city had to clear simply that its employees "set[] reasonable bonds to assure the prisoner's appearance in court," JA192–3, the $25,000 it demanded from Friend worked fine because he lacked the money. In that sense, a million dollars would work like a charm in all instances. But Stamford was required to adhere to the Due Process and Equal Protection clauses by setting a bail that accounted for the penny ante misdemeanor Friend was charged with, his lifelong Stamford residency and local employment, his lack of criminal history, and his inability to pay.

3. Conclusion

For the reasons set forth above, the judgement of the District of Connecticut must be reversed, and remanded for entry of judgment in favor of Michael Friend on Counts One through Three, and consideration of the merits on Counts Four and Five.

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/s/ Dan Barrett________________
Dan Barrett

May 14, 2021