UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ADELANA AKINDES, OSCAR WALTON,
DANICA GAGLIANO-DELTGEN, and
VICTOR GARCIA, on behalf of themselves
and other similarly situated individuals,

Plaintiffs,

CASE NO. 20-CV-1353

v.

CITY OF KENOSHA, KENOSHA COUNTY,
DAVID BETH, in his Individual Capacity,
DANIEL MISKINIS, in his Individual Capacity, and
JOHN DOES 1-100, in their Individual Capacities.

Defendants.

BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT by CITY OF KENOSHA, DANIEL MISKINIS, AND JOHN DOES 1-100

The City of Kenosha, Daniel Miskinis, and John Does 1-100 by their attorneys, MUNICIPAL LAW & LITIGATION GROUP, S.C., respectfully submit this Brief in Support of their Motion to Dismiss to Plaintiffs' Amended Complaint.

The City of Kenosha recently faced unprecedented riotous activity during protests, including nationally observed and documented destructive activity of property and persons. To protect the community, a State of Emergency Curfew Order was implemented and arrests followed for violations of the Emergency Curfew Order. The City has never faced such a situation before and, therefore, lacks a track record sufficient to support many of the allegations presented in this lawsuit. Plaintiffs here should not be able to hold the City of Kenosha financially liable based on formulaic conclusions and speculation about motives and what the future might hold for protest

activities, all while overlooking the fact that probable cause for their own arrests in violation of the Emergency Curfew Order may serve as not only a bar to their First, Fourth, and Fourteenth Amendment claims but may deprive this Court of subject matter jurisdiction.

BACKGROUND

Plaintiffs allege constitutional violations stemming from enforcement of a State of Emergency curfew enacted in Kenosha County to curb violence associated with protests following the shooting of Jacob Blake on August 23, 2020. (Dkt. 16, Amend. Compl. ¶¶ 12-13, 18, 20, 23-25, 27-28, 30, 32.). Demonstrations in response to such "police brutality" began "almost immediately." (*Id*. ¶ 13). During the course of these demonstrations, Plaintiffs acknowledge there was "destructive activity, (*Id*., ¶ 14), albeit only with scant reference in their Complaint. The rioting, mayhem, and attacks on person and property were extensive, especially in the nighttime hours, making national news and catching the attention of the President, Governor, and National Guard.

The issuance of a curfew was widely known, having been publicized by the Kenosha County Sheriff, (*Id*., ¶ 18) as well as media outlets.[1] Plaintiffs allege Police Chief Daniel Miskinis directed his officers to make arrests of protestors for violating the curfew on August 24, August 25, and August 26. (Dkt. 16, Amend. Compl. ¶ 25, 28, 32.)

The curfew was in place from August 23, 2020 to September 2, 2020. On August 23, 2020, the Kenosha County Sheriff's Department issued a media release announcing a curfew. (*Id*. at ¶ 23, Ex. 3.) On August 24 and 25, Kenosha County Sheriff's Department issued similar media releases announcing a curfew beginning at 8:00 p.m. for the area "East of I-94." (*Id*. Ex. 4, 5.) Also

[1] *See e.g.*, https://www.nbcchicago.com/news/local/kenosha-curfew-to-remain-in-effect-through-labor-day-officials-say/2331849/; https://www.wbay.com/2020/08/30/kenosha-curfew-extended-through-at-least-wednesday-morning/; https://www.tmj4.com/news/local-news/emergency-curfew-extended-in-kenosha-through-tuesday

on August 25, 2020, Kenosha County Sheriff David Beth issued a press release pleading with the public to abide by the curfew and not to engage in destructive behavior.[2]

On August 26, the curfew was issued from 7:00 p.m. to 7:00 a.m. for the area "East of I-94" and through Sunday, August 30th. (*Id*. Ex. 6.) On August 30, the curfew was issued for August 31 and September 1 from 7:00 p.m. to 7:00 a.m. for the same area.[3] On September 1, Kenosha County Sheriff's Department issued a media release stating that the curfew would remain in effect from 7:00 p.m. to 7:00 a.m. through September 2 at 7:00 a.m.[4] On September 2, when violent acts had subsided, the curfew ended.[5]

Plaintiffs are protestors with viewpoints against the police (described as "anti-police") in Kenosha during the above times. (Dkt. 16 Amend. Compl. ¶¶ 54-55, 58-59, 62-63, 66-67.) Plaintiffs assert they were all arrested for violating the curfew. (*Id*. at ¶¶ 56,60, 64, 68.) Plaintiffs' Amended Complaint asserts the Kenosha Police and Sheriff's Office "use [the State of Emergency curfew] as a tool to silence those peaceful protesters who dare to confront this police department's brutality." (*Id*. at ¶ 51.) "Even though there were both pro-police and anti-police brutality protestors, ONLY anti-police protesters have been arrested under this ordinance." (*Id*. at ¶ 46.)

Plaintiffs each assert they intend to continue to protest in Kenosha but will either be arrested or chilled from participating in such protests for fear of arrest. (*Id*. at ¶¶ 57, 61, 65, 69.)

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[2] "Tuesday evening, Aug. 25, Statement from Kenosha County Sheriff David Beth," available at https://www.kenoshacounty.org/CivicAlerts.aspx?AID=1811. This Court can take judicial notice of the Kenosha County Sheriff's Office media releases announcing the State of Emergency Curfew because they are not in dispute and matters of public records. The media releases are publicly available at the Kenosha County Sheriff's Department website: https://www.kenoshacounty.org/CivicAlerts.aspx?CID=16. "A document posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website itself." *Qui Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013) See also *Denius v. Dunlap*, 330 F.3d 919, 926-27 (7th Cir. 2003) (taking judicial notice of information found on National Personnel Records Center's website).

[3] "State of Emergency Curfew west of I-94 to continue nightly through Tuesday, Sept. 1, available at https://www.kenoshacounty.org/CivicAlerts.aspx?AID=1823.

[4] "Nightly curfew to continue through night of Sept. 6; to begin at 9 p.m. Wednesday-Sunday," available at https://www.kenoshacounty.org/CivicAlerts.aspx?AID=1827.

[5] "UPDATE: Nightly State of Emergency Curfew now suspended," available at, https://www.kenoshacounty.org/CivicAlerts.aspx?AID=1829.

The Amended Complaint alleges the following claims against the City, its Police Chief and its police officers: Count IV Unlawful Seizure (against City and Chief Miskinis); Count V Equal Protection – Selective Enforcement (against City and John Does 1-100); and Count VI First Amendment Retaliation (against City and John Does 1-100). Besides damages, Plaintiffs seek class certification, injunctive relief and declaratory relief. (Dkt. 16, Amend. Compl. p. 22.)

STANDARD OF REVIEW

When considering a Rule 12(b)(6) motion to dismiss, a court should accept "the well-pleaded facts in the complaint as true." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011). This standard, however, is not a free pass to the federal courthouse: "Importantly, the Supreme Court's decisions in *Twombly* and *Iqbal* ushered in a requirement that civil pleadings demonstrate some merit or plausibility in complaint allegations to protect defendants from having to undergo costly discovery unless a substantial case is brought against them." *United States v. Vaughn*, 722 F.3d 918, 926 (7th Cir. 2013). A complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* At a minimum, the complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully…. When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to

relief." *Iqbal*, 556 U.S. at 678. If allegations give rise to an "obvious alternative [legitimate] explanation" for the allegedly wrongful conduct, the claim fails to meet the plausibility requirement and must be dismissed. *Id*. at 678. Moreover, "[i]f discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim." *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008).

ARGUMENT

I. PLAINTIFFS' MUNICIPAL LIABILITY CLAIMS FAIL TO MEET THE REQUISTE PLEADING STANDARDS.

Plaintiffs allege the City of Kenosha had policies and customs of violating the freedom of expression of protestors, retaliating on the basis of viewpoint, enforcing certain ordinances on the basis of race and viewpoint (dkt. 16 ¶ 70) infringing on peoples' rights to assemble, to protest, to express their political and other beliefs on the basis of their viewpoint (*Id.* ¶ 73), and that Police Chief Miskinis is a final decision maker whose "instruction to arrest protestors under a State of Emergency he knew to be unlawful represents an official policy of the City of Kenosha." (*Id.*).

However, Plaintiffs' municipal liability claims fail to meet the *Twombly-Iqbal* pleading requirements. *Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658, 691 (1978). To withstand a motion to dismiss, a complaint must contain facts that state a claim that is "plausible on its face," such that the defendant's liability is a "reasonable inference" from the facts. *Twombly*, 550 U.S. at 566, 570. The Supreme Court articulated a two-part test for a motion to dismiss. *Iqbal*, 556 U.S. at 679. First, a court should identify any conclusory statements that are not entitled to the assumption of truthfulness. *Id*. at 683 (quoting *Twombly*, 550 U.S. at 570.) Second, a court should review the remaining factual allegations to determine if they "nudge" the claim "across the line from conceivable to plausible." *Id*.

"[A] municipality cannot be held liable under § 1983 on a *respondeat* superior theory." *Monell*, 436 U.S. at 691. Under *Monell*, municipal liability exsts only "when execution of a government's policy or custom, whether made by its law-makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id*. at 694. The Seventh Circuit identified three different ways in which a municipality or other local governmental unit might violate § 1983: (1) through an express policy, statement, ordinance, or regulation that, when enforced, causes a constitutional deprivation; (2) through a "wide-spread practice" that although not authorized by written law and express policy, is so permanent and well-settled as to constitute a "custom or usage" with the force of law; or (3) through an allegation that the constitutional injury was caused by a person with "final decision policymaking authority." *McTigue v. City of Chicago*, 60 F.3d 381, 382 (7th Cir. 1995). *Monell's* rules and requirements apply equally to any claim for an injunction against the municipality. *See Los Angeles County v. Humphries*, 562 U.S. 29 (2010).

Here, as noted above, Plaintiffs allege claims for "policies and customs" and final policy maker which do not meet the standards set forth in *Twombly/Iqbal*:

First, Plaintiffs' Amended Complaint fails to identify any official written policy of the City of Kenosha regarding a curfew order or any other written policies that are the subject of their lawsuit. The only "policy" identified in Plaintiffs' Amended Complaint is the Emergency Curfew order instituted by *Kenosha County*, a separate governmental body. The failure to identify a city of Kenosha policy defeats Plaintiffs' claim: "[l]ocating a policy ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997). *See also Glisson v. Indiana Dep't of Corrs*., 849 F.3d 372, 381 (7th Cir. 2017) ("The critical question under *Monell* remains this: is

the action about which the plaintiff is complaining one of the institution itself, or is it merely one undertaken by a subordinate actor?").

Second, Plaintiffs did not adequately plead a custom or practice claim. While a custom or practice "may be so persistent and widespread [such that it has] the force of law," when identifying such custom, "[t]he word 'widespread' must be taken seriously." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167 (1970). The critical issue is whether there was a particular custom or practice that was so well-settled that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it, yet did nothing to end the practice. *Board of County Comm'r v. Brown*, 520 U.S. 397 (1997). *See, e.g., Jenkins v. Bartlett*, 487 F.3d 482 (7th Cir. 2007) (four deadly force incidents was not enough to provide the city with actual or constructive knowledge); *Gable v. City of Chicago*, 296 F.3d 531, 538-539 (7th Cir. 2002) (three incidents over four-year period in which city agents erroneously informed vehicle owners that their automobiles were not impounded at city lot were too few to support municipal liability); *Robles v. City of Fort Wayne*, 113 F.3d 732, 737 (7th Cir. 1997) (evidence failed to support plaintiff's claim that City had policy of investigating citizen complaints against police officers in such way as to exonerate officer where evidence indicated four citizen complaints against officer were not sustained while fifth was sustained after internal investigation).

In *Lytle v. Doyle*, the Fourth Circuit found that a police department did not have a policy or custom of enforcing a loitering statute on bridges after pro-life protestors were arrested on a bridge pursuant to a lieutenant's memo in a roll call book. 326 F.3d 463, 471-72 (4th Cir. 2003). The court held that the memo did not constitute an official policy because it was never approved by the city manager and there was no evidence that the memo was enforced after the incident in

question. *Id*. Nor did this single occasion of enforcement give rise to the sort of widespread and permanent practice necessary to establish a custom or practice. *Id.*

In addition to establishing widespread conduct, a plaintiff must also allege and show deliberate indifference. *Thomas*, 604 F.3d at 303. Under this stringent standard, "it is not enough to demonstrate that policymakers could, or even should, have been aware of the unlawful activity because it occurred more than once." *Phelan v. Cook Cnty*., 463 F.3d 773, 790 (7th Cir. 2006).

Proof of deliberate indifference can take one of two forms: (1) "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need"; or (2) "a repeated pattern of constitutional violations" made the deficiencies in the systems "plainly obvious to the city policymakers." *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007*). See also Connick v. Thompson*, 131 S. Ct. 1350, 1365 (2011) (while "highly predictable" is a viable basis to establish deliberate indifference, it was not highly predictable in this case that failure to better train prosecutors on Brady obligations would have resulted in the production of the exculpatory evidence and prevented plaintiff's wrongful conviction).

Deliberate indifference is a high bar to plead and prove. For example, in *McCauley v. City of Chicago*, 671 F.3d 611 (7th Cir. 2011), the Seventh Circuit held that the complaint, which alleged an equal protection claim, failed to meet the pleading standards under *Twombly/Iqbal*. The core allegation in *McCauley* was that the City of Chicago "failed to have adequate policies in place for the protection of female victims of domestic violence." *McCauley*, 671 F.3d at 614. The Seventh Circuit determined the complaint failed to state a claim:

> The allegations … do not plausibly suggest that the City maintained a policy or practice of selective withdrawal of police protection. To the contrary, the complaint alleges that the City failed to have particularized practices in place for the special protection of domestic

> violence victims. In essence, the complaint alleges that the City failed to promulgate specific policies for this particular class of crime victims, not that the City denied this class of victims equal protection. At most, the factual allegations in the complaint plausibly suggest the uneven allocation of limited police-protection services; they do not plausibly suggest that the City maintained an intentional policy or practice of omitting police protection from female domestic-violence victims as a class.

Id. at 618-19.

Here, as against the City, Plaintiffs fail to allege factual averments showing widespread conduct and deliberate indifference in handling protests, riotous events and curfews.

Plaintiffs do not make any allegations that describe or even suggest widespread conduct that could support a claim of municipal liability. Plaintiffs only point to the protests that occurred immediately following the Blake shooting. They do not point to any other instances of protests, emergency orders or curfew enforcement, whether in the past or ongoing. Indeed, there is *no allegation* that enforcement of an emergency order curfew, occurred at any other time period, let alone with sufficient frequency.

Additionally, Plaintiffs did not plead deliberate indifference. Plaintiffs' Amended Complaint makes no *factual* allegations that the alleged deprivations were so widespread so as to constitute deliberate indifference. Plaintiffs purport to be "anti-police protestors" and claim that they were arrested because of this purported affiliation. However, they do not allege the City police have previously handled protests with curfew arrests or viewpoint discrimination such that their deficient training has become (a) "so obvious" and "the inadequacy so likely" to result in constitutional deprivations or (b) that the repeated pattern of violations created systematic deficiencies "plainly obvious" to the City policymakers. Moreover, Plaintiffs do not set forth any factual averments regarding when any alleged violations were brought to light of the City and what corrective action the City failed to issue in order to avoid the "highly predictable" likelihood that repeat constitutional violations would occur. There is simply no allegations nor inferences that any

alleged violations had been occurring for any length of time historically such that the City has been aware of the constitutional risks. The absence of such allegations is not just fatal to the *Monell* claim, it is remarkable given the fact that three months earlier the City saw protests in the wake of the national outcry over the Minneapolis police shooting of George Floyd.

Third, Plaintiffs have pled no facts giving rise to municipal liability based on failure to train. To state a claim for a municipal civil rights violation based on a failure to train, a plaintiff must allege that the municipality adopted a policy that amounts to "deliberate indifference to the rights of the person with whom the [untrained employees] come into contact. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). For example, a city may be deliberately indifferent if its policymakers choose to retain a program which they have actual or constructive notice that one of their training programs causes city employees to violate citizens' constitutional rights. *See generally, Connick.* Additionally, a city's policy of inaction in light of notice that its program will cause constitutional violations "is the functional equivalent" of a decision by the city itself to violate the Constitution. *Id*. at 61-62.

To establish a failure to train claim, "[a] pattern of similar constitutional violations is ordinarily necessary to demonstrate deliberate indifference." *Id*. at 62. (citations omitted). Even if "a particular officer may be unsatisfactorily trained" that "will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *City of Canton v. Harris*, 489 U.S. 378, 390-91 (1989). A plaintiff must allege more than mere conclusory allegations that the alleged constitutional violation was the result of inadequate training. For example in *Moss v. U.S. Secret Service*, 675 F.3d 1213, 1231 (9th Cir. 2012) (reversed on other grounds) the Ninth Circuit granted defendants' motion to dismiss because

the plaintiffs in that case – protestors of President Bush – did not specify *in what way* any training or supervision was deficient.

Here, again, Plaintiffs fail to allege sufficient facts to establish deliberate indifference. Plaintiffs do not allege any facts that the City of Kenosha or Chief Miskinis was aware of or put on notice of any allegedly unconstitutional conduct attributable to inadequate training. Plaintiffs also do not allege *how* the City of Kenosha and/or Chief Miskinis failed to train its officers. Nor do they even allege, through plausible facts or even threadbare legal conclusions, that the City and/or Chief Miskinis knew it was highly predictable that such constitutional deprivations would occur without more or different training of its police officers because there was a pattern of similar constitutional violations. "Without notice that a course of training is deficient in a particular respect, decision-makers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Connick*, 563 U.S. at 62.

Fourth, Chief Miskinis is not a final policymaker such that municipal liability may apply to his decisions. The Amended Complaint contains no factual averments establishing Chief Miskinis is the final policymaker *for making law or setting policy.* Rather, under Plaintiffs' own allegations, Kenosha County and the Sheriff made law or set policy.

Chief Miskinis' conduct cannot create policy unless based on the decision of a municipal policymaker with *final authority in the area in question* as defined by state law. *St. Louis v. Praprotnik*, 485 U.S. 112, 123-127 (1988); *Radic v. Chicago Transit Authority*, 73 F.3d 159, 161 (7th Cir. 1996). "In order to have final policymaking authority, *an official must possess '[r]esponsibility for making law or setting policy,' that is, 'authority to adopt rules for the conduct of government.'" Killinger v. Johnson*, 389 F.3d 765, 771-772 (7th Cir. 2004) (emphasis added) (quoting *Rasche v. Village of Beecher*, 336 F.3d 588, 599 (7th Cir. 2003)). The mere authority to

implement pre-existing rules is not the authority to set policy. *Rasche*, 336 F.3d at 601. Accordingly, because Plaintiffs do not allege that Chief Miskinis set the curfew or put in place the Emergency Management Order – but rather Kenosha County or the Sheriff did so (Amd. Compl. ¶¶ 17-24, 27, 30, 74; see also Count II and Count III) – the Amended Complaint fails to state a final policymaker claim against Chief Miskinis as a matter of law and, consequently, he must be dismissed from the action in this regard.

Additionally, the question of whether a government actor "has final policymaking authority is a question of state or local law." *Milestone v. City of Monroe, Wis.*, 665 F.3d 774, 780 (7th Cir. 2011. The fact that a particular official - even a policy making official - has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-482 (1986). If the government actor's decisions are subject to review by a higher authority, then that individual is not a final policymaker, and the municipality is not liable. *Milestone*, 665 F.3d at 780. "The question is whether the promulgator, or the actor, as the case may be—in other words, the decisionmaker—was at the apex of authority for the action in question." *Id.* at 468.

In the City of Kenosha, power is vested with the City Council pursuant to Wis. Stat. § 62.11(5). Under Wis. Stat. § 62.13(1), the City has a board of police and fire commissioners. By Ord. § 1.06(B), the City of Kenosha Board of Police and Fire Commissioners (PFC) operates under Wis. Stat. § 62.13.[6] The Police Chief is appointed by the Police and Fire Commission. Ord. § 1.05(A)(1); Wis. Stat. § 62.13(3). The Police Chief commands the police force of the city "under the direction of the mayor" and "shall obey all lawful written orders of the mayor or common council." Wis. Stat. §62.09(13)(a). The Wisconsin Legislature commanded the Police Chief "shall

[6] https://www.kenosha.org/images/GENORD.pdf

arrest with or without process and with reasonable diligence take before the municipal judge or other proper court every person found in the city engaged in any disturbance of the peace or violating any law of the state or ordinance of the city." *Id*. The Police Chief holds his office "during good behavior, subject to suspension or removal by the board for cause." Wis. Stat. § 62.13(3).

Here, Chief Miskinis' actions are subject to and constrained by the higher governance which belongs with the City Council generally (creation of laws, setting policy, emergency powers and the like) and, for some matters, the Police and Fire Commission. A higher authority exists above Chief Miskinis. He does not set policy or create laws, nor do Plaintiffs here allege that he set the curfew or emergency management orders. Even if they were to re-plead in order to *allege* he created or issued the curfew order, such allegations would be futile under Wisconsin Statutes and City Code set forth above. Ultimately, Chief Miskinis is being sued because he had his police force enforce the curfew order, which is not unlike his instruction (and command from the Wisconsin Statutes) to direct his officers to enforce the laws and preserve the peace generally. Chief Miskinis could have chosen to (a) do nothing or (b) enforce the curfew order. His discretionary decision to select option B does not make him a final policymaker under all the authorities above. *See also Argyropoulos v. City of Alton*, 539 F.3d 724, 740 (7th Cir. 2008) (plaintiff failed to establish "by reference to applicable state or local law" that police chief was final policymaker); *Ores v. Vill. of Dolton*, 152 F. Supp. 3d 1069, 1090 (N.D. Ill. 2015) (village police chief was not a final policymaker for similar reasons given the Village's structure and PFC).

In sum, Plaintiffs do not allege any facts establishing a specific policy, custom, final policymaker, or failure to train was *the cause* of their allegedly retaliatory arrests. Before *Monell* liability can attach, a plaintiff must "demonstrate that, through its deliberate conduct, the

municipality was the 'moving force' behind the injury alleged." *Bryan County*, 520 U.S. at 404. The Plaintiffs have not pled "the requisite degree of culpability." *Id*. And, as discussed below, they have to sufficiently alleged a plausible constitutional violation; without such violation, there can be no *Monell* liability.

II. PLAINTIFFS' FIRST, FOURTH, AND FOURTEENTH AMENDMENT CLAIMS MUST BE DISMISSED.

Additionally, Plaintiffs' underlying constitutional claims – under the First Amendment, the Fourth Amendment, and the Fourteenth Amendment – fail to state a claim as a matter of law.

a. COUNT VI FIRST AMENDMENT RETALIATION – CITY AND DOES 1-100

In their Amended Complaint, Plaintiffs allege that they were retaliated against, on the basis of their viewpoint, for observing, recording, and participating in protests. (Dkt. 16. ¶¶ 120-131.)

Such claims under the First Amendment require pleading certain factual allegations. Under *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019) plaintiffs alleging First Amendment retaliatory arrest cases must allege in their complaint, as a threshold matter, that the decision to arrest lacked probable cause. In a retaliatory arrest claim, "it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct. *Id*. at 1724. The Supreme Court unequivocally required in *Nieves* that "[a] plaintiff pressing a retaliatory arrest claim ***must plead and prove*** the absence of probable cause for the arrest." *Id*.(emphasis added); *see also Lund v. City of Rockford, Ill*., 956 F.3d 938 (2020).

Here, Plaintiffs' Amended Complaint is bare of any factual averments that they were arrested without probable cause or that their ongoing proceedings have reached disposition favorable to them. It is unreasonable to presume, under the *Twombly/Iqbal* pleading standards, that the arrests were made without probable cause. Nor could the Plaintiffs try to plead around this as their Amended Complaint implicitly acknowledges they were arrested for violating the

curfew: if the police officers arrested them prior to the start of the curfew, minutes into it, or on days without a curfew, surely they would have presented such allegations.

Acknowledging they were arrested squarely within the confines of the Emergency Curfew, Plaintiffs instead allege, generally, that they were arrested for their expressions. However, Plaintiffs cannot use the First Amendment as a shield against prosecution, if indeed there was probable cause, and they certainly cannot use it a sword to commence Section 1983 civil rights claims at this time against the City and police officers when the criminal courts have yet to reach disposition of their arrests and charges. All four Plaintiffs have been charged with a violation of Wisconsin State Statute 323.28 for "Failure to Comply With Emergency Management Order of State of Local Government," which is a non-criminal forfeiture action currently underway in the state courts. (*See generally*, Kenosha County Case Nos. 2020FO596 (Akindes), 2020FO595, 2020FO589 (Gagliano-Deltgen), 2020FO594 (Garcia) and 2020FO573 (Walton).) None of these cases have concluded; all four of the Plaintiffs have pre-trial conferences scheduled next month.

Under *Nieves*, therefore, the Plaintiffs cannot allege *Monell* liability against the City or against the individual officers for First Amendment constitutional deprivations in the form of retaliatory arrests unless they can plead their arrests lacked probable cause. They did not do so here and cannot do so while the state court system is still evaluating the probable cause giving rise to the non-criminal forfeiture complaints against them.[7]

Until the citations against the Plaintiffs reach a disposition in the state court proceedings, which will necessarily address whether they were supported by probable cause, the First

[7] Further, because the probable cause inquiry in those cases is not insurmountable, it is all the more reason under *Iqbal/Twombly* and *Nieves* to avoid presuming their retaliatory arrest claims are ripe. Probable cause is to be made based on the "totality of the circumstances" and is a fluid concept. *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id*. Thus, probable cause exists if a reasonable officer would have believed, at the time, that there was a probability or substantial chance the plaintiffs were failing to comply with the Emergency Curfew in violation of Wis. Stat. § 323.28.

Amendment retaliatory arrest claims are not mature or ripe to convey federal court subject matter jurisdiction.[8] *See Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994) (a city may well have "a legitimate interest in quickly dispersing and removing lawbreakers with the least risk of injury to police and others. " Although many of [those] crimes were misdemeanors, the city's interest in preventing their widespread occurrence was significant: 'The wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, persistent, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of its citizens.'").

b. COUNT IV UNLAWFUL SEIZURE – CITY AND CHIEF MISKINIS

In a creative attempt to side-step *Nieves*, Plaintiffs' Amended Complaint presents a new claim for Unlawful Seizure (dkt. 16 Amend. Compl. Count IV). This claim is brought against the City of Kenosha and Defendant Miskinis, as a final policymaker. (*Id*; *Id*. at 110.) Plaintiffs contradictorily allege that no Emergency Management Order was in force at the time of Plaintiffs' arrest, despite Plaintiffs being arrested for failing to comply with the same. (*Id*. at 107-108.) They further allege that Chief Miskinis "as Chief of Police, was aware that no authority existed for the enforcement of a fake criminal law – that such law was in effect a limited use of martial law." (*Id*. at 109.) Plaintiffs allege they were detained for "many hours" following their arrests without cause and they complain that they are being prosecuted for their offenses. (*Id*. at 112.)

Plaintiffs cannot sidestep *Nieves* in this fashion. In *Nieves*, the plaintiff, sued officers for false arrest and imprisonment, excessive force, malicious prosecution, and retaliatory arrest.

[8] It is doubtful the Plaintiffs here will surrender their Fifth Amendment rights in civil litigation until there is a disposition of the charges against them. See e.g., *Chagolla v. City of Chi*., 529 F. Supp.2d 941, 947 (N.D. Ill. 2008) ("In the Court's experience, it is not at all rare for a person faced with criminal charges or a pending investigation to invoke the privilege even though he may have done nothing wrong, out of an abundance of caution prompted by a careful criminal defense lawyer.").

Given the prevalence of probable cause in the analysis, the Supreme Court found it did not need to distinguish between the various kinds of alleged torts at common law that defined the contours of the § 1983 claim. 139 S.Ct. at 1726-1727 & n. 2. Thus, the probable cause requirement remains.

Regardless, however, Plaintiffs failure to plead a lack of probable cause still defeats their claims. With respect to Plaintiffs' claim based upon their arrest, the absence of probable cause is an "essential predicate" to any claim under Section 1983 for unlawful seizure predicated on unlawful arrest. *Kelley v. Myler*, 149 F.3d 641, 646 (7th Cir. 1998) *Williams v. City of Chicago*, 733 F.3d 749, 756 (7th Cir. 2013) "Probable cause is an absolute defense to claims of wrongful or false arrest under the Fourth Amendment in Section 1983 suits." *Ewell v. Toney*, 853 F.3d 911, 919 (7th Cir. 2017)(citations omitted).

Additionally, the Fourth Amendment continues to govern a claim for unlawful pretrial detention even after an arrest. *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017); *Lewis v. City of Chicago*, 914 F.3d 472, 478 (7th Cir. 2019) ("[T]he general rule [is] that Fourth Amendment seizures are 'reasonable' only if based on probable cause to believe that the individual has committed a crime."). Again, the existence of probable cause defeats a claim for unlawful detention. *Id*. *See also Kelly v. Myler*, 149 F.3d 641, 646 (7th Cir. 1998).

As with Plaintiffs' First Amendment claim, Plaintiffs' Fourth Amendment claims premised on false arrest and detention must fail because Plaintiffs have not pled a lack of probable cause. To the contrary, it can be inferred through the Amended Complaint that Plaintiffs' were, in fact, arrested because they were out past the curfew. Plaintiffs' criminal matters have moved past the initial appearance phase and have been scheduled for pre-trial hearings in the coming months. The establishment of probable cause thus defeats Plaintiffs' Fourth Amendment claims.

c. COUNT V EQUAL PROTECTION – SELECTIVE ENFORCEMENT – CITY AND DOES 1-100

Plaintiffs' equal protection selective enforcement claim is brought against the City of Kenosha and John Does 1-100. (Dkt. 16, Amend. Compl. Count V.) Plaintiffs allege that none of the individuals who expressed a pro-police message were arrested and, therefore, Plaintiffs – as anti-police protesters who were arrested – were selectively treated. (Id. at 115-118.) They further allege that such alleged selective treatment was motivated by an intent to discriminate, punish, and inhibit the exercise of the First Amendment. (*Id*. at 118.)

This claim, like the seizure claim, is simply a creative end-around *Nieves* and the probable cause requirements. However, it fails for the same reasons outlined above. In addition, Plaintiffs' claims fall under a class of one analysis and, for the reasons set forth below, must also be dismissed.

The Equal Protection Clause of the Fourteenth Amendment prohibits state action that discriminates on the basis of membership in a protected class or irrationally targets an individual for discriminatory treatment as a so-called "class of one." *See Enquist v. Oregon Dep't of Agric*. 553 U.S. 591 (2008). Plaintiffs do not identify themselves or their class members as members of a protected class for purposes of their Equal Protection claim. Thus, Plaintiffs appear to be proceeding under a class-of-one claim premised upon selective enforcement.

Selective enforcement, by itself, does not violate the Equal Protection Clause. *Van Dyke v. Village of Alsip*, 819 Fed. Appx. 431, 432 (7th Cir. 2020). Indeed, selective enforcement that does not offend the constitution occurs when, for example, a municipality has limited resources. *See Sutton v. City of Milwaukee*, 672 F.2d 644, 648 (7th Cir. 1982) (holding that towing illegally parked cars of people with more than one unpaid ticket while not towing cars without such unpaid tickets did not offend the constitution due to limited resources.).

To establish a class of one equal protection claim for selective enforcement, then, a plaintiff must allege (1) he has been intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment or that the cause of the differential treatment is a "totally illegitimate animus" toward the plaintiff by the defendant. *McDonald v. Village of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004). "It is considerably harder" to prove a selective enforcement claim, *United States v. Hare*, 820 F.3d 93, 100 (4th Cir. 2016), because it requires identification of others who were not prosecuted. *Chavez v. Illinois State Police*, 251 F.3d 612, 640 (7th Cir. 2001).

In *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000), the Seventh Circuit dismissed a plaintiff's claim that the city police were unfair in responding to multiple complaints among neighbors. *Id*. at 1007. The plaintiff alleged that the police arrested him several times in response to complaints from his neighbors but they did not respond similarly to his complaints about his neighbors. *Id*. However, the Seventh Circuit held that plaintiff had merely alleged uneven enforcement of local laws and, thus, his claim was dismissed. *Id*. at 1007-08. The court held that, "to make out a prima facie case [for a class of one equal protection violation] the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position." *Id*.

Here, Plaintiffs assert no factual averments that any decision to institute and/or enforce the curfew were made pursuant to an improper motive as opposed to police officers merely fulfilling their duty of enforcement under Wis. Stat. §§ 62.09(13)(a), 323.11, 323.28 and the curfew orders. The Amended Complaint is bare of any facts or inferences alleging that *any of Plaintiffs' arrests* were of a personal nature as opposed to a police officer simply fulfilling their duties to enforce the Emergency Order curfew. As noted above, *Plaintiffs were all arrested after the curfew* was in

place in Kenosha, providing an exceedingly high likelihood that probable cause existed for their arrests. There are no allegations of any arrests outside curfew hours.

Moreover, as in *Sutton*, the limited resources of the Police Department must be taken into account. In the midst of unanticipated mass protests and riotous activity – which has not previously occurred in the Cit y– the police have limited resources and should not, without sufficient supporting facts or allegations, be assumed to have violated the Constitutional rights of citizens simply because they were unable to arrest every person allegedly in violation of the Emergency Curfew.

Further, Plaintiffs fail to identify individuals that were not arrested *because of* their viewpoints. Plaintiffs point to videos allegedly of Kyle Rittenhouse as the only example of a "pro-police counter-protestor." (Dkt. 16, Amend. Compl. ¶ 43.) However, Plaintiffs make no showing, beyond their own assumptions, that Rittenhouse was a "protestor" in Kenosha or that he was there to express "pro-police" views, as opposed to any other purpose or intent held by Rittenhouse. Nor do Plaintiffs assert that Rittenhouse was in Kenosha during the same time period that they were in Kenosha and did not get arrested at that time. Indeed, the Rittenhouse videos referenced by Plaintiffs reveal no arrests were made of *anyone*. The Amended Complaint makes no factual averments supporting a claim that there were *any non-arrests of people who violated curfew to protest in support of the police*- for example, the names of the individuals, the date and times the individuals were in Kenosha, the purpose behind the individuals attendance in Kenosha, whether the individual was intending to protest against the police, or whether Kenosha Police had knowledge of any particular arrestee's political beliefs or viewpoints.

Moreover, a rational basis for arresting Plaintiffs exist because they were, in fact, in violation of the curfew and, therefore, Plaintiffs selective enforcement claim must be dismissed.

At the pleading stage, a complaint cannot survive if it merely alleges a difference in treatment: "[a]ll it takes to defeat [a class of one] claim is a conceivable rational basis for the difference in treatment." *D.B. ex rel Kurtis B v. Kopp*, 725 F.3d 681, 686 (7th Cir. 2003). Indeed, a plaintiff can quickly plead themselves out of court if their complaint reveals a potential rational basis for the actions of local officials: "[i]f we can come up with a rational basis for the challenged action, that will be the end of the matter –animus or no." *Fares Pawn, LLC v. Ind. Dep't of Fin. Insts.*, 755 F.3d 839, 845 (7th Cir. 2014) (citations omitted).

In *Story v. City of Alton, Ill.*, the Seventh Circuit found a rational basis for enforcement of local ordinances against the plaintiff but (as alleged by plaintiff) not against others because the plaintiff "admit[ted] that he did commit certain ordinance violations and did pay fines for these violations," and, therefore, "his admission demonstrates that the City had a rational basis for citing him." 710 Fed. Appx. 706, 708 (7th Cir. 2018).

As discussed above, it is readily inferred from Plaintiffs' Amended Complaint that they were arrested during the period of time that the curfew was in effect, thus creating not only probable cause for their arrests but a rational basis sufficient to deflate the equal protection claim.

III. JURISDICTIONAL CONCERNS REQUIRE DISMISSAL.

The ongoing criminal proceedings, the lifting of the curfew, and the subsiding of the demonstrations all raise jurisdictional concerns.

a. STANDING.

Standing requires that (1) a plaintiff has suffered an injury in fact; (2) there exists a causal connection between the injury and the conduct of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Article III requires the existence of an actual case or controversy at every phase of the proceedings. *Jones v. Sullivan*, 938 F.2d 801, 805 (7th Cir. 1991) To meet this requirement, a plaintiff requesting *prospective* equitable relief must hold a "personal stake" in the outcome by showing a "significant likelihood and immediacy of sustaining some injury." *Sierakowski v. Ryan*, 223 F.3d 440, 443-44 (7th Cir. 2000). However, absent a showing of continuing, present adverse effects, past exposure to illegal conduct does not present a case or controversy for purposes of injunctive relief. *O'Shea v. Littleton*, 441 U.S. 488, 495 (1974). In a class action lawsuit, if none of the named plaintiffs representing a class meet the standing requirements, none of the plaintiffs may seek relief on behalf of himself or herself, or any other member of the class. *O'Shea*, 414 U.S. at 494.

In *O'Shea v. Littleton*, the Supreme Court held that"[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Id*. at 495-496. Past wrongs were evidence bearing on "whether there is a real and immediate threat of repeated injury." *Id*. at 496. But the prospect of future injury rested "on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners." *Id*. The Court ruled that a past threat to plaintiffs was not "sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses . . . . *Id.* at 496. *See also Swanigan v. City of Chicago*, 881 F.3d 577, 583 (7th Cir. 2018) (holding that plaintiff's argument that he might be pulled over, arrested, and again subjected to an unconstitutionally long detention "is layered with hypothetical and nowhere near certain.").

Under the above standards, Plaintiffs lack standing to seek the injunctive relief set forth in their Amended Complaint. Plaintiffs cannot show an existing controversy because any argument that they might be arrested in the future is layered with hypothetical and speculation.

b. THE *YOUNGER* AND *HECK* DOCTRINES.

The doctrine of *Younger* abstention prevents a state criminal defendant from asserting ancillary challenges to ongoing state criminal procedures in federal court. *Younger v. Harris*, 401 U.S. 37, 54-55 (1971). That federal courts abstain from hearing a case before it when there is an ongoing state proceeding is grounded in "longstanding public policy against federal court interference with state court proceedings. *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974).

The doctrine of *Younger* abstention is so fundamental to jurisprudence, that an exception only exists when a plaintiff can show irreparable injury that is both great and immediate. *Id*. at 46. In *Younger*, the Supreme Court dismissed the idea that injuries such as "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" could, by themselves, constitute such irreparable injury. *Id*. Federal injunctions are not to be granted against criminal statutes, as a matter of course, even if such statutes are unconstitutional. Instead, the Court in *Younger* directed that an alleged injury was only irreparable, such that would warrant federal intervention, if the threat to the plaintiff's federally protected rights cannot be eliminated by a defense in a criminal prosecution. *Younger*, 401 U.S. at 43-45.

In *Younger*, the federal plaintiff requested the district court find unconstitutional the law under which the government was prosecuting him, which would effectively foreclose his prosecution. Similarly, here, ***the equitable relief requested by the Plaintiffs is aimed specifically at their state prosecutions*:** Plaintiffs seek injunctive relief regarding the curfew and a declaration that the curfew they violated is unconstitutional. Thus, *Younger* abstention applies.

Moreover, the claims here involve constitutional issues that these Plaintiffs have the ability to litigate during the course of the state proceedings. *Gakuba v. O'Brien*, 711 F.3d 751 (7th Cir.2013). Such issues do not present a danger of irreparable and immediate loss and deciding these issues in federal court could undermine the state court proceedings. *Simpson v. Rowan*, 73 F.3d 132 (7th Cir. 1995). Plaintiffs can litigate their state charges to the fullest extent within the Wisconsin state court system. They have the appeal process and post-conviction relief. Only when their Wisconsin state proceedings are over can the federal courts hear her their claims. *Simpson v. Rowan*, 73 F.3d 132 (7th Cir. 1995); *Edwards v. Takaca*, 2016 WL 2853561 (E.D. Wis. 2016).

Additionally, if this case were allowed to proceed, it could contradict a finding of probable cause for the arrest and run afoul of *Heck v. Humphrey* which held that:

> In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, … a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. 28 U.S.C. § 2254.

512 U.S. 477 (1994). The favorable-termination requirement applies when "a judgment in favor of the plaintiff would necessarily imply" that his conviction or sentence was invalid. *Id*. at 487.

As noted by the Supreme Court in *Wallace v. Kato*, "[i]f a plaintiff files a false-arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of the criminal case is ended." 549 U.S. 384, 393. Upon conviction, "if the stayed civil suit would impugn that conviction, *Heck* will require dismissal."

Here, Plaintiffs state court proceedings remain pending in Kenosha County Circuit Court. Should Plaintiffs ultimately be convicted, the *Heck* doctrine requires that their case be dismissed.

IV. THE INDIVIDUAL OFFICERS ACTED IN GOOD FAITH AND ARE ENTITLED TO IMMUNITY.

Whether enforcing an allegedly unlawful State law or County law, the police officers' arrests made in good faith or on reasonable but mistaken reliance on the law would not create a constitutional offense. Qualified immunity has an analog in the good-faith exception to the exclusionary rules. In *Malley v. Briggs*, 475 U.S. 335 (1986), the Court explained, "the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* [the good-faith exception to the exclusionary rule] . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Id*. 344.

In *Heien v. North Carolina*, the Supreme Court further concluded that the reasonable suspicion necessary to justify a stop may be based on a police officer's reasonable mistake of law. *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014). In evaluating the reasonableness of an officer's beliefs, "the inquiry is *not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation*." *Id*. at 540.

Allegations of officers' subjective understanding of the law's validity are thus irrelevant to the analysis. *Heien*, 135 S. Ct. at 539. As the Court noted, "[w]e do not examine" it at all. *Id*. *See also Whren v. United States*, 517 U.S. 806, 813 (1996) ("But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). The principal reason that subjective intent has no role in the analysis was explained in in *Whren*: "Their principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with

"reasonableness" allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Id*. at 814.

This good faith exclusionary rule exception applies in the civil context through good faith reliance. An arrest made in good-faith reliance on an ordinance is valid regardless of a subsequent judicial determination of its unconstitutionality.[9] *Thayer v. Chiczewski*, 705 F.3d 237, 245 (7th Cir. 2012) *citing Michigan v. DeFlillippo*, 443 U.S. 31, 37 (1979). Officers are further entitled to "arguable probable cause" (sometimes reviewed as qualified immunity) when, "in a false-arrest case, if there is no probable cause, 'a reasonable officer could have mistakenly believed that probable cause existed." *Fleming v. Livingston Cnty*., Ill., 674 F.3d 874, 879-80 (7th Cir. 2012).

Here, there are no allegations in the Amended Complaint that the individual officers did not act in good faith when arresting the Plaintiffs. Plaintiffs acknowledge that Kenosha County had enacted a curfew order. It can further be inferred from the Amended Complaint that Plaintiffs were arrested because they were out past the curfew. Regardless of whether the Kenosha County curfew order is later determined to be unconstitutional, the officers' good faith reliance on the County order and/or the City order, coupled with the inference that there was probable cause (or at least arguable probable cause) to arrest the Plaintiffs because they were out past curfew, precludes any claim of false arrest against the individual officers.

V. THE INDIVIDUAL OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY.

Governmental officials performing discretionary functions are shielded from liability insofar as their conduct does not violate any clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1992); *Hinnen v.*

[9] It is also worth noting that, under Wisconsin law, statutes and ordinances enjoy a presumption of constitutionality and, thus, it is reasonable for officers to rely on the same. *ABC Auto Sales v. Marcus*, 255 Wis. 325, 330, 38 N.W.2d 708 (1949) (statutes); *State ex rel. Baer v. City of Milwaukee*, 33 Wis.2d 624 (1967) (ordinance)

Kelly, 992 F.2d 140, 142 (7th Cir. 1993). An official is entitled to immunity if, when he acted, "he reasonably could have believed that his action did not violate a clearly established law." *Cham v. Wodnick*, 123 F.3d 1005, 1008 (7th Cir. 1997), *cert denied*, 522 U.S. 1117 (1998). Once raised by the defendant, the plaintiff bears the burden of defeating a defense of qualified immunity. *Weinmann, v. McClone*, 787 F.3d 444, 450 (7th Cir. 2015.)

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011) (internal citations omitted). The Supreme Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage of the litigation." *Wood v. Moss*, 572 U.S. 744, 2056 n. 4 (2014).

The qualified immunity analysis requires the application of a two-part test: 1) whether the plaintiff has established a deprivation of a constitutional right; and, if so, (2) whether the right was clearly established at the time of the alleged violation. *Wilson v. Layne*, 526 U.S. 607, 609 (1999).

To be "clearly established," a constitutional right must be identified in a particularized sense with regard to the circumstances of the alleged violation. *Warlick v. Cross*, 969 F.2d 303, 309 (7th Cir. 1992). It may not be defined with "high levels of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011.) Rather, a plaintiff must show controlling authority or "a robust consensus of cases of persuasive authority" decided prior to the alleged incident. *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023 (2014.) Such authority "must have placed the statutory or constitutional question beyond debate." *Id*. (internal citations omitted.) Disagreement among authority favors government officials: "[I]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Pearson v. Callahan*, 555 U.S. 223, 245 (2009).

For the reasons explained above, Plaintiffs cannot prove any underlying constitutional violation. To the contrary, the authority cited above directs that the Officer Defendants acted within the confines of the law when they enforced the curfew by arresting Plaintiffs.

Even so, Plaintiffs further cannot show robust authority putting police on notice they engage in unconstitutional behavior when enforcing a curfew order during nighttime protests that involve riotous activity. For example, in *Wood v. Moss*, 572 U.S. 744 (2014), the Supreme Court held that it was not clearly established that agents bore an obligation to ensure that groups with different viewpoints were at comparable locations to the President at all times. There, groups of protestors and supporters were allowed to congregate on opposite sides of a street along the President's motorcade route. *Id*. at 2058. The protestors then moved to an area deemed dangerous to the President by the Secret Service. *Id*. Soon thereafter, the protestors were moved to any area about two blocks away. *Id*. When the President then left, he passed the supporters but not the protestors. *Id*. The protestors filed suit alleging viewpoint discrimination. *Id*.

However, the Supreme Court held that the Secret Service officers who had created the security perimeter were protected by qualified immunity in light of a valid security concern that the anti-President protestors, before they were moved, were within a dangerous area ("weapons range") of the President. *Id*. at 2070. "It [should] not have been clear to the agents that the security perimeter they established violated the First Amendment." *Id*. Thus, it was not clearly established, in a similar situation involving heightened security, that law enforcement was under a First Amendment obligation to make sure that groups with opposing viewpoints were at comparable locations at all times.

Similar to *Moss*, the Defendants here are entitled to qualified immunity. The individual officers were tasked with maintaining security during a period of heightened safety and security

concerns and would not have known that their actions of enforcing the curfew violated the First Amendment or Fourteenth Amendments. Accordingly, Plaintiffs' claims against the individual officers are barred by qualified immunity.

VI. BECAUSE THE STATE OF EMERGENCY CURFEW IS NO LONGR IN EFFECT AND BECAUSE THE PROTESTS HAVE SUBSIDED, PLAINTIFFS' CLAIMS ARE MOOT INSOFAR AS THEY SEEK INJUNCTIVE RELIEF OR ARE BASED ON ALLEGED FEAR FROM FUTURE ENFORCEMENT.

Plaintiffs' requests for injunctive relief are moot because the State of Emergency Curfew ended on September 2, 2020 and there is no allegation that the curfew will be reinstated in the future. Nor is there any allegation that the protests are continuing.

In *Federation of Advertising Industry Representatives, Inc. v. City of Chicago,* 326 F.3d 924, (7th Cir. 2003), the court held that "the complete repeal of a challenged law renders a case moot, unless there is evidence creating a reasonable expectation that the City will reenact the ordinance or one substantially similar." The court further stated, "[i]n a string of cases, the [Supreme] Court has upheld the general rule that repeal, expiration, or significant amendment to challenged legislation ends the ongoing controversy and renders moot a plaintiff's request for injunctive relief. *Id.* at 929-930.

An unprecedented civil unrest occurred in Kenosha following the shooting of Jacob Blake. During this time, the State of Emergency Curfew was enacted in an effort to curb violence and destruction during the nighttime hours – violence and destruction that the Plaintiffs acknowledge. The curfew was tailored to the area experiencing violence. Moreover, Plaintiffs do not allege that any time prior to or after the protests following the shooting of Jacob Blake, were they ever placed under curfew or arrested for violating the same. Nor is there any indication that Plaintiffs will be arrested in the future for curfew violations, as the State of Emergency Curfew is no longer in place.

Additionally, any concern over a future arrest, or other irreparable harm, is based purely on speculation and is insufficient to establish injunctive relief. *See also Swanigan v. City of Chicago*, 881 F.3d 577, 583 (7th Cir. 2018) (holding that plaintiff's argument that he might be pulled over, arrested, and again subjected to an unconstitutionally long detention "is layered with hypothetical and nowhere near certain). Thus, the Court should dismiss Plaintiffs' request for injunctive relief.

CONCLUSION

For these reasons, the City of Kenosha, Chief Daniel Miskinis, and John Does 1-100 respectfully request that all claims alleged them be dismissed.

Dated this 11th day of November, 2020.

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