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

BRIEF OF APPELLANT

Dan Barrett
Elana Bildner
ACLU Foundation of Connecticut
765 Asylum Avenue
Hartford, CT 06105
Phone: (860) 471-8471
e-filings@acluct.org

Counsel for Appellant
January 29, 2021

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Statement of Jurisdiction

The Court has jurisdiction to hear this appeal of a final judgment pursuant to 28 U.S.C. § 1291. The District of Connecticut (Covello, J.) had jurisdiction pursuant to 28 U.S.C. § 1331. The district court granted summary judgment to the defendant-appellees as to all counts in plaintiff-appellant Michael Friend's amended complaint on September 29, 2020. Friend filed his notice of appeal on October 23, 2020.

Statement of Issues

1. Whether a peaceful sidewalk demonstrator may be punished either for publishing truthful information, or, because the government dislikes the speaker's message.
2. Whether probable cause to believe that a person violates Connecticut's police interference statute can exist where the person's silent sign-holding on a public sidewalk is the sole basis for the charge.
3. Whether a municipality is an eligible *Monell* defendant where the three relevant sources of law—state statute, municipal policy, and 'custom and usage having the force of law'—delegated authority on a subject to those identified as having carried out the constitutional violations at issue.

Introduction

Twenty-nine years after the Supreme Court proclaimed that the freedom to verbally challenge police action without fearing arrest "is one of the principal characteristics by which we distinguish a free nation from a police state," Michael Friend stood on a Stamford, Connecticut sidewalk silently holding a sign warning motorists that the police were handing out $150 traffic tickets two or three blocks ahead. *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). A Stamford police employee thought that Friend was preventing him and his colleagues from issuing as many traffic tickets as they could have, so he confiscated Friend's sign. Shortly thereafter, he arrested Friend to prevent him from displaying a second, identical one.

Once at the police station, the arresting employee exercised Stamford's statutory authority to set bail for Friend. He decided to detain Friend, a lifelong Stamford resident with no criminal history, for want of twelve and a half times the maximum fine for the misdemeanor charged. He picked that number based on his perception of Friend's "actions on scene" and "his personality."

Calling into legal peril radio traffic reports and navigation apps like Google Waze that publish reports of speed traps and police road blocks, the District of Connecticut held that the silencing of Friend satisfied strict

scrutiny review because it was the only means necessary of combating the traffic violation that police were issuing tickets for that afternoon. Simultaneously, it held that police were justified in arresting Friend on the basis of protected speech, bucking long-settled law to artificially and incorrectly distinguish between speech and the physical acts required to facilitate it.

In a single paragraph, the district court then shortcut the examination of local practice and custom required under *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989), and its progeny to summarily conclude that the police employee lacked 'sufficient authority' for his actions to be imputed to Stamford.

Both results require reversal.

Statement of the Case

On a spring afternoon in April 2018, Michael Friend was driving in his hometown of Stamford when he saw municipal police operating a sting in which they ticketed motorists at the corner of Hope and Greenway Streets for using their cellphones while driving. *See* JA094-95. Friend saw police employee Richard Gasparino standing about a block south on Hope Street, hiding behind a pillar watching northbound traffic and radioing

ahead to his colleagues whenever he thought he saw a driver using a cellphone in violation of the traffic code. JA097, 171. *See* Conn. Gen. Stat. § 14-296aa(b) (forbidding driving "while using a hand-held mobile telephone to engage in a call or while using a mobile electronic device"). Police refer to this violation as "distracted driving."

Gasparino and his colleagues were being paid that afternoon from a grant provided to Stamford by the Connecticut Department of Transportation for a project entitled "FY 2018 DDHVE," standing for "Distracted Driving High Visibility Enforcement." JA136. As a condition of receiving the money, Stamford promised that stings would "take place during daylight hours," and that it would "take part in earned media activity related to" the program. Suggested media activities included "[h]osting a kick-off press event," and "[c]onducting ride-alongs or interviews with media at enforcement locations." JA140.

Friend protests, has his sign confiscated, and is arrested and charged with a crime after displaying a second sign.

Friend objected to the way that the police were issuing tickets, so he parked his car on a side street and wrote "Cops Ahead" in marker on a piece of paper he had with him. JA097-99. He stood on the sidewalk two blocks

south of where police were detaining motorists, and displayed his sign to passing traffic. *See* JA023 at ¶ 11, JA186, 188.

Gasparino walked to where Friend was, confiscated the sign, and told Friend that he was "interfering with our police investigation" and therefore had to leave. *See* JA023 at ¶ 14, 100-03. Friend walked further south to a convenience store on the corner of Hope and Fahey, three blocks south of where police were ticketing drivers. *See* JA023 at ¶ 18, 105, and 189 at ¶ 4. Friend borrowed a marker from the person behind the counter at the store and made another sign reading "Cops Ahead." JA106. He stood on the nearby Hope Street sidewalk and displayed his sign. JA107-08. Some time after that, an employee came outside and gave Friend a larger "Cops Ahead" sign made from cardboard, which Friend displayed to passing cars. JA108-10.

About a half-hour later, Gasparino traveled to where Friend was standing and arrested Friend for "interfering with our investigation." JA024 at ¶¶ 20, 21. In his view, Friend "was tipping off motorists and due to this [police] officers were not observing as many violations as they should be." JA020. Gasparino charged Friend with misdemeanor interference in contravention of Conn. Gen. Stat. § 53a-167a(a). JA019-20. Gasparino did not witness Friend commit—and did not have probable cause

to believe that Friend committed—any other offense. JA170. During the arrest, Gasparino confiscated two cellphones that Friend had with him, including one that Friend used for work as a food delivery driver, dog walker, and junk remover. *See* JA020, 091, 178. Friend was put in a police car and taken to Stamford police headquarters.

Stamford sets Friend's bail at twelve and a half times the maximum fine for the offense charged, and holds him overnight.

Once there, Friend was booked, and the Stamford police set his bail. In Connecticut, there are no night arraignments for off-hours arrests. Instead, municipalities act in lieu of the superior court and set conditions of release until the arrestee's first appearance in court. Under the state's law, each municipal police chief or their "authorized designee" must "promptly order release of the arrested person upon the execution of a written promise to appear or the posting of such bond as may be set." Conn. Gen. Stat. § 54-63c(a).[1]

[1] Connecticut law refers to pre-trial release interchangeably as "release" or "bail." *See, e.g.*, Conn. R. Super. Ct. § 38-1(a) (intermixing the two terms). Although bail does not always involve financial conditions, Stamford uses the term "bail" interchangeably with "bond." JA217, 236-37.

Via a written document entitled Police Procedure 120, Stamford's police chief has, in turn, delegated bail-setting decisions to subordinate supervisors working (1) a job assignment called "desk sergeant" or (2) as lieutenants in the narcotics bureau. JA191-94, 200. And by accepted practice over the years, the chief has further delegated bail decisions to all supervisory employees; that is, anyone with the job title of sergeant or better. JA201, 208. Accordingly, supervisors in Stamford order bail conditions for arrestees whether or not they are working the desk sergeant job assignment. JA175-76, 223.

Stamford does not record the reasoning for bail-setting decisions. JA202, 211, 285. Once an employee has decided bail, Stamford provides no way for an arrestee to appeal the bail decision to another police department employee. JA229-30, 274-75. Desk supervisors[2] are not required to review the bail decisions of other supervisors, JA213, 229, and do not regularly do so: some do, and some do not. Lieutenants are not required to review bail decisions at all. JA282.

---

[2] Stamford uses the terms "desk supervisor" and "desk sergeant" interchangeably. JA707.

The city has no written policies or rules governing how bail should be decided other than a lone sentence in Police Procedure 120 noting that desk sergeants should affix "reasonable bonds to ensure the prisoner's appearance in court." *See* JA174-75, 191-94, 214, 229, 266-68, 271, 280-81. It provides its employees with no written materials about determining reasonable bail other than Procedure 120 and a copy of a state statute. JA175, 226-27, 237-38. The city does not require its employees to be trained on how to decide bail conditions, JA233-34, and provides them no formal training about how to do so. JA197, 236.

Although Friend is a lifelong resident of Stamford, is employed, has no criminal history, JA129, and was charged with a single misdemeanor, Gasparino ordered Friend's bail to be $25,000. That figure is twelve and a half times the maximum fine for the misdemeanor that Friend was charged with. *See* Conn. Gen. Stat. § 53a-167a(b) (classifying interference with police as a Class A misdemeanor); *id*. § 53a-42(1) (setting maximum fine for Class A misdemeanor at $2,000). Gasparino admitted at deposition that he picked the $25,000 number based upon Friend's "actions, by his actions on scene, and his, honestly, his personality . . . ." JA179-80.

Gasparino told Friend orally of the $25,000 condition. JA119. There was no method by which Friend could appeal the decision to any Stamford

employee or agency, JA177, and he couldn't afford $25,000. So, he was held in the Stamford police station overnight. JA025 at ¶ 35. Steve Perrotta—employee working as the desk sergeant—testified that he does not remember whether he reviewed the bail decision that Gasparino made as to Friend. At summary judgment, he modified his position a bit, claiming that he has no reason to believe that he did *not* look over Gasparino's decision, and that he usually does.

Around 1:30 a.m. the next morning, a state judicial employee known as a bail commissioner visited Friend. JA123, 295. Bail commissioners conduct in-person interviews of arrestees who cannot meet municipally set bail, and can order different conditions of release based on their assessment of the severity of the crime charged, as well as the arrestee's residence, marital status, employment, schooling, criminal history, supports available in getting them to court, and financial ability to pay. *See* Conn. Gen. Stat. §§ 54-63d, 54-63b(b). Based on Friend's lack of criminal history, absence of risk to the public, and assurance of attending court, the bail commissioner immediately changed Friend's conditions of release to zero dollars and a promise to appear in court at a later date. JA123, 293-94.

Friend was finally able to leave the Stamford police station around 2 a.m. JA113. Because he was locked up all night, he missed an evening's

work delivering food. *See* JA116, 188 at ¶ 5. And because Gasparino confiscated the cellphone on which Friend relies to work, he was forced to purchase a replacement phone later that morning. JA116, 189 at ¶ 6.

Friend hired a lawyer to defend the criminal charge against him. JA114. In accordance with his bail conditions, he was required to appear at two hearings at the Connecticut Superior Court. JA115-16. *See* Conn. Gen. Stat. § 54-63e (mandating anyone released on a promise to appear to do so); *id.* § 53a-173(a) (making the "wilful[] fail[ure] to appear when legally called according to the terms of such person's . . . promise to appear" a Class A misdemeanor). At the second of those hearings, the prosecution entered a *nolle prosequi* and explained that Friend's signs "actually . . . help[ed] the police do a better job than they anticipated because when [drivers] saw the signs, they got off their cell phones." The court thereafter granted Friend's oral motion to dismiss, ending the case. *See* JA317-18.

Procedural History

Friend filed suit against Richard Gasparino in the District of Connecticut in October 2018, and impleaded the City of Stamford by amendment in August 2019. *See* JA010. The amended complaint pressed three counts against Gasparino: a violation of Friend's right to free speech

for taking Friend's first "Cops Ahead" sign (Count One); a violation of his right to free speech for arresting him to stop display of his second "Cops Ahead" sign (Count Two); and a violation of his Fourth Amendment right against malicious prosecution for causing a criminal case to initiate against him absent probable cause (Count Three). JA015-16 at ¶¶ 50-52.

Friend pleaded two counts against Stamford. Count Four alleged that the city contravened his right to procedural due process by using an arbitrary and retaliatory dart's throw to decide on a $25,000 bail. Count Five alleged that Stamford violated his rights to due process and equal protection for jailing him for want of $25,000 without any meaningful inquiry as to whether he could pay that astronomical amount or whether that amount was necessary to secure his presence at court.

Following discovery, all parties cross-moved for summary judgment in February 2020. On September 30, 2020, the district court denied Friend's motion and granted both defendants' ones without oral argument.

As to Counts One and Two, the district court concluded that Gasparino's decisions to confiscate Friend's first sign, and arrest him to stop display of the second, were the vanishingly rare speech restrictions to survive strict scrutiny review. The court identified "stopping distracted drivers and issuing citations for their behavior" as Gasparino's compelling

interest in silencing Friend's speech. JA791. Although the court agreed that barring Friend from speaking "defeated the purpose of what Friend was trying to accomplish," it nonetheless stated that the only way that Gasparino could stop distracted driving was to halt Friend's speech. JA791. On Count Three, the court held that probable cause existed to charge Friend with interference—notwithstanding its sole basis being protected speech—because Friend "was not arrested for verbal conduct, but rather his physical conduct" in displaying his sign after being told not to. JA797.

On Counts Four and Five, the District of Connecticut did not reach the merits of Friend's claims but concluded that Stamford was not an eligible defendant for the purposes of *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). It concluded that, although Stamford provides no training on how to set bail, Friend did not demonstrate a failure to train. JA803-04. It also concluded in a brief paragraph—without citation—that Gasparino was not a "policymaker," but did not identify who that person was. JA803. Friend appealed to this Court on October 23, 2020.

Summary of the Argument

"It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000).

However treated, Gasparino's censoring actions cannot survive his strict scrutiny burden. He had no compelling interest in silencing speech just to generate more traffic citations. And, speech restrictions fail narrow tailoring examination where there is a non-speech-silencing alternative, or where speakers are punished for the conduct of lawbreaking third parties. Finally, both Connecticut's authoritative interpretation of its police interference statute and decades of U.S. Supreme Court precedent confirm that Gasparino did *exactly* the wrong thing here: arrest someone solely on the basis of protected speech. For all these reasons, this Court should reverse and remand for entry of judgment in Friend's favor on Counts One through Three of his amended complaint.

Additionally, the District of Connecticut incorrectly granted judgment to the City of Stamford without considering a mandatory facet of *Monell* eligibility: whether custom or usage in the municipality conferred final policymaker status on the person who committed the constitutional violation. Conducting that inquiry on the record in this case reveals that

Stamford is the proper defendant. Unlike in other contexts, here, state statute overtly *permits* delegation of final bail-setting authority to multiple, concurrent people. The city's written procedures delegated that authority to all desk sergeants. Custom further delegated that authority to all supervisors, including Richard Gasparino. That fact that the bail he set was unreviewable in practice, and therefore final, only cements Gasparino's policymaking status.

Stamford's professed alternative is that a different supervisor on duty that night—desk sergeant Steve Perrotta—was the only person with authority to set Friend's bail. But that scenario is of no help to Stamford: If so, the city is responsible for Counts Four and Five of the amended complaint just the same, and remand is required to reach the merits on those counts.

Standard of Review

All issues are questions of law reaching the Court from a ruling on cross-motions for summary judgment, and are reviewed *de novo*. *E.g.*, *Doro v. Sheet Metal Workers' Int'l Ass'n*, 498 F.3d 152, 155 (2d Cir. 2007).

Argument

1. Friend's sidewalk speech was protected by three independent First Amendment doctrines.

Friend presses three speech-related claims in Counts One through Three of his amended complaint. Counts One and Two stand on the principles that neither the publication of truthful speech, nor content-based speech silencing, can occur without the government meeting strict scrutiny. Although Count Three has multiple elements, the only genuine dispute concerns whether protected speech, standing alone, can comprise probable cause for purposes of Connecticut's police interference statute—when the First Amendment, and the authoritative interpretation of the statute, have long forbidden its application to anything other than unprotected speech.

1.1 Friend's publication of lawfully obtained, truthful information on a matter of public concern is protected by strict scrutiny.

Beginning with *New York Times Co. v. United States (The Pentagon Papers Case)*, 403 U.S. 713 (1971) (per curiam), the First Amendment's speech clause has almost unconditionally guaranteed the dissemination of "lawfully obtain[ed] truthful information about a matter of public significance." *Smith v. Daily Mail Publ'g*, 443 U.S. 97, 103 (1979). Any state actor punishing such speech "seldom can satisfy constitutional standards,"

id. at 102, because they must prove that the punishment was borne of "a need to further a state interest of the highest order," and was narrowly tailored to that 'highest order' interest. *Id.* at 103, 105.

In the court below, Richard Gasparino attempted two end-runs around the governing case law. First, he contended that the message he forbade Friend from speaking was not one of public concern. The law of this circuit holds otherwise, deeming speech to address matters of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is . . . a subject of general interest and of value and concern to the public." *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 128 (2d Cir. 2013).

Whether speech deals with a subject of general interest or mere "domestic gossip . . . of purely private concern," *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001), is a question of law resolved by "examining the content, form, and context of a given statement." *Jackler v. Byrne*, 658 F.3d 225, 235 (2d Cir. 2011). That includes "what was said, where it was said, and how it was said," *Snyder v. Phelps*, 562 U.S. 443, 454 (2011), and whether it was "calculated to redress personal grievances or . . . had a broader public purpose." *Singer v. Ferro*, 711 F.3d 334, 339 (2d Cir. 2013).

Here, all signs point to a broader public purpose. To begin with, the character of Friend's speech was public. He chose to publish his warnings about the police on the sidewalk running alongside Hope Street, a category of location "traditionally . . . held open to the public for expressive activities," *Marcavage v. City of New York*, 689 F.3d 98, 104 (2d Cir. 2012). *Accord Snyder*, 562 U.S. at 454 (finding the fact that defendants' signs were "displayed on public land next to a public street" bolstered the conclusion that their speech dealt with matters of public concern); *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) (deeming plaintiff's posting of actors' birthdates on its website "free of charge for the public" to "impart[] an inherently public character to the speech").

Further, Friend's speech concerned the doings of the police, a topic of perennial value and concern to the public. Courts have time and again held that policing is a matter of public concern. *See Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (deeming the "investigation . . . of a violent crime" to be a subject of "paramount public import"); *Montero v. City of Yonkers*, 890 F.3d 386, 391, 401 (2d Cir. 2018) (same for decision to shut police units "dedicated to investigating domestic violence and burglary"); *Jackler*, 658 F.3d at 237 (same for "police malfeasance"); *Mandell v. Suffolk Cnty.*, 316 F.3d 368, 383 (2d Cir. 2003) (same for police department's "systemic

racism and anti-Semitism"); *Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir. 1999) (same for "crime rates, police staffing, equipment shortages and related budgetary matters"), abrogated on other grounds, *Lore v. City of Syracuse*, 670 F.3d 127 (2d Cir. 1999); *Piesco v. City of New York*, 933 F.2d 1149, 1157 (2d Cir. 1991) (same for "the competency required to become a police officer"), *abrogation on other grounds recognized by Jeffries v. Harleston*, 52 F.3d 9, 12 (2d Cir. 1995).

Gasparino conceded as much below, admitting "that the issue of distracted driving is a matter of public concern." JA533. But he attempted to blunt the effect of that concession by complaining that Friend's sign was too terse to be understood by passing motorists. That complaint is irrelevant. The Speech Clause does not legislate the verbosity of a speaker's message—no one is required to provide particular explanations, context, or phrasing in order to "merit" First Amendment protection. Descriptive messages, like journalism, are protected just the same as argumentative ones. Friend's speech was not robbed of its value to the community because it lacked a detailed explication "stat[ing] how such [cellphone ticket] issuance was unlawful or improper," or "discuss[ing] how [the ticketing] procedure was unfair . . . or was a deviation from normal police procedure." JA790. For Friend, simply notifying the public what the police were up to

was enough. As a result, Friend's warning to motorists was entitled to the strict scrutiny protection afforded the publication of truthful information on a matter of public significance.

1.2 Because Friend's sidewalk speech was shut down solely on account of its message, Gasparino's actions were content-based and subject to strict scrutiny.

The second reason that Friend's speech could not have been punished lies in an independent First Amendment tenet: the government may not censor disfavored messages without satisfying strict scrutiny.

Content-based speech restrictions are those "appl[ying] to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). They "are presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), meaning that the burden of proof rests on the defender of the speech restriction. *E.g.*, *Green Party of Conn. v. Garfield*, 616 F.3d 189, 208 (2d Cir. 2010). And they are permissible only if the speech-squelcher satisfies strict scrutiny. *E.g.*, *United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012).

Reed makes assessment of the undisputed fact record here easy. Gasparino admitted below that he took Friend's first sign—and arrested him for holding the second one—because of the contents of the signs.

JA364 (explaining Friend "was tipping off motorists and due to this officers were not observing as many violations as they should be"). Gasparino otherwise had no reason to detain or arrest Friend:

> Q. On April 12th, 2018, did you have probable cause to believe that Mr. Friend committed any other offense other than interfering with a police officer?
>
> A. No, sir.

JA170. Hence, Gasparino's decisions punish Friend "depend[ed] entirely on the communicative content of the sign[s]" he held, meaning those decisions were content-based and subject to strict scrutiny. *Reed*, 576 U.S. at 164.

1.3 However treated, Gasparino's censoring actions cannot survive strict scrutiny.

Whether his actions are viewed as punishment for publishing truthful information, or as content-based speech discrimination, Gasparino bears the burden of satisfying strict scrutiny for his seizure of Friend's first sign and arrest of Friend for the second one. He cannot meet it, and the District of Connecticut was wrong to conclude otherwise.

1.3.1 There is no compelling interest in silencing speech that *reduces* lawbreaking.

Gasparino's first hurdle is demonstrating that silencing Friend's warning to motorists was made in service of "a need . . . of the highest

order." *Bartnicki*, 532 U.S. at 528. In the district court, Gasparino—perhaps recognizing the uncomfortable fact that Friend was not driving—phrased his compelling interest somewhat unusually. He identified it as the deterrent effect of ticketing (1) on people whom he *would have stopped* on that April day, and (2) on anyone *those* ticketed drivers might urge "to not engage in distracted driving to avoid such sanctions." JA532-33. Neither is a compelling interest.

Speech silencing "requires a justification far stronger than mere speculation about serious harms," *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475 (1995). In other words, it requires actual harms rather than hypothetical ones. *E.g.*, *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 664 (1994). But Gasparino's two assertions are the definition of speculative. As to drivers he would have caught but for Friend's speech, he asks the Court to assume that absent a ticket, they would at some time in the future use a cellphone while driving in a way that violates state law. But those drivers are equally likely to have taken Friend's signs as a close brush with a $150 ticket[3] and given up the practice.

---

[3] Conn. Gen. Stat. § 14-296aa(h) (setting fine for first violation at $150, second at $300, and any subsequent at $500).

Even worse off is Gasparino's theory that arresting Friend was necessary so that some of those would-have-been-ticketed drivers might perhaps tell their friends about their hypothetical tickets, and then *those* hypothetical friends would decide against using a mobile device while driving. Neither of Gasparino's supposition-upon-supposition justifications rises to a compelling interest for silencing speech.

1.3.2 Speech restrictions fail narrow tailoring where there is a non-speech-silencing alternative, or where speakers are punished for the conduct of lawbreaking third parties.

Things get even worse for Gasparino when it comes to narrow tailoring. That inquiry asks whether a government employee has "curtail[ed] speech only to the degree necessary to meet the particular problem at hand," without "infringing on speech that does not pose the danger" the curtailment is meant to address. *Green Party of Conn.*, 616 F.3d at 209. 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), such that the existence of a less speech-restrictive alternative is the constitutional death knell for the curtailment. *E.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997).

Gasparino's choice to silence Friend in the name of reducing distracted driving fails the narrow tailoring inquiry. Most obviously, Gasparino had a non-speech-restrictive means of reducing cellphone use in the form of Conn. Gen. Stat. § 14-296aa, the very motor vehicle statute he was being paid to enforce that morning. That alone dooms his decision. As between the two means he had to reduce distracted driving—enforcing the statute against motorists who were engaging in the practice, or, silencing Friend's sidewalk speech—there was only one permissible answer, because the First Amendment "will not permit speech-restrictive measures when the state may remedy the problem by . . . enforcing laws that do not infringe on speech." *IMDb.com*, 962 F.3d at 1125. *See also Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) (striking anti-solicitation ordinance justified as a means of preventing fraud, and explaining that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly" rather than suppressing protected speech).

And, the U.S. Supreme Court has expressly held that speech restrictions levied on one person in order to deter the lawbreaking of a third party do not meet narrow tailoring. In order to adhere to the Speech Clause's guarantees, "[t]he normal method of deterring unlawful conduct is

to impose an appropriate punishment on the person who engages in it." *Bartnicki*, 532 U.S. at 529. So ill-fitting was the remedy that Gasparino chose—the suppression of "speech by a law-abiding possessor of information . . . in order to deter conduct by a non-law-abiding third party"—that the Supreme Court has described it as "quite remarkable." *Id* at 529-30.

Bartnicki aside, Gasparino's choice to enforce the distracted driving statute by punishing Friend fails even a commonsense assessment of the relationship between means and ends. Friend's speech warned motorists to obey the traffic code because police were a few blocks down Hope Street giving out tickets. If there were a speech-related way to better enforce the distracted driving statute that morning, it was for Gasparino to *amplify* Friend's speech, not shut it down. As the state prosecutor remarked when dismissing the charge against him, Friend "actually . . . help[ed] the police do a better job than they anticipated because when [drivers] saw the signs, they got off their cell phones." JA544.

Connecticut's Department of Transportation reached the same conclusion. In funding the cellphone sting that Gasparino and his colleagues were carrying out that morning, the Department mandated that Stamford "take part in earned media activity" announcing the distracted

driving ticketing program, including by "[h]osting a kick-off press event," or "interviews with media at enforcement locations." (Conn. Dep't of Transp., *Fiscal Year 2018 DDVE* 5). JA576. The district court's conclusion to the contrary must therefore be vacated, and judgment must enter for Friend on Counts One and Two.

1.4 Connecticut's criminal interference statute may not be used to punish either protected speech or the physical acts necessary to communicate protected speech, and so probable cause could never have existed to charge Mr. Friend with it.

Friend's final speech-related claim comes in form of Count Three's malicious prosecution. As Friend explained, there can never be probable cause for an arrest on the sole basis of protected speech. In response, Gasparino argued—and the district court agreed—that probable cause to prosecute Friend lay not in his speech, but in Friend's physical act of standing and holding his sign after being told not to.

Contrary to the district court's cursory assessment that Gasparino punished Friend not "for verbal conduct, but rather for his physical conduct," JA797, there is no difference between prohibiting the physical acts necessary to disseminate ideas and prohibiting the dissemination itself. Someone must hoist a sign up for others to see, tap the 'send' button on an

e-mail, or put a megaphone to their lips. As far as the Speech Clause is concerned, "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category." *Bartnicki*, 532 U.S. at 527 (holding that if the purpose of a physical act is to provide a "recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet"). Arresting a speaker for 'disobeying' a verbal prohibition against the physical acts necessary for speech is as violative as forbidding the speech outright.

Nor is there any shelter for Gasparino in the interference statute's prohibition of "hinder[ing]" a police employee. Conn. Gen. Stat. § 53a-167a(a). The superficial contention that any act or omission hindering the police gives rise to a § 53a-167a violation is just another way of arguing that Gasparino could criminalize protected expression by first ordering a person not to engage in it, and then arresting them if they did.

Settled law prohibits using Connecticut's interference statute to quell protected speech. As the U.S. Supreme Court has held, each and every criminal statute applicable to speech "must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (striking Georgia breach of peace statute on that

basis). *See also, e.g.*, *City of Houston*, 482 U.S. at 462 (same for ordinance that was "not limited to fighting words"); *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974) (same for breach statute applicable "to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments").

In line with that requirement, Connecticut's high court has construed § 53a-167a to apply only to "core criminal conduct *that is not constitutionally protected*," *State v. Williams*, 534 A.2d 230, 239 (Conn. 1987) (emphasis added).[4] On that interpretation, the state's appellate courts have confirmed in recent years that communications to third parties about police activity—even those urging a lack of cooperation with police—do not violate the statute. *See State v. Sabato*, 138 A.3d 895, 900 (Conn. 2016) (holding that text message to friend to "keep your mouth shut" could not violate the statute); *State v. Lamantia*, 187 A.3d 513, 522 (Conn. App. 2018) (text messages warning that "cops are coming" and asking boyfriend

---

[4] While the federal courts may strike a state statute outright for unconstitutionality, "it is not within [their] power to construe and narrow state laws," so state supreme courts have the last word on interpretations conforming them to the national constitution. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

to lie to police cannot constitute interference, because the messages did not comprise fighting words).

As a result, the District of Connecticut has confirmed, time and time again, that "statements . . . intended to protest the actions of" police, like Friend's, are "insufficient to invoke the application of section 53a-167a." *Goff v. Chivers*, No. 15-cv-722, 2017 WL 2174404, at *9 (D. Conn. May 17, 2017); *see also Ruttkamp v. De Los Reyes*, No. 3:10-CV-392, 2012 WL 3596064, at **7-8 (D. Conn. Aug. 20, 2012) (bystander's urging detainee not to play voicemail messages for police); *Darbisi v. Town of Monroe*, No. 3:00-CV-1446, 2002 WL 32348250, at *2 (D. Conn. Jan. 11, 2002) (because of *Williams*, no probable cause for interference "based solely on false statements to police unless the statements constituted fighting words"), *aff'd*, 53 F. App'x 159 (2d Cir. 2002). So Gasparino could have had probable cause to believe that Friend violated § 53a-167a only if the message 'Cops Ahead' was one of the very "few limited areas" of speech unprotected by the First Amendment. *United States v. Stevens*, 559 U.S. 460, 468 (2010). It was not, and neither Gasparino nor the district court identified any reason to believe otherwise.

At any rate, as with his narrow tailoring argument, Gasparino's interference theory is off course by one hundred eighty degrees. A

motorist's decision to *obey* the traffic code does not interfere with the police. Neither does a third party's urging of others to obey the traffic code. Gasparino's inverted conception of interference requires accepting that his job—the thing Friend 'interfered' with—was issuing some minimum number of tickets, rather than issuing tickets only to those motorists breaking the law, if any. If Friend's 'Cops Ahead' speech caused the police to not "observ[e] as many violations as they should be," so much the better for enforcing the traffic code. The district court's decision must be vacated, and summary judgment should instead enter for Friend.

2. Either policymaker identified by the parties had unreviewable authority over bail determinations, so Stamford is inescapably a proper defendant.

The district court did not reach the merits of either Counts Four (violation of Friend's right to procedural due process) or Five (substantive due process and equal protection). It devoted just a single paragraph of analysis to the question at hand: who is a *Monell* policymaker in Stamford on the issue of bail-setting. Without citation or explanation, it simply stated that "Gasparino is not an individual with 'substantial authority' regarding bail setting procedure," and left it at that. Opinion at 28.

But whether someone has "substantial authority" is not the test for identifying a *Monell* policymaker. Rather: "Reviewing the relevant legal materials, including state and local positive law, as well as '*custom or usage having the force of law*,'" it is the trial court's job to identify those "who speak with final policymaking authority . . . concerning the action alleged to have caused the particular . . . violation at issue." *Jett*, 491 U.S. at 737 (citing *St. Louis v. Praprotnik*, 485 U.S. 112, 108 (1988) (plurality opinion) (emphasis added)).

Following this analysis to its logical conclusion, Gasparino is a municipal policymaker. If, as Friend contends, Gasparino—in keeping with Stamford's well-settled custom—decided Friend's bail absent any input or constraint from above and any possibility of Friend appealing, he spoke with final policymaking authority on the issue, and his conduct is chargeable to the city.

Stamford does not fare any better under the alternative scenario, because the city concedes that desk sergeants are municipal policymakers. Therefore, if Perrotta—the desk sergeant on duty the night of Friend's arrest, who claimed he had "no reason to believe" he was not involved in setting Friend's bail—was instead the person who set Friend's bail, his conduct is chargeable to the municipality.

Either way, the result is the same: Friend's bail was decided by a *Monell* policymaker, and this Court should reverse and remand for further proceedings consistent with that holding.

2.1 Stamford's 'custom or usage having the force of law' delegated bail setting authority to supervisors like Gasparino.

To identify a *Monell* policymaker, a trial court must take two steps: First, examine the sources of law that bear on the issue—and not just state or local law, but also "custom or usage having the force of law." *Id*. Then, determine which municipal official has "final policymaking authority" with respect to "the particular conduct challenged in the lawsuit." *Roe v. City of Waterbury*, 542 F.3d 31, 37 (2d Cir. 2008).

2.1.1 Longstanding practice in the Stamford police department permitted "any sergeant" to decide conditions of release.

Friend presented three sources of law that bear on the issue of who sets bail in Stamford. The first is a statute mandating that the police chief or an "authorized designee" set bail for a person who is arrested. Conn. Gen. Stat. § 54-63c(a). The second is the Stamford policy duly enacted by its police chief, Police Procedure 120, which delegates bail

decisions to desk sergeants. And the third is custom: Stamford's longstanding practice, confirmed by its deponents and documentary evidence, that "any sergeant can set a bond." JA201, 208.

The district court ignored this third category. Instead, it summarily concluded that Friend "cites no law on point to support the proposition that Gasparino, a police sergeant, was a 'policymaker' with regard to the issue of setting bail in the city of Stamford." JA803. Yet the Supreme Court places "custom or usage having the force of law" on par with other sources of law when it comes to identifying *Monell* policymakers. *Jett*, 491 U.S. at 737. This is unsurprising given that custom also plays a key, liability-generating role in the wider *Monell* ecosphere, and in Section 1983 jurisprudence more generally. *See Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 870–71 (2d Cir. 1992) (internal citation omitted) (holding, for *Monell* claims generally, that "[w]here the "practices of city officials are persistent and widespread, they could be so . . . 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 (1970) (holding that "custom or usage," not just "written law," "must have the force of law" in the Section 1983 context).

Therefore, the district court was not at liberty to simply bypass evidence presented by Friend regarding persistent, widespread bail-setting

practices within Stamford—in the words of *Jett*, "the 'standard operating procedure' of the local governmental entity," 491 U.S. at 737—when identifying the city's *Monell* policymakers on the issue of bail-setting.

That evidence included that by longstanding custom, Stamford delegated bail-setting power to supervisors beyond those working as desk sergeants, including patrol sergeants such as Gasparino. In Stamford, as Gasparino declared, "[a]ny sergeant can set a bond." *See* JA082 at Nos. 36, 37, and JA201, 208, 223. Desk sergeants are not required to review bails set by other sergeants. JA084 at No. 51, and JA213, 229. Practically speaking, some do and some do not. Regardless, there is no way for a bailee to appeal a bond once set. JA083 at No. 49, and JA229-30, 273-75.

It is notable that Connecticut law explicitly envisions the possibility of multiple *Monell* policymakers in the bail-setting context. By statute, bail-setting may be performed not just by a police chief, but by whomever the police chief deems an "authorized designee." Friend's claim is thus *unlike* the many cases in this Circuit focused on the policymaking authority of various actors in New York's education law, which arguably leave no room for delegation or multiple policymakers. *E.g.*, *Agosto v. New York City Dep't of Educ.*, 982 F.3d 86, 99 (2d Cir. 2020) (finding no possibility of delegation within New York education law, and thus no policymaking status

for principals, where "only the chancellor has authority to make 'a final determination' when teachers appeal poor ratings . . . and to resolve formal disciplinary proceedings brought against teachers and staff"). Other cases in this Circuit that discount *Monell* liability similarly rely on legally imposed impossibility of multiple *Monell* policymakers. In *Jeffes v. Barnes*, for instance, this Court found dispositive that "[n]or does local County law provide any indication that there is any final policymaker other than the Schenectady County sheriff with respect to operations at the Jail." 208 F.3d 49, 60 (2d Cir. 2000).

The *Agosto* court found that New York City's chancellor of education was the sole *Monell* policymaker because he was the only one with authority in certain areas of employee discipline. The *Jeffes* court found that the county sheriff was the sole *Monell* policymaker because he was *not* required "to answer to any other entity in the management of his jail staff with respect to" the practice at issue in that case: "the existence or enforcement of a code of silence" among employees. 208 F.3d at 60. But this is not *Agosto*, and this is not *Jeffes*. Connecticut law expressly creates

the possibility of multiple *Monell* policymakers on the issue of bail-setting, and Gasparino was one of them.[5]

2.1.2. Gasparino's bail decision was unreviewable in practice, and therefore final.

Secondly, the district court failed to examine the finality of Gasparino's decision making when determining bail. *E.g.*, *Roe*, 542 F.3d at 37. The unreviewability of a decision has long been found by this Court to be a significant indicator of *Monell* policymaker status. *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 45 (2d Cir. 1983) (finding that executive director for hospital and vice president for corporate affairs were municipal policymakers because their "decisions, at the time they [we]re made, for

---

[5] Delegation has always featured prominently in *Monell* policymaker case law. In 1986, less than a decade after *Monell*, the Supreme Court court confirmed that "[a]uthority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority . . . ." *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483 (1986). And in a recent summary ruling, this Court considered whether an individual board member of the Battery Park City Authority had been delegated authority such that he was a policymaker on the issue of banning people from meetings. *See Greer v. Mehiel*, 805 F. App'x 25, 31 (2d Cir. 2020). It confirmed that New York law authorizing such boards has an open-ended delegation provision making such a scenario possible, though ultimately decided that the person who banned Green had not been delegated the power. *Id.*

practical or legal reasons constitute the municipality's final decisions"). An individual's title, taken alone, is "not dispositive of his authority to make policy": "Equally important [is] evidence that [his] authority over personnel decisions was final." Id. Accordingly, "municipal liability may be predicated upon the constitutional acts of a subordinate official who has been delegated final authority in limited areas"—in this case, Gasparino. *Id.* n.3. (In fact, all employees at issue in this case are officially of the same rank: sergeant. Stamford's 30(b)(6) deponent testified that desk sergeants and patrol sergeants are equally positioned, as both are supervisors and both report to lieutenants. JA237.) In this dispute, Stamford contended in the district court that Gasparino was not the final decision maker because Police Procedure 120 delegates bail-setting from the police chief to desk sergeants. In Stamford's formulation, that written delegation silently rendered all bail-setting subject to review by desk sergeants and hence, Gasparino could not have been the final decision maker.

But 'review' cannot be a paper tiger. "[A]ny review procedure or constraints must be meaningful—as opposed to merely hypothetical—in order to strip an official of 'final policymaking' authority." *Randle v. City of Aurora*, 69 F.3d 441, 449 (10th Cir. 1995) (emphasis in original). *See also Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1295 (11th Cir. 2000)

("The opportunity for *meaningful* review will suffice to divest an official of any policy making authority.") (emphasis added).

Time is one barometer of meaningfulness. Review that is theoretically available, but practically incapable of occurring before it is pointless, renders the decision final. The Eleventh Circuit illustrated the principle in *Holloman v. Harland*. There, a high school teacher reacted badly to a student's speech and gave him a choice: either accept corporal punishment or be excluded from graduation ceremonies that were "a few days away." 370 F.3d 1252, 1293 (11th Cir. 2004). Although a multi-level disciplinary appeal procedure existed on paper, it would have taken weeks to conclude, at best. Thus, "as a practical matter," the school employee who levied the punishment was the final decisionmaker for *Monell*. *Id.*

The obscurity of review is a second yardstick of finality. An established, known procedure that is available for the plaintiff to use to contest an adverse decision tends to show that the adverse decisionmaker was not the 'final' one in *Monell* terms. *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988) (holding that supervisor was not final decisionmaker where there existed a civil service commission to which the plaintiff made "repeated appeals").

But the possibility of 'review' that Stamford identified as defeating the finality of Gasparino's bail-setting decision was completely hidden from Friend. Although some Stamford employees testified that a detainee could ask to have a bail decision reviewed, they did not tell detainees this. Friend was never told that he could ask to have his bail decision reviewed, let alone whom to ask. Locked in a cell, he was not in a position to circulate the office and ask, or to leaf through the police department's Manual of Procedure and divine that Police Procedure 120 possibly vested review in the desk sergeant. For Friend, alone in his cell that night, Gasparino's decision on bail was, for "practical" reasons, the last word. *Rookard*, 710 F.2d at 45 (2d Cir. 1983).

2.2 The alternative—that the desk sergeant on duty that night set Friend's bail—equally cements Stamford's eligibility as a *Monell* defendant.

Lastly, Stamford's proffered alternative—that Perrotta the desk sergeant was the municipal policymaker by virtue of Police Procedure 120—does not help it avoid liability. Rather, it leads directly to the conclusion that Stamford is responsible for the constitutional violations.

Perrotta gave undisputed testimony that he was the desk sergeant on duty when Friend's bail was set. JA480-84, JA586. While he initially stated

at deposition that he did not recall setting bail for Friend, in an affidavit submitted at summary judgment, Perrotta offered that there was "no reason to believe that I did not do what I normally do when I am the [d]esk [s]ergeant"—that is, set bail. JA480-84. Taking this version of events as true, it is a direct route to *Monell* eligibility.

First, "[a] single action on a policymaker's part is sufficient to create a municipal policy." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 125 (2d Cir. 2004); *see also Pembaur*, 475 U.S. at 471 (holding that a decision by a municipal policymaker on even "a single occasion" may expose the municipality to Section 1983 liability); *Jeffes*, 208 F.2d at 57 (same).

Second: Perrotta, as a desk sergeant, is unquestionably a *Monell* policymaker on bail-setting for Stamford. "Whether an official has final policymaking authority is a legal question, determined on the basis of state law." *Roe*, 542 F.3d at 37. Conn. Gen. Stat. § 54-63c(a) mandates that the "chief of police, or . . . authorized designee" set bail, and in Stamford, the police chief's "authorized designee," per Police Procedure No. 120 in the Department's Manual of Procedure, is the desk sergeant.

At summary judgment, Stamford admitted as much. As the district court explained, "Stamford clarifies that the desk sergeants are responsible for setting bail." JA587, 798. ("Desk sergeants have ultimate responsibility

for setting bail") (citing Stamford's Statement of Undisputed Material Facts Nos. 23 and 24).

But the city cannot have it both ways. If Stamford contends that only desk sergeants may make bail decisions, and thus that Perrotta, as desk sergeant, must have made Friend's bail decision, it is chargeable to the municipality as the act of a municipal policymaker. But if Perrotta did not make the decision, Gasparino's "authority was not constrained by any other policymaker," *Williams v. Butler*, 863 F.2d 1398, 1402 (8th Cir. 1988), and thus Gasparino is himself a municipal policymaker. In other words, the fact that a bail decision could go forward without Perrotta's involvement would itself be evidence of Gasparino's policymaking authority. *See Rookard*, 710 F.2d at 46 n.5 (explaining that higher-ups' "failure to intervene is relevant not as a ratification of the transfer and discharge, but as indirect evidence of the scope of [the claimed policymakers'] authority").

Because the district court never got past *Monell* policymaker identification, this Court should remand to the district court for further proceedings. "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at

issue by policies which affirmatively command that it occur." *Jett*, 491 U.S. at 737.

3. Conclusion

For the foregoing reasons, the judgment of the District Court should be vacated, and the case remanded for entry of summary judgment in favor of Friend on Counts One through Three, and a decision on the merits of Counts Four and Five.

/s/ Dan Barrett_____
Dan Barrett
Elana Bildner
ACLU Foundation of Connecticut
765 Asylum Avenue
Hartford, CT 06105
Phone: (860) 471-8471
e-filings@acluct.org

Counsel for Appellant

Federal Rules of Appellate Procedure Form 6
Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) because it contains 8,494 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Georgia font.

/s/ Dan Barrett_____
Dan Barrett

January 29, 2021