IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

LEONARD JOHNSON, ***Plaintiff***, v. TOWN OF PROSPER, TEXAS, PAUL BOOTHE, and DOUG KOWALSKI, ***Defendants***.	Civil Action No. 4:23-cv-650-ALM

PLAINTIFF'S CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS [DKTS. 8 & 9]

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I. Introduction

Plaintiff Leonard Johnson filed three lawful public records requests to the Town of Prosper, Texas, using a pseudonym, Geoff Hodges. Nine months later, he was unlawfully arrested for allegedly impersonating a public official—Prosper Town Councilmember Jeff Hodges. From the outset, it should have been obvious to Town officials, and to any reasonable official, that Plaintiff was using a pseudonym and was not attempting to hold himself out as Councilmember Hodges, or to wield any official authority he did not have. Nonetheless, Defendants carried out a nine-month investigation into Plaintiff's identity because they did not like what he was asking for—police records—and why he was asking for them—to hold the Police Department and Town officials accountable to the public. For his troubles, Plaintiff was arrested and subjected to a prosecution that was dismissed by the presiding judge because the lack of an actual criminal offense, and the unconstitutional implications of Plaintiff's prosecution, were apparent from the face of the indictment. Defendants violated Plaintiff's Fourth Amendment rights to be free from a search and an arrest without probable cause, and his First Amendment rights to speak and petition the government without fear of retaliation. Plaintiff has stated valid, plausible claims for each, and properly pled claims for supervisory liability against Chief Kowalski, and for municipal liability against the Town of Prosper. Plaintiff's claims should be allowed to proceed.

II. Plaintiff's Response to Movants' Statement of Issues

Plaintiff responds to the Movants' Statement of Issues as follows:

a. Response to Defendant Officers

i. Plaintiff plausibly alleged a supervisory liability claim against Chief Kowalski, because Plaintiff adequately and plausibly pled his personal involvement in Plaintiff's investigation and arrest;
ii. Plaintiff adequately established valid *Franks* and *Malley* claims against Lt. Boothe and Chief Kowalski;

iii. It was clearly established that a search and arrest without probable cause violates the Fourth Amendment; Plaintiff therefore adequately pled a Fourth Amendment claim that overcomes the Defendant Officers' claim of qualified immunity;
iv. It was clearly established that an arrest which is substantially motivated against the exercise of one's constitutional rights violates the First Amendment; Plaintiff therefore adequately pled a First Amendment claim that overcomes the Defendant Officers' claim of qualified immunity;
v. Declaratory relief is available if any of Plaintiff's claims survive dismissal;
vi. Plaintiff adequately pled that Defendants acted willfully, intentionally, and recklessly, such that punitive damages are available.

b. Response to Town of Prosper

i. Plaintiff plausibly alleged that Town Council's direction to investigate and prosecute Plaintiff was a policy that was the moving force of Plaintiff's Fourth and First Amendment injuries;
ii. Plaintiff is entitled to declaratory relief if his underlying municipal liability claim survives dismissal.

III. Factual Background

Plaintiff Leonard Johnson filed three public records requests under the Texas Public Information Act to the Town of Prosper and its Police Department. The first two, filed within minutes of each other on October 14, 2020, broadly sought information about the Town's police department: an organizational chart, basic personnel information, and statistical data about the Police Department's criminal investigation case closure rates. Compl. ¶¶ 24–25. The third, filed two weeks later, was incomplete and therefore required no response. Dkt. 8-5 at 3.

Plaintiff was afraid that asking for these records using his real name could prompt some form of retaliation. Compl. ¶ 27. Plaintiff's wife, Roxanna, worked for the Town as an emergency services communications manager and had close working relationships with police officials, which he did not want to jeopardize. *Id.* ¶ 14–15. Plaintiff was also personally afraid of how the Police Department would react if he sought information that could place the department in a negative

light. *Id.* ¶ 34; *see also* Dkt. 8-15. Plaintiff thus used a pseudonym—Geoff Hodges—and parody email account—prospercitycouncil@gmail.com—to submit his requests.

Plaintiff did this to protect his own identity. Compl. ¶ 34. As someone who was familiar with making public records requests, Plaintiff knew that a name was not strictly required to file a request anyway. *Id.* ¶ 12. But because the Town of Prosper's online forms required that he supply a name and email in order to process his requests, he picked names that were "tongue-in-cheek" references to the Town's government, a choice which "reflected [his] desire to hold the town accountable." *Id.* ¶ 29. The name he used—Geoff Hodges—is similar to the name of Prosper Town Councilmember Jeff Hodges. The email he chose, prospercitycouncil@gmail.com, was a noticeable parody of Prosper's government—Prosper is a Town, not a City. *Id.* ¶ 29.

Plaintiff did not think the name he used mattered all that much. A reasonable officer under the circumstances would have thought the same. The Texas Public Information Act, except in limited circumstances, does not require a name to process a request for public records. *Id.* ¶ 72; *see generally* Tex. Gov't Code Ch. 552, Subchapter E (Procedures Related to Access). It also requires governmental bodies to treat all requestors "uniformly, without regard to the position or occupation of the requestor, the person on whose behalf the request is made, or the status of the individual as a member of the media." *Id.* § 552.223. And even where a governmental body believes it is obliged to verify the identity of the requestor, the TPIA permits governmental bodies to correspond with the requestor to do just that. *See* Tex. Gov't Code § 552.222(a). No Town official ever attempted to verify Plaintiff's identity. In fact, Town public records officials appeared to process Plaintiff's requests as if he was any other member of the public. Compl. ¶¶ 32, 56, 80.

The substance of the Town's response to his lawful requests gave Plaintiff cause for concern. *Id.* ¶¶ 32–33. Plaintiff opted to share these concerns directly with the entire Town Council

and Town leadership, including Councilmember Jeff Hodges—the alleged subject of his impersonation. *Id.* ¶ 34. On November 2, 2020, Plaintiff used his prospercitycouncil@gmail.com account to send an unsigned email to the Town's political leadership in order to explain his desire to protect his anonymity, and to describe his belief that Town officials were not being forthright with the records he requested. *Id.*

Unbeknownst to Plaintiff, his requests had already drawn the attention of Prosper Police leadership. Shortly after Plaintiff filed his lawful, pseudonymous requests, Chief Doug Kowalski communicated with Councilmember Jeff Hodges to confirm he was not the person who filed Plaintiffs' requests. *Id.* ¶¶ 36–39. Having confirmed that Councilmember Hodges was not the requestor, this should have been the end of the inquiry—after all, nothing about the requests was improper, and the TPIA requires that all requestors be treated equally. Tex. Gov't Code § 552.223. But reasonable heads did not prevail here. In response to Plaintiff's lawful records requests and subsequent correspondence critical of the Town's handling of his requests, Town officials opted to criminally investigate Plaintiff for impersonating Councilmember Jeff Hodges, a third-degree felony under the Texas Penal Code. Tex. Penal Code § 37.11(a)(1). Compl. ¶¶ 36–40. They did this despite being aware from the beginning that Plaintiff had not actually impersonated Jeff Hodges, that Plaintiff had not shown any intent to hold himself out as the Councilmember, and that he did not attempt to wield official authority he did not possess. Plaintiff only used the name "Geoff Hodges" to submit the online forms that initiated his public records requests, never used the name again thereafter, and explained directly to Town Council—including Councilmember Jeff Hodges—that he only sought to protect his identity, and nothing more. *Id.* ¶¶ 31, 34, 48, 79.

To Defendants though, this was enough to embark on a nine-month investigation into Plaintiff's identity, that would end in Plaintiff's unlawful and retaliatory arrest. In the process,

Defendants obtained four separate warrants that were founded upon facially deficient probable cause affidavits which materially withheld crucial, exculpatory facts; and were at least willfully misleading as to others. The first two warrant affidavits, filed on March 5, and March 8, 2021, did not disclose that Plaintiff's requests for "official government information" were made pursuant to the Texas Public Information Act; they withheld from the reviewing judge Plaintiff's voluntary, unprompted disclosure to Town Council that he used a pseudonym to maintain his anonymity; and they falsely claimed that Plaintiff had evaded attempts to verify his identity, when in fact no Town official had ever made such an attempt. *Id.* ¶¶ 45–58. The information Lt. Boothe obtained from Plaintiff's email accounts after executing these unlawfully procured search warrants led Lt. Boothe to finally unmask Plaintiff on April 20, 2021. *Id.* ¶¶ 59–60.

Having identified the anonymous requestor as Plaintiff, Defendants tied up their investigation and returned to court to obtain an arrest warrant, and search warrant for Plaintiff's home. *Id.* ¶ 65. Lt. Boothe—acting with his superior, Chief Kowalski's approval—filed his second pair of facially deficient and willfully misleading warrant affidavits to obtain the reviewing judge's sign-off on the arrest. *Id.* ¶¶ 66–81. The July affidavits disclosed for the first time what should have been disclosed originally: that Plaintiff's requests were for public information under the Texas Public Information Act. *Id.* ¶ 70. But Lt. Boothe's affidavits reinforced the same faulty and misleading narrative that he relied upon in his March affidavits.

Despite his familiarity with the TPIA, Lt. Boothe failed to note that the TPIA required all requestors be treated equally, and thus there was no official authority Plaintiff could have wielded that would have given him special access to the records he sought. *Id.* He again pointed to Plaintiff's alleged admission that he used a fake email in his November 2, 2020 email to Town Council, but again withheld Plaintiff's stated reason for doing so—to maintain his anonymity. *Id.*

¶ 72. Lt. Boothe pointed to Plaintiff's use of an entirely separate pseudonym—Sam King—but did not assert any other factual detail to explain how this furthered the impersonation offense. *Id.* ¶ 73. And he again falsely claimed that Defendant had evaded attempts to identify him, when in fact no attempts had ever been made. *Id.* ¶ 80.

With improperly-obtained arrest and search warrant in hand, Defendants unlawfully arrested Plaintiff and seized his personal effects from his home on July 20, 2021. Then, on November 4, 2021, a Collin County grand jury issued a facially deficient indictment, alleging Plaintiff "impersonate[d] a public servant, namely Jeff Hodges, a Prosper City Councilman, with intent to induce Devin Reaves to submit to the pretended official authority of the defendant or to rely on the pretended official acts of the defendant by sending open records requests to the Prosper Police Department in attempt to obtain police records[.]" *Id.* ¶ 83.

For the next year, Plaintiff was forced to endure the stress and trauma of a criminal prosecution that he knew to his core to be wrong. The presiding judge in his criminal matter agreed with that assessment. On November 6, 2022, Plaintiff filed a motion to quash his indictment on three grounds: "(1) that the indictment failed to state an offense; (2) that Plaintiff's right to use a pseudonym in seeking public information was protected by the First Amendment; and (3) that Plaintiff's right to make a public information request was also protected by the First Amendment." *Id.* ¶ 87. That motion, which was unopposed by the Collin County District Attorney, was granted by the district judge the very next day. *Id.* ¶ 88.

Defendants' actions turned Plaintiff's exercise of his First Amendment rights to speak and petition the government, and his statutory rights to request public records, into a criminal offense. Their completely novel interpretation of the impersonation statute and the TPIA, and their decision to retaliate against Plaintiff for exercising his rights, was unconstitutional under the Fourth and

First Amendments. Plaintiff brought this lawsuit to remedy the harms he suffered, and to ensure something similar does not happen again. For the following reasons, his claims should proceed.

IV. Legal Standard

a. Pleading Standard

"To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007)). Thus, 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, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

At the motion to dismiss stage, the "court[] must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). "The court 'accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Guidry v. Am. Pub. Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007) (quoting *In re Katrina Canal Breaches Litig.,* 495 F.3d 191, 205 (5th Cir. 2007)).

b. Qualified Immunity

Qualified immunity is generally resolved in two parts: (1) "whether the officer's alleged conduct has violated a federal right"; and (2) "whether the right in question was 'clearly established' at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct." *Bailey v. Iles*, 78 F.4th 801, 807 (5th Cir. 2023) (quoting *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019).

A right is clearly established when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). If it was "clear to a reasonable officer that his conduct was unlawful in the situation he confronted[,]" then the officer has violated clearly established law. *Keenan v. Tejeda*, 290 F.3d 252, 261 (5th Cir. 2002). "The central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)); *see also Davidson v. City of Stafford*, 848 F.3d 384, 394 (5th Cir. 2017). "The defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution[.]" *Thompson v. Upshur Cty., Tex.*, 245 F.3d 447, 457 (5th Cir. 2001). "The 'defendant's circumstances' includes facts known to the defendant. However, because qualified immunity turns only upon the *objective* reasonableness of the defendant's acts, a particular defendant's subjective state of mind has no bearing on whether that defendant is entitled to qualified immunity." *Id.*

V. Evidentiary Objections

As an initial matter, the Defendant Officers attached fifteen exhibits to their Motion and ask the Court to either take judicial notice of their facts, or accept them because they are records which were referred to in the Complaint. Dkt. 8 at 4. Plaintiff offers two limited objections to this request: (1) the *contents* of Defendants' exhibits are not judicially noticeable; *see Franklin v. Apple, Inc.*, 569 F. Supp. 3d 465, 476–77 (E.D. Tex. 2021) (Mazzant, J.); and (2) even if the Court can review the attached records because they are referred to, and therefore incorporated, into Plaintiff's

Complaint, the Court may not accept Defendants' *characterizations* of those records—certainly not when those characterizations would conflict with, or negate, plausible allegations made in the Complaint. *See Bosarge v. Miss. Bur. of Narcotics*, 796 F.3d 435, 440–41 (5th Cir. 2015).

VI. Plaintiff Has Plausibly Alleged a Violation of his Fourth and First Amendment Rights.

Turning to the merits, Plaintiff asserts claims for unlawful search and false arrest under the Fourth Amendment, and direct and retaliatory violations of his First Amendment rights. Because his First Amendment claims are conditional on finding no probable cause, Plaintiff leads with his Fourth Amendment claim, then moves to his First Amendment claim having established that no reasonable officer would have found probable cause under the circumstances.

a. Legal Standard for Probable Cause

"The 'long-prevailing' constitutional standard of probable cause embodies 'the best compromise that has been found for accommodating [the] often opposing interests in safeguard[ing] citizens from rash and unreasonable interferences with privacy and in seek[ing] to give fair leeway for enforcing the law in the community's protection." *Ybarra v. Illinois*, 444 U.S. 85, 95–96 (1979). Probable cause is "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Florida v. Harris*, 568 U.S. 237, 244 (2013) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

"Probable cause exists when the facts and circumstances within the arresting officer's knowledge, or of which he has reasonably trustworthy information, are sufficient to occasion a person of reasonable prudence to believe an offense has been committed." *Evett v. DETNTFF*, 330 F.3d 681, 688 (5th Cir. 2003) (quoting *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988)). That standard is not "toothless." *Bigford*, 834 F.2d at 1218. It requires "a reasonable basis under the circumstances" for concluding that a crime was committed, "and for acting on it." *Id.*

"The facts must be known to the officer at the time of the arrest; post-hoc justifications based on facts later learned cannot support an earlier arrest. *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009) (citing *Sibron v. New York*, 392 U.S. 40, 62–63 (1968)). "Courts must look to the 'totality of the circumstances' and decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer' demonstrate 'a probability or substantial chance of criminal activity.'" *Terwilliger v. Reyna*, 4 F.4th 270, 282 (5th Cir. 2021) (quoting *Dist. of Colum. v. Wesby*, 583 U.S. 48, 56–57 (2018)). Law enforcement "also may not disregard facts tending to dissipate probable cause." *Bigford*, 834 F.2d at 1218.

b. Defendants Lacked Probable Cause to Search and Arrest Plaintiff for Impersonating a Public Official.

Defendants arrested Plaintiff under a completely novel and untenable application of the impersonation statute, Tex. Penal Code § 37.11(a)(1), to Plaintiff's lawful request for public records. As discussed below, no reasonable officer would have believed they had probable cause to arrest Plaintiff under these circumstances. Plaintiff did not actually impersonate Councilmember Jeff Hodges, and it would have been obvious to a reasonable officer that he lacked the specific intent required under the circumstances to be held criminally liable.

i. Impersonating a Public Official, Tex. Penal Code § 37.11, Requires a Showing of Actual Impersonation, Paired with a Specific Intent.

Impersonating a Public Official is a third-degree felony offense that occurs when one "impersonates a public servant with intent to induce another to submit to the person's pretended official authority or to rely on the person's pretended official acts." Tex. Penal Code § 37.11(a)(1). Because the offense focuses on the actions of the alleged impersonator, it is "essentially a nature-of-conduct offense with an accompanying specific intent." *Cornwell v. State*, 471 S.W.3d 458, 464

(Tex. Crim. App. 2015). In other words, "it is the act of conduct that is punished, regardless of any result that might occur." *Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011).

Broken into its component parts, the offense requires the *actus reus* of impersonation, and the *mens rea* of intent that another "submit to the person's pretended official authority or to rely on the person's pretended official acts." Tex. Penal Code § 37.11(a)(1). The specific intent is what safeguards the offense from raising fraught constitutional problems; otherwise, mere impersonation alone would run the risk of criminalizing all forms of protected speech and expression. A timely example illustrates the point: without the specific intent required here, a person who dresses as President Joe Biden or Senator Ted Cruz for Halloween could be prosecuted for impersonation. The Texas Court of Criminal Appeals has thus been clear: "An accused may not be convicted on a simple showing that he falsely held himself out to be a public servant." *Cornwell*, 471 S.W.3d at 464. Here, Plaintiff plausibly alleged that Defendants lacked probable cause to arrest him because he neither committed the act of impersonation, nor possessed the requisite specific intent—as any reasonable official would have concluded.

ii. Plaintiff Did Not Impersonate Town Councilmember Jeff Hodges.

First, the impersonation offense required Plaintiff to "impersonate[] a public servant[.]" The statute itself does not define "impersonation," but other sources offer guideposts. For one, courts interpreting the impersonation offense have explained that impersonation requires the alleged impersonator to adopt a "false assumption or pretension … that he is a public servant . . . ." *Tovar v. State*, 777 S.W.2d 481, 489 (Tex. App.—Corpus Christi 1989, pet. ref'd), *abrogated on other grounds*, *Cornwell*, 471 S.W.3d at 464. A separate Penal Code provision which criminalizes online impersonation requires that one "use[] the name or persona of another person" for liability

to attach. Tex. Penal Code § 33.07(a).[1] Finally, several dictionaries define "impersonation" similarly, as "an act of pretending to be another person for the purpose of entertainment or fraud";[2] "the act of pretending to be someone else, with intent to mislead or deceive";[3] and "the act of attempting to deceive someone by pretending that you are another person."[4]

Legal and common understandings of the word "impersonation" thus indicate that a person impersonates another by adopting the actual identity of someone, typically by taking on their name, persona, title, or distinguishing characteristics such as dress or official markings. The typical prosecution for impersonation shows precisely how this definition applies practically. In *Tiller v. State*, the defendant claimed to be an elected constable, and submitted multiple forms of fraudulent documentation in an attempt to establish his authority to purchase two engraved badges from a company that sells public safety equipment. 362 S.W.3d 125, 126–27 (Tex. App.—San Antonio 2011, pet. ref'd). In *Rice v. State*, the appellate court affirmed the conviction of a person who "[wore] a department of corrections uniform with a patch that read 'State of Louisiana'" while attempting to "retriev[e] a prisoner[.]" 195 S.W.3d 876, 879, 881 (Tex. App.—Dallas 2006, no pet.). In *Dietz v. State*, the appellant's conviction for impersonation was affirmed when he "identified himself as a Travis County Sheriff's deputy and showed [an Austin Police Department officer] his badge" in order to ask for her assistance in executing a felony warrant. 62 S.W.3d 335,

[1] *See* Tex. Gov't Code § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider … common law or former statutory provisions, including laws on the same or similar subjects[.]").

[2] *Impersonation*, OXFORD LANGUAGES, *accessible at* https://www.google.com/search?q=impersonation (last accessed Oct. 23, 2023).

[3] *Impersonation*, DICTIONARY.COM, *accessible at* https://www.dictionary.com/browse/impersonation (last accessed Oct. 23, 2023).

[4] *Impersonation*, CAMBRIDGE DICTIONARY, *accessible at* https://dictionary.cambridge.org/us/dictionary/english/impersonation (last accessed Oct. 23, 2023); *see also id.* (alternatively defining "impersonation" as "the act of intentionally copying another person's characteristics, such as his or her behavior, speech, appearance, or expressions").

337 (Tex. App.—Austin 2001, no pet.). In *Paul v. State*, the court there affirmed the conviction of a person whose car was equipped with "an emergency siren, white lights mounted on the dash, and a Bexar County fire search and rescue decal on the windshield." 2020 WL 1869028, at *3 (Tex. App.—Amarillo Apr. 14, 2020, no pet.). And in *Torgerson v. State*, the appellant "portrayed himself to be a police officer to certain people" and "had a badge and a gun and identified himself as a police officer." 2022 WL 17074838, at *2 n.3 (Tex. App.—Tyler Nov. 17, 2022, pet. ref'd).[5]

Here, Defendants have only ever alleged one act satisfies the definition of impersonation—Plaintiff's use of the pseudonym "Geoff Hodges" to file his lawful public records requests. This failed to establish Plaintiff impersonated Town Council Member Jeff Hodges, because Plaintiff did not adopt Councilmember Jeff Hodges's name, take on his persona, "assum[e]" his identity, or "preten[d]" to be Councilmember Hodges. *Tovar*, 777 S.W.2d at 489. Each of Defendants' affidavits acknowledged and confirmed this, explaining that Plaintiff allegedly used "a *modified* name *resembling* that of" Councilmember Hodges, without ever stating Plaintiff actually adopted his name at any time. *E.g.*, Dkt 8-3 at 2 (emphasis added); *see* Compl. ¶ 71. And as Plaintiff alleged, he only used the name "Geoff Hodges" to submit his requests using an online form. Compl. ¶¶ 31,

[5] *See also Calhoun v. State*, 2011 WL 398077, at *8 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (finding impersonation when appellant and another person pulled over a vehicle by flashing bright lights while dressed as police officers with caps, shirts, handcuffs, flashlights, and badges); *Marshall v. State*, 1996 WL 491654, at *1 (Tex. App.—Houston [14th Dist.] 1996, no writ) (finding impersonation when appellant was pulled over driving a car with a spotlight, red and blue lights, and a law-enforcement decal and when appellant falsely identified himself as a sheriff deputy and gave the officer a false badge number and false supervisor's name); *Alvarezmijan v. State*, 2014 WL 2146255, at *2 (Tex. App.—Fort Worth 2014, no pet.) (finding impersonation when appellant gave a woman the impression that he had the authority to take her to jail while using a security guard badge, a police-like radio, and a toy gun); *Ex parte Niswanger*, 335 S.W.3d 611, 613 (Tex. Crim. App. 2011) (describing prosecution for impersonation where no-longer-active volunteer firefighter displayed fire department badge, and arrestee informed officer he was a fireman in response to her questioning); *but see Tovar*, 777 S.W.2d at 489 (finding no impersonation where security guard did not identify himself as a police officer and was only wearing the uniform of a security guard).

48, 79. After, he never used the name again, including in his direct communication to the Prosper Town Council and municipal leadership two weeks later. *Id.*

That Plaintiff also furnished a parody email—"prospercitycouncil@gmail.com"—did not further support Defendants' conclusion that Plaintiff's conduct constituted an act of impersonation. To a reasonable officer with basic knowledge of Prosper's government, the obvious misspelling of Jeff Hodges's name (Geoff), taken together with the email's use of "city" instead of "town," would have signaled that the requestor was someone who perhaps had a keen interest in local politics, but, without more, was not actually trying to pass himself off as a sitting Councilmember.[6] And in fact, Plaintiff alleged Public Information Clerk Devin Reaves—the initial recipient of Plaintiff's records requests—did not believe they came from Jeff Hodges. Compl. ¶ 36. Likewise, Chief Kowalski noted the misspelling of Jeff Hodges' name immediately and communicated that directly to Councilmember Hodges when he called him to confirm that he was not the requestor. *Id.* ¶ 37.

Defendants' decision to investigate and prosecute Plaintiff was an overreaction to an entirely lawful request for public information using a pseudonym that a reasonable officer under the circumstances would not have taken as an act of impersonation. Nor, for the reasons discussed below, would a reasonable officer have understood Plaintiff's conduct to carry the requisite intent.

iii. It was Obvious to Town Officials that Plaintiff Lacked the Specific Intent Required to Meet the Elements of the Impersonation Offense.

[6] To further illustrate the point by analogy, an anonymous requestor who submitted a Freedom of Information Act request to the Department of Justice under the name José Biden and the email "usaprimeminister@gmail.com" would have impersonated President Joe Biden, under Defendants' theory. Likewise, the celebrity gossip blogger Perez Hilton could have been charged under Texas's online impersonation law for impersonating Paris Hilton. *See* Tex. Penal Code § 33.07. Or the pop singer Rihanna's makeup brand Fenty could be held liable under the Texas Deceptive Trade Practices Act for being too similar to the luxury brand Fendi, even though savvy consumers would recognize the difference. *See* Tex. Bus. & Commerce Code § 17.46(b)(3).

"An accused may not be convicted on a simple showing that he falsely held himself out to be a public servant." *Cornwell*, 471 S.W.3d at 464. He must also demonstrate that he possessed the "specific intent (to induce another to submit or rely) for there to be a violation under Section 37.11(a)(1)." *Id.* And "while law enforcement personnel 'may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause.'" *Evett*, 330 F.3d at 688 (quoting *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988)). Here, several key indicators make clear that Defendants ignored every sign that Plaintiff lacked the specific intent necessary to be held criminally liable for impersonation.

1. First, Plaintiff submitted his request for records under the Texas Public Information Act. Under the TPIA, "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." Tex. Gov't Code § 552.001. To implement that policy, the TPIA creates a statutory right for any person to request official government records, and to have the government respond to that request. *See generally* Tex. Gov't Code Ch. 552, Subchapter E, §§ 552.221–.235.

An essential feature of the TPIA—one that furthers its democracy-enhancing functions—is that every requestor must be treated equally. All governmental bodies are obligated under the Act to "treat all requests for information uniformly without regard to the position or occupation of the requestor, the person on whose behalf the request is made, or the status of the individual as a member of the media." Tex. Gov't Code § 552.223.[7] This has important implications for the *type* of authority any requestor, including a public official, is capable of wielding when making a TPIA request. Recall that, for Plaintiff to have lawfully been arrested for submitting his public records

[7] This is more than mere policy language, contrary to the Officer Defendants' suggestion in their Motion. Ofc. Mot. at 20; *see* Tex. Gov't Code § 311.016 (Code Construction Act) (the word "shall" "imposes a duty"); *City of Marshall v. City of Uncertain,* 206 S.W.3d 97, 105 (Tex. 2006).

requests, Defendants had to have a reasonable belief under the totality of the circumstances that Plaintiff acted with "intent to induce another to submit to the person's pretended *official* authority or to rely on the person's pretended *official* acts." Tex. Penal Code § 37.11(a)(1) (emphasis added). But Defendants have no answer to the question of what official authority Plaintiff allegedly wielded when he made these requests. The TPIA's equality principle, Tex. Gov't Code § 552.223, ensures that all requestors come to the table on equal footing, and have no more authority than any other person who makes a TPIA request to ask for and obtain official government records.[8]

A reasonably prudent officer under the circumstances would have concluded that, when Plaintiff made his public records requests, he was wielding *public* authority to do so—public authority that the Texas legislature gave every member of the public when it enacted the TPIA. This eliminated any reasonable inference that Plaintiff intended to wield some sort of power he did not otherwise possess. No other indicators pointed to a different conclusion. Plaintiff did not claim any official status when he made his requests, ask for special treatment, or assert that he was seeking those records in any capacity other than as a member of the public. The officials who responded to his requests apparently understood this. *See* Compl. ¶ 32; Tex. Gov't Code § 552.221(d).[9]

2. Additionally, on November 2, 2020, less than three weeks after Plaintiff filed his records requests and received initial responses from the Town's public information officers, Plaintiff—using his "prospercitycouncil@gmail.com" account—sent an email to the Prosper Town Council,

[8] The TPIA creates a special carve-out, not relevant here, for members of the Texas Legislature who request records. Tex. Gov't Code § 552.008.

[9] To put it another way, Council Member Jeff Hodges had no more authority under the TPIA than Plaintiff, using his own name or an assumed name, to request the records Plaintiff asked for here. And it was therefore of no consequence to the finding of probable cause—contrary to each affidavit of probable cause submitted by Defendants—that Plaintiff requested "official government records," because *every* TPIA request is ostensibly a request for official government records. Compl. ¶¶ 46–47, 72; *see, e.g.*, Dkt 8-3 at 2.

in which he explained that he used a "fake" name and email address "to remain anonymous and protect myself from retaliation." Compl. ¶ 34; Dkt. 8-15 at 1. As the Officer Defendants did with their probable cause affidavits, they have failed to address that exonerative statement in their Motion. *See* Ofc. Mot. at 20 (noting only that Plaintiff alleged it); *but see Evett*, 330 F.3d at 688.

That fact is important, however, because it is the only direct evidence of the intent behind Plaintiff's pseudonymous request for public records, and it showed not only that Plaintiff lacked the specific intent required by the impersonation offense, but also that every member of the Prosper Town Council and Town leadership was aware of this fact—volunteered by Plaintiff in an unsolicited email to them—before Defendants' investigation into Plaintiff's identity picked up in earnest. Compl. ¶¶ 34, 40. To be sure, Defendants were not obligated to take Plaintiff's explanation at face value. *Wesby*, 583 U.S. at 68.[10] But, to a reasonable officer, Plaintiff's unsolicited disclosure would have further contextualized Plaintiff's public records requests, and lessened the "probability or substantial chance" of a criminal act. *Terwilliger*, 4 F.4th at 282.

That is especially true given that Plaintiff included Council Member Jeff Hodges as a recipient of his November 2, 2020 email. Compl. ¶ 34; *see* Dkt. 8-15. Defendants' argument that Plaintiff used his "prospercitycouncil@gmail.com" address as an instrument of his impersonation simply does not square with Plaintiff's use of that address to correspond directly with the alleged subject of his impersonation. And it would have been apparent to any reasonable reader that Plaintiff's email did not claim any official status or authority when he did so. *See* Dkt. 8-15.[11]

[10] Even so, this is not like the situation in *Wesby*, where the Court held the defendants attempted to offer "probable-cause-vitiating" statements in order to explain away, *in response to police questioning*, conduct that on its own gave officers probable cause. *Id.* Here, Plaintiff volunteered this explanation before he was even aware of law enforcement involvement. Compl. ¶ 34.

[11] Defendants' framing of Plaintiff's email to the Prosper Town Council and Town leadership as "menacing," Ofc. Mot. at 7, is an improper characterization. Truth of that characterization aside, their argument lends support to Plaintiff's concern that Defendants were motivated against Plaintiff's exercise of his right to criticize them. "Menacing" speech is still protected speech that public officials must tolerate.

3. No other fact cited by Defendants tips the balance back in their favor. For example, Defendants repeatedly highlight Plaintiff's use of another pseudonym (Sam King/Kingston) and email (samk38043@gmail.com) as evidence of impersonation. Ofc. Mot. at 8, 10, 11; *see* Dkt. 8-4, 8-5, 8-7. But Defendants never explained in their affidavits, or their Motion, how this was remotely relevant to either of the elements of the impersonation offense. They do not allege that Sam King or Sam Kingston were the names of public officials, or that Plaintiff used this name or email address to hold himself out as a public official. They do not allege that Plaintiff acted improperly while using these pseudonyms, or that he exceeded the bounds of his authority when he again asked for public records using the TPIA. They do not allege—other than in the most conclusory terms—that any of Plaintiff's acts or words using the Sam Kingston pseudonym furthered his alleged impersonation of Council Member Jeff Hodges in any way. The closest nexus ever alleged by Defendants between the Sam Kingston pseudonym and the impersonation offense is that Sam Kingston and Geoff Hodges were the same person.

c. Under *Malley* and *Franks*, Defendants' Actions Tainted the Probable Cause Determinations of the Independent Intermediaries.

A reasonable officer under the circumstances would have known that, on these facts, no probable cause existed to carry forward with their unlawful search of Plaintiff's email accounts, and later, Plaintiff's arrest. But Defendants instead manufactured four different probable cause affidavits which willfully omitted material facts, and misrepresented others essential to the probable cause determination. Defendants assert that the chain of causation between their acts and Plaintiff's unconstitutional arrest was broken by independent intermediaries—a district judge and

Cf. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (noting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

grand jury—who assessed the factual basis for Plaintiff's arrest and found probable cause. But Plaintiff has plausibly alleged that Defendants' willful misrepresentations to these intermediaries tainted their review. The causal chain is thus intact, and Plaintiff's claims should proceed.

i. Deference to an Independent Intermediary is not "Boundless."

"If facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Arizmendi v. Gabbert*, 919 F.3d 891, 897 (5th Cir. 2019). But "[d]eference to the magistrate . . . is not boundless." *United States v. Leon*, 468 U.S. 897, 914 (1984). If "the deliberations of [the] intermediary were in some way tainted by the actions of the defendant," the defendant can still be liable. *Wilson v. Stroman*, 33 F.4th 202, 208 (5th Cir. 2022).

The role of the independent intermediary in the false arrest analysis is thus one involving causation. Plaintiff can state a Fourth Amendment claim despite the involvement of an independent intermediary on either one of two theories. First, in *Malley v. Briggs*, the Supreme Court held that an officer who submits a warrant application lacking in probable cause is not entitled to qualified immunity where "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." 475 U.S. 335, 344–45 (1986). In that situation, a court "will not 'defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause.'" *Kohler v. Englade*, 470 F.3d 1104, 1109 (5th Cir. 2006) (quoting *Leon*, 468 U.S. at 914–15 (internal quotations omitted)).

Second, under *Franks v. Delaware*, 438 U.S. 154 (1978), "a Fourth Amendment violation may be established where an officer intentionally, or with reckless disregard for the truth, includes a false statement in a warrant application." *Kohler*, 470 F.3d at 1114. Under those circumstances, "the false statements must be disregarded in determining whether the affidavit is sufficient to

support a finding of probable cause." *Hale v. Fish*, 899 F.2d 390, 400 n.3 (5th Cir. 1990). "The holding in *Franks* applies to omissions as well." *Id.* (citing *United States v. Thompson*, 615 F.2d 329 (1980)). Plaintiff must "show that the official's malicious motive led the official to withhold relevant information or otherwise misdirect the independent intermediary by omission or commission." *McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2017). At the 12(b)(6) stage, though, "'mere allegations of taint' … may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference." *Polnac v. City of Sulphur Springs*, 555 F. Supp. 3d 309, 337 (E.D. Tex. 2021) (Mazzant, J.) (quoting *McLin*, 866 F.3d at 690).

Each of these theories is mutually exclusive. Thus, "a plaintiff cannot hold an officer liable under *Franks* for intentionally omitting important exculpatory information from a warrant affidavit when the officer has also committed a *Malley* violation by presenting a facially deficient warrant affidavit to the issuing judge." *Kohler*, 470 F.3d at 1113–14. Defendants raise the independent intermediary doctrine as a defense, but do not meaningfully grapple with *Malley* or *Franks*. Plaintiff takes up that mantle now.

ii. Plaintiff Plausibly Alleged a Malley Claim, because the Warrant Affidavits Lacked Sufficient Indicia of Probable Cause.

A *Malley* wrong can be summed up as "the obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant." *Melton v. Phillips*, 875 F.3d 256, 264 (5th Cir. 2017) (en banc). The affidavits submitted by the Defendants to unlawfully arrest Plaintiff, and unlawfully search his personal effects, meet the demands of *Malley*, because "a reasonably well-trained officer in [the same] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley*, 475 U.S. at 345. Though filled with detail about the lengths Defendants went to unmask Plaintiff, Defendants' affidavits are barebones where it mattered most: showing particularized facts

establishing "a probability or substantial chance of criminal activity." *Terwilliger*, 4 F.4th at 282; *see also Blake v. Lambert*, 921 F.3d 215, 220 (5th Cir. 2019). As discussed herein, each of Defendants' affidavits failed on their face to establish probable cause to search and arrest Plaintiff.

March 5, 2021 Search Warrant Affidavit (prospercitycouncil@gmail.com). Defendants' first search warrant sought the contents of Plaintiff's prospercitycouncil@gmail.com email account. The supporting affidavit sworn to by Defendant Boothe identified the impersonation offense as the basis for the search, but it provided insufficient factual detail to show a probability or substantial chance each element of the offense was met. The affidavit admits that Plaintiff "identified himself using a modified name resembling that of Town Councilman Jeff Hodges[.]" Dkt. 8-3 at 2; *see also* Compl. ¶ 71. It goes on to explain that Plaintiff "spelled the Councilman's first name using Geoff[,]" and concludes noting that "[a] records check of this name through the Texas driver's license database showed that the name does not exist." *Id.* Defendants' affidavit did not allege that this conduct amounted to impersonation, and the facts alleged by Defendants failed to support that inference. That Defendants were explicitly aware, and acknowledged, that Plaintiff used a modified name undermines their own argument that Plaintiff ever actually impersonated Council Member Jeff Hodges.

The affidavit's detail about Plaintiff's prospercitycouncil@gmail.com email address did not get Defendants over the finish line. The affidavit does not identify how the use of a "fictitious" gmail account furthered the act of impersonation, or contributed to the conclusion that Plaintiff intended to wield some official authority that he did not possess. *Id.* At most, the affidavit alleged Plaintiff used this email to "submit[] online record requests" to "request[] official government records[.]" The affidavit adds that Plaintiff submitted his requests "through the Town of Prospers' online portal for obtaining official government information[.]" *Id.* But the affidavit does not state

or show any indicia that Plaintiff intended, through those requests, to wield official authority he did not have, or that the act of requesting those records constituted a "pretended official act[.]" Tex. Penal Code § 37.11(a)(1). And at bottom, the affidavit recognizes that Plaintiff used a "fictitious name and fictitious email account"—which undermines the argument that impersonation occurred, because it concedes that Plaintiff used a fake persona, instead of adopting the identity of Councilmember Jeff Hodges. Dkt. 8-3 at 2.

March 8, 2021 Search Warrant Affidavit (samk38043@gmail.com). Defendants' March 8, 2021 warrant affidavit, for the contents of Plaintiff's samk38043@gmail.com email account, was facially invalid for the same reasons as Defendants' March 5, 2021 warrant affidavit. It reproduced the same deficient narrative about Plaintiff's use of his "fictitious" name and email to submit his records requests, and thus revealed no additional basis for probable cause than the first affidavit showed. *See* Dkt. 8-4 at 1–2.

What additional factual content the March 8 affidavit does allege, however, places into sharper relief the thin foundation on which Defendants' probable cause analysis stood. In particular, the March 8 affidavit averred that Plaintiff's samk38043@gmail.com email account "was created and is being used by the same unknown suspect in furtherance of the same offense of Impersonating a Public Servant to continue the attempts to obtain official government records." But other than linking the "samk38043" account to the "prospercitycouncil" account, the affidavit offers no detail about how the former was being used to further the offense committed by the latter.

Indeed, the affidavit does not allege that the act of requesting records using the "samk3804" account independently constituted an act of impersonation, or that the act of requesting records, alone or under an assumed name, was a separate criminal offense. Nor did it state specific detail explaining how the "samk3804" account was used to support the acts of impersonation originally

alleged in the March 5 affidavit. It also does not say that any acts of impersonation occurred during the time that the "samk3804" account was in use. And the timeline of events alleged in the March 5 and March 8 affidavits together reveal that the "prospercitycouncil" and "samk38043" accounts were not even in active use at the same time. *Compare* Dkt 8-3 at 2 (last communication from the "prospercitycouncil" account was on November 2, 2020) *with* Dkt 8-4 at 2–3 (noting that Town of Prosper officials received communications from the "samk38043" account between November 3, 2020 and March 3, 2021); *see also* Dkt 8-5 at 2 (noting that the alleged impersonation offense occurred between Oct. 14 and Oct. 28, 2020).

July 19, 2021 Arrest and Search Warrant Affidavits. Four months later, Defendants obtained an arrest warrant for Plaintiff, and a search warrant for his home, using probable cause affidavits which acknowledged for the first time that the acts of impersonation allegedly committed by Plaintiff involved his use of a pseudonymous name and email address to file "Public Information Requests." Compl. ¶ 70; Dkt 8-5 at 2. This should have eliminated any doubt that Defendants lacked probable cause to believe Plaintiff committed the impersonation offense. That is because, as explained above, a person who requests records under the TPIA wields public authority granted them by the statute. By going through the TPIA to submit his requests for public records, Plaintiff demonstrated his intent *not* to wield official authority, but to instead proceed through the lawful process the Town requires *every* member of the public to use.

None of the other factual content alleged in either the arrest affidavit or the search affidavit altered this conclusion. For one, Defendants did not allege Plaintiff committed acts of impersonation beyond the three public records requests he transmitted to the Town of Prosper. *See* Dkts. 8-5, 8-7 (noting the acts of impersonation only occurred between October 14, and October 28, 2020). That matters, because Defendants did not claim that Plaintiff ever committed an act of

impersonation in direct correspondence with any Town official. Defendants also re-alleged many of the same factual allegations raised in their March 5 and March 8, 2021 search warrant affidavits. *Compare* Dkts. 8-3, 8-4 *with* Dkts. 8-5, 8-7. Again, they noted that Plaintiff "admitted to using a fictitious name and fictitious email account"—an admission that, when viewed in light of the now-properly contextualized fact that Plaintiff was asking for public records, has little relevance to the commission of the impersonation offense alleged here. Nothing in the TPIA requires that a requestor provide *any* name to initiate a request, except in circumstances not relevant here.[12]

Defendants also filled their affidavits with irrelevant information about Plaintiff's samk38043@gmail.com account. Defendants alleged Plaintiff used this account "in furtherance of the offense of Impersonating a Public Servant," but stated only that Plaintiff used this account "from November 3, 2020 through May 6, 2021, to correspond with the Town and to make numerous additional requests for official government records." Compl. ¶ 73; Dkt. 8-5 at 4; Dkt. 8-7 at 5. An explanation of how this conduct furthers the alleged impersonation offense is completely absent from Defendants' warrant affidavits.

Though Defendants' search and arrest affidavits alleged many facts, few of them were relevant to the pertinent question: whether probable cause existed to arrest Plaintiff for impersonating a public servant. The only acts of impersonation Defendants alleged, after a nine-month investigation, were Plaintiff's submission of three lawful requests for public information using a pseudonym and parody email account. On those facts, it would have been apparent to a

[12] *See* Tex. Gov't Code § 552.275(n) (permitting government body to request photo identification for purpose of establishing requestor has not exceeded limits on requests requiring a large amount of personnel time; or has not concealed their identity in order to exceed those limits). The TPIA also permits a public information officer to contact the requestor "to establish proper identification[.]" *Id.* § 552.222. But this does not mandate a requestor furnish a proper name in the first instance. And here, Defendants never alleged they attempted to initiate contact with Plaintiff to establish his identification prior to or while responding to his records requests. Dkt. 1, ¶¶ 56, 72.

reasonable officer that Plaintiff lacked the specific intent required: for an official to "submit to [his] pretended official authority or to rely on [his] pretended official acts." Tex. Penal Code § 37.11(a)(1). Plaintiff has therefore pleaded a valid *Malley* claim, because the affidavits submitted by Defendants on their face showed that they lacked probable cause.

November 4, 2021 Grand Jury Indictment. Finally, on November 4, 2021, Plaintiff was indicted by a Collin County Grand Jury for Impersonating a Public Servant. The indictment returned by the Grand Jury alleged Plaintiff "impersonate[d] a public servant, namely Jeff Hodges, a Prosper City Councilman, with intent to induce Devin Reaves to submit to the pretended official authority of the defendant or to rely on the pretended official acts of the defendant by sending open records requests to the Prosper Police Department in attempt [sic] to obtain police records[.]" Compl. ¶ 83; Dkt. 8-12. At this stage, Plaintiff has plausibly alleged the Grand Jury's indictment was facially invalid, because Plaintiff's indictment was quashed by the presiding judge in his criminal case on November 7, 2022, after Plaintiff filed an unopposed motion seeking that relief. Compl. ¶¶ 86–89.

iii. Plaintiff Plausibly Alleged a Franks Claim, because Defendants, Knowingly or with Reckless Disregard for the Truth, Withheld Key Information from the Independent Intermediaries that was Necessary to the Finding of Probable Cause.

The facial deficiencies evident in Defendants' warrant affidavits do not tell the whole story, because Defendants also willfully included false statements and omitted exonerative information essential to the probable cause analysis. Had the affidavits submitted to the independent intermediaries properly disclosed this information, it would have been apparent from the beginning that Defendants had no lawful basis to search and arrest Plaintiff.

Under *Franks v. Delaware*, "it has been clearly established that a defendant's Fourth Amendment rights are violated if (1) the affiant, in support of the warrant, includes 'a false

statement knowingly and intentionally, or with reckless disregard for the truth' and (2) 'the allegedly false statement is necessary to the finding of probable cause.'" *Winfrey v. Rogers*, 901 F.3d 483, 494 (5th Cir. 2018) (quoting *Franks*, 438 U.S. at 155–56). An officer is therefore liable for a *Franks* violation when he "deliberately or recklessly provides false, material information for use in an affidavit in support of [a warrant]" or "makes knowing and intentional omissions that result in a warrant being issued without probable cause" *Wilson*, 33 F.4th at 206) (quoting *Melton*, 875 F.3d at 264). To state a valid *Franks* claim, Defendants' falsehoods and omissions must have been "necessary to the finding of probable cause." *Winfrey*, 901 F.3d at 494 (quoting *Franks*, 438 U.S. at 156).. To that end, courts "consider the faulty affidavit as if those errors and omissions were removed." *Id.* at 495. Here, the Court must "examine the 'corrected affidavit' and determine whether probable cause for the issuance of the warrant survives the deleted false statements and material omissions." *Id.*

Reviewing the material omissions and falsehoods in Defendants' affidavits reveals that Defendants had no reasonable basis to believe Plaintiff possessed the requisite intent necessary to make out a violation of Penal Code § 37.11(a)(1). That is because no "objectively reasonable police officer" or "reasonable and prudent men" would think Plaintiff possessed the specific intent to induce an agent of the Town of Prosper to submit to his "pretended official authority" or "pretended official acts" when he submitted his lawful public records requests. *Terwilliger*, 4 F.4th at 282 (quoting *Wesby*, 583 U.S. at 57; *Maryland v. Pringle*, 540 U.S. 366, 370 (2003)); Tex. Penal Code § 37.11(a)(1).

1. Each Warrant Affidavit Contained Factual Falsehoods and Omitted other Material Information Necessary to the Finding of Probable Cause

Because each of the warrant affidavits submitted by Defendants contained falsehoods and withheld important exonerative information that was material to the probable cause determination, Plaintiff again discusses each in turn.

March 5 and 8, 2021 Search Warrant Affidavits. The initial search warrants obtained by Defendants withheld the material fact that Plaintiff was seeking public records under the lawful process set out by the Texas Public Information Act. *See* Compl. ¶¶ 45–58. The affidavits thus recklessly cast a narrative that Plaintiff's attempts to request "official government records" and "official government information" were not pursued through the process that every member of the public is required to follow in order to obtain public information created by a governmental body. *See* Dkt. 8-3 at 2, 8-4 at 2.

Plaintiff followed the TPIA's lawful process to request the records he sought. That is vital to the probable cause analysis, despite Defendants' arguments otherwise. Ofc. Mot. at 20–21. The TPIA is designed to ensure that any member of the public can request official government records because access to those records ensures that the people receive "at all times … complete information about the affairs of government and the official acts of public officials and employees." Tex. Gov't Code § 552.001(a). Importantly, the act of requesting records does not on its own entitle a person to the information they requested, or mandate their disclosure. Instead, the TPIA lays out a careful process to ensure that a governmental body who receives a request for information can protect information that is confidential, sensitive, or otherwise excepted from disclosure. *See generally* Tex. Gov't Code, Ch. 552, Subchapters C (Exceptions to Disclosure), E (Procedures Related to Access), & G (Attorney General Decisions).

That makes Defendants' statement in their affidavits—that Plaintiff's pseudonymous requests "caused agents of the Town to act and cause the release of information upon this purported

official capacity"—false. Dkt. 8-3 at 2, Dkt. 8-4 at 2. No "official capacity" was required to oblige the Town's public information officers to respond to Plaintiff's lawful requests. And his requests alone certainly did not—indeed, could not—"cause the release of information" that is not expressly public under law. *See generally* Tex. Gov't Code, Ch. 552, Subchapter C (Information Excepted from Required Disclosure); *see also id.* § 552.301 (identifying procedures when a governmental body "wishes to withhold [information] from public disclosure and that it considers to be within one of the exceptions under Subchapter C").

That also further contextualizes the affidavits' allegation that Plaintiff requested records such as "a Police Department Organizational Chart and the names of employees holding positions within the Police Department[,]" as well as "personal information about current employees of the organization." Dkt. 8-3 at 2; Dkt. 8-4 at 2. The affidavits presented this fact as being relevant to Defendants' belief of Plaintiff's participation in a criminal act. But Defendants failed to note that they had already *publicly disclosed* this information on their website, a fact which they informed Plaintiff of when they processed his records requests. Compl. ¶ 32.

To artificially enhance their superficial allegations of probable cause, Defendants highlighted the November 2, 2020 email that Plaintiff sent to Town Council and Town leadership, in which he allegedly "admitted to using a fictitious name and fictious email account in an attempt to obtain official government records." Compl. ¶ 47; Dkt. 8-3 at 2; Dkt. 8-4 at 2. But as explained above, Defendants withheld the reason Plaintiff offered for doing so—"to remain anonymous and protect myself from retaliation." Compl. ¶¶ 34, 47; Dkt. 8-15 at 1. And through it all, Defendants represented to the reviewing judge that Plaintiff had "refused all efforts to present him/herself and to identify themselves and prove the right to access information-as required." Compl. ¶ 55; Dkt. 8-4 at 3. Again, this is false. Compl. ¶ 56. As Plaintiff alleged, "no agent of the Town of Prosper

ever attempted to communicate with Plaintiff in order to verify his identity, or asked him to offer any form of proof establishing a right to these records before deciding whether to disclose them to him." *Id.* This makes Defendants' decision to prosecute Plaintiff for seeking public records that much more troubling and confusing: all of this could have been solved by a simple email to Plaintiff asking him to confirm his identity. Defendants never even made that effort. Compl. ¶ 56.

July 19, 2021 Search and Arrest Warrant Affidavits. After successfully obtaining and executing two search warrants for Plaintiff's email accounts and finally ascertaining Plaintiff's true identity, Defendants finally disclosed for the first time in their July 19, 2021 warrant affidavits that the criminal acts they alleged, involved Plaintiff's use of a pseudonym to make three public records requests under the TPIA. Even then, Defendants still withheld exculpatory evidence of intent and included material falsehoods which would have left "serious doubts" that there was probable cause to arrest Plaintiff, as discussed above. *Winfrey*, 901 F.3d at 494 (quoting *Hart v. O'Brien*, 127 F.3d 424, 449 (5th Cir. 1997)).

In particular, after listing the three instances of Plaintiff's public records requests, Defendants alleged that Plaintiff "consistently identified himself using a modified name resembling that of Town of Prosper Councilman Jeff Hodges[.]" Dkt. 8-5 at 3; Dkt. 8-7 at 4. This falsely implies that Plaintiff used this pseudonym more than the three times he used the name to initiate his requests. But as Plaintiff alleged, he only ever supplied this name to file his requests, and thereafter never used the name again, in correspondence with Town officials, or otherwise. Compl. ¶¶ 31, 48, 79. And as the immediately preceding paragraphs of Defendants' affidavits show, two of those instances were within mere minutes of each other, and the third instance came two weeks later when Plaintiff filed an incomplete request that the Town would have had no obligation to respond to anyway. Dkt. 8-5 at 3; Dkt. 8-7 at 4.

Defendants also again withheld details of Plaintiff's voluntary communication to Town Council and Town leadership explaining that he used a pseudonym for the purpose of remaining anonymous. Compl. ¶ 78. Defendants' omission is at least reckless since the withheld fact was "clearly critical" to the probable cause determination. *Hale*, 899 F.2d at 400 (quoting *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980)). Likewise, Defendants' decision to omit exculpatory language in the TPIA itself—that all requestors are to be treated equally regardless of status or position, Tex. Gov't Code § 552.223—frustrated the reviewing judge's ability to consider all the relevant facts. This omission is important given that Defendants' prior warrant affidavits showed they had previously reviewed the TPIA's text to understand the rights and obligations requestors and government bodies hold in the public records request process. Indeed, in Defendants' March 8, 2020 search warrant affidavit for Plaintiff's samk38043@gmail.com account, Defendants explained that "the law allows the governmental entity to sufficiently identify the requestor and/or recipient of said records" Dkt. 8-4 at 3 (implicitly referencing Tex. Gov't Code § 552.222(a)). Defendants thus claimed familiarity with the TPIA, and that they consulted it to understand their own rights when processing Plaintiff's requests.

Finally, other material omissions and mislaid facts further tainted the affidavits, including: the allegation that Plaintiff used his samk38043@gmail.com account "in furtherance of the offense" without a shred of factual detail to support that claim, Compl. ¶ 73; the false recounting of a call between Plaintiff and Town Councilmember Marcus Ray, *id.* ¶¶ 74–76; the failure to note that Plaintiff only ever used the name "Geoff Hodges" when filling out required information in the Town's online forms for submitting public records requests, *id.* ¶ 79; and the fact that no Town official ever asked Plaintiff to verify his identity when processing his records requests, *id.* ¶ 80.

2. Plaintiff Plausibly Alleged Defendants Offered Their Factual Falsehoods and Material Omissions Intentionally, Knowingly, or with Reckless Disregard for the Truth.

Plaintiff also plausibly alleged that Defendants offered their material falsehoods and omissions intentionally, knowingly, or with reckless disregard for the truth. "In considering whether the drafting of an affidavit involved reckless disregard for the truth, the Fifth Circuit has consistently considered both the materiality of the false statement as well as the context in which the affidavit was drafted." *United States v. Beard*, 2019 WL 2161038, at *9 (S.D. Tex. May 17, 2019) (citing *United States v. Alvarez*, 127 F.3d 372, 374 (5th Cir. 1997)). To evaluate an affidavit's context, the Fifth Circuit considers a range of factors, including: the experience of the draftsmen, whether the affiant consulted with an attorney, that the affiant failed to disclose "facts underlying his conclusory statements," whether any exigency precluded the drafting officer from "carefully setting out the facts upon which he based his conclusion." *Alvarez*, 127 F.3d at 375, that the prosecution was based on a "novel legal theory" of criminal liability, and that the draftsmen had an "appreciation of the importance" of the statements at issue. *United States v. Namer*, 680 F.2d 1088, 1092, 1094 (5th Cir. 1982).

Plaintiff plausibly alleged that each of the material omissions and misrepresentations made by Defendants in their affidavits was carried out with reckless disregard for the truth, at a minimum. *See* Compl. ¶¶ 45–58; 65–81; 96. In addition, nearly all of the circumstantial factors laid out in *Alvarez* and *Namer* are present here. *First*, Lt. Boothe was a seasoned law enforcement officer who had been licensed since 1984—nearly 37 years at the time of Plaintiff's arrest. *See* Dkt. 8-3 at 1. Drawing on his decades of law enforcement experience, Lt. Boothe should have known that crafting a probable cause affidavit that withheld key exculpatory facts, and

misrepresented others, would deprive the reviewing judge of "all the facts" necessary to the probable cause determination. *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988).

Second, the affidavits were replete with conclusory statements which were not placed in their proper context, or supported by additional facts. For example, Defendants' statement in their March affidavits that Plaintiff "caused agents of the Town to act and cause the release of information upon [Plaintiff's] purported official capacity" failed to explain that the Town's agents were obligated by law to respond to Plaintiff's lawful TPIA request, and that much of the information they "release[d]" was already in the public domain. *Compare* Dkt. 8-3 at 2, Dkt. 8-4 at 2, *with* Compl. ¶ 32. Likewise, in their July affidavits, Defendants alleged Plaintiff "admitted to using a fictitious name and fictitious email account to submit records requests in an attempt to obtain official government records[,]" but again failed to clarify that Plaintiff did so "to remain anonymous and protect [himself] from retaliation." Compl. ¶ 34; *see* Dkt. 8-15 at 1.

Third, no exigency existed here. Defendants took from November 4, 2020, when they issued their first document hold and took their first formal investigative step, to July 19, 2021, when they obtained their arrest and search warrants—about nine months from start to completion. In between, they sought their first search warrants on March 5, 2021, and March 8, 2021, respectively—four months after their investigation began in earnest. Between the issuance of the March warrants and the July warrants, Defendants gained no new factual information to add to their basis for probable cause, and in fact provided even *less* factual detail in their July 2021 arrest warrant than they did in their March 2021 search warrants. For example, the July 2021 arrest warrant removed much of the detail about Plaintiff's samk38043@gmail.com account that Defendants relied on to establish probable cause to search that account back in March 2021. *Compare* Dkt. 8-4 *with* Dkt. 8-5.

Fourth, Defendants' theory of criminal liability here—that Plaintiff can be prosecuted for using a pseudonym and parody email to ask for public records that the First Amendment and the TPIA says he has an absolute legal right to request—is entirely novel, and as previously described, directly conflicts with the express terms of the TPIA.[13] That required more care from Defendants, not less, in ensuring that the facts alleged in their affidavits were meticulously and accurately presented to the reviewing judge who signed off on their warrants. *See Namer*, 680 F.2d at 1092, 1094 (noting that awareness of the novelty of a legal theory, coupled with efforts to "camouflage" that novelty in less-novel terms, amounted to recklessness).

Fifth, Plaintiff plausibly alleged that Defendants understood the importance of the fact that Plaintiff was following the lawful process for requesting public records to the probable cause inquiry, and that he was doing so to maintain his anonymity. Defendants even avoided informing the reviewing judge that Plaintiff was making lawful public records requests until their July 2021 affidavits. And in each of the four affidavits they filed, Defendants failed to disclose Plaintiff's voluntary communication to Town Council that he used his chosen pseudonym and email account "to remain anonymous and protect myself from retaliation." Compl. ¶ 34; Dkt. 8-15 at 1; *see* Dkts. 8-3, 8-4, 8-5, 8-7.

Sixth, even though the record does not reflect whether Defendants consulted with an attorney, Defendants' March 8 affidavit explained that they consulted with the TPIA's text to understand the law's application to Plaintiff's conduct. *See* Dkt. 8-4 at 3 ("[T]he law allows the governmental entity to sufficiently identify the requestor and/or recipient of said records."). Defendants thus claimed familiarity with the TPIA in one affidavit, but failed in each of their other

[13] Indeed, undersigned counsel have been unable to locate any similar case in Texas where a person was charged under the theory upon which Defendants arrested Plaintiff.

affidavits to disclose other exculpatory provisions which eliminated any reasonable belief Plaintiff had the specific intent to impersonate Jeff Hodges. Then, Defendants subsequently removed the language demonstrating familiarity with the TPIA from their July 19 affidavits altogether. *Compare* Dkt. 8-4 at 3 *with* Dkts. 8-5, 8-7.

3. Plaintiff Plausibly Alleged the November 4, 2021 Grand Jury Indictment was Tainted by Defendants' Actions

Finally, Plaintiff has plausibly alleged that the Collin County Grand Jury which returned an indictment for the impersonation offense alleged here was tainted by Defendants' actions, and thus the chain of causation is intact. In a *Franks* case where, as here, a grand jury is involved, "the chain of causation between the officer's conduct and the unlawful arrest 'is broken only where *all the facts* are presented to the grand jury.'" *Winfrey*, 901 F.3d at 497 (emphasis in original) (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)). At the motion to dismiss stage, so long as "a plaintiff adequately pleads that [another] intermediary, such as a grand jury, has been misled in similar fashion, then the taint exception will apply to that intermediary's decision as well." *Wilson*, 33 F.4th at 212.

Plaintiff alleged Defendant Boothe was "the sole witness produced to the grand jury" where he "testified to the same basic, tainted set of facts that he alleged in his previous warrant affidavits, which included the same material omissions and misrepresentations that induced District Judge Smith to sign off on the search and arrest warrants[.]" Dkt. 1 ¶¶ 84–85. These allegations are sufficient to overcome the independent intermediary doctrine as to the grand jury, because "'mere allegations of "taint"' . . . may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference." *Wilson*, 33 F.4th at 212 (quoting *McLin*, 866 F.3d at 690). Plaintiff alleged as much in his Complaint. Compl. ¶¶ 84–85. He has therefore adequately pled that each intermediary's decision was tainted by Defendants. Moreover, since "'a general rule

of secrecy shrouds the proceedings of grand juries,' it is understandably difficult for a plaintiff to know what was said—or wasn't said—to the grand jury absent any form of discovery." *Wilson*, 33 F.4th at 212 (internal citation omitted). The Defendant Officers offer nothing to contradict Plaintiff's plausible allegations on the matter, other than conjecture about what the grand jury "presumably" considered. Ofc. Mot. at 19. That type of argument is insufficient to supplant Plaintiff's well-pleaded allegations here. Plaintiff's *Franks* claim should proceed.

d. Plaintiff Stated Valid Claims for Direct and Retaliatory Violations of his First Amendment Rights.

Plaintiff also raised a First Amendment claim, under two theories: a retaliatory arrest theory and a direct infringement theory. *See Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002) ("The First Amendment prohibits not only direct limits on individual speech but also adverse governmental action against an individual in retaliation for the exercise of protected speech activities."). As an initial matter, Defendants only challenged the former theory—retaliatory arrest—in their motion to dismiss. Ofc. Mot. at 25–30. Thus, even if the Court finds Plaintiff has failed to state a First Amendment claim under his retaliatory arrest theory, Plaintiff's direct infringement theory should survive Defendants' motion.

Turning to the merits of his retaliatory arrest claim, to proceed on this theory, Plaintiff must "establish[] the absence of probable cause[.]" *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019). If this threshold is cleared, Plaintiff must show: (1) that Plaintiff was "engaged in constitutionally protected activity" at the time of his arrest; (2) that the government took an "adverse action" against Plaintiff "that would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) that the government took that adverse action based on Plaintiff's exercise of his constitutionally protected activity. *Keenan*, 290 F.3d at 258; *see Bailey v. Iles*, 78 F.4th at 813–14. Plaintiff has met his threshold burden to establish the absence of probable cause for his arrest and

prosecution for Impersonating a Public Official. Accordingly, Plaintiff's analysis proceeds with the remaining three elements.

i. Plaintiff's Pseudonymous Public Records Requests and Subsequent Communications with Town Officials were Constitutionally Protected.

Plaintiff alleged his pseudonymous public records requests, and subsequent anonymous communications with Town officials, were the *sine qua non* of his arrest. Dkt. 1 at ¶¶ 36–39. But Defendants' criminal investigation did not begin in earnest until November 4, 2020—two days after Plaintiff anonymously emailed the Prosper Town Council and Town leadership to explain his desire for anonymity, and to criticize Town officials for the handling of his public records requests. *Id.* ¶¶ 34, 40. The timing of Defendants' actions suggests that they chose to escalate their investigation after Plaintiff informed Town Council anonymously of his intent to hold Town officials accountable for failing to respond to his records requests in good faith. *See* Dkt. 8-15.

Plaintiff's public records requests and communication with Town Council, taken together, show that Defendants' investigation proceeded in response to Plaintiffs' exercise of conduct protected by the speech and petition clauses of the First Amendment—rights which have been clearly established under Supreme Court and Fifth Circuit precedent. Broadly, "[s]peech is an essential mechanism for democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Turner v. Lt. Driver*, 848 F.3d 678, 689 (5th Cir. 2017) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010). Those principles extend to anonymous speech as well.

Indeed, "free speech was originally understood to include the right to speak without being known. Consistent with this original understanding, the Supreme Court has upheld the right by striking down laws banning anonymous speech." *Novak v. City of Parma*, 932 F.3d 421, 434 (6th

Cir. 2019) (citing *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 357 (1995)); *see also Americans for Prosperity v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (donor disclosure law burdens associational rights). As a result, actions like "anonymous pamphleteering [are] not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority." *McIntyre*, 514 U.S. at 357. The values underpinning the right to anonymous speech are essential, because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley v. California*, 362 U.S. 60, 65 (1960); *see also Pac. Gas & Elec. v. Pub. Utils. Com'n of Cal.*, 475 U.S. 1, 8 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected.").[14]

Plaintiff exercised these rights by anonymously asking for information from the Town of Prosper, and by anonymously communicating his criticism of the Town's response to his lawful requests for public records. Defendants do not dispute that Plaintiff was engaged in constitutionally-protected activity, just that "the First Amendment [does not] provide[] carte blanche protection to commit criminal acts." Ofc. Mot. at 29. That is an argument about probable cause; not whether Plaintiff was exercising his rights. There is no reasonable dispute that he was.

ii. Plaintiff's Arrest was an Adverse Government Action that Chilled Him from Continuing to Engage in that Activity.

Second, there is no doubt that an arrest constitutes adverse action. *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477 (2022) (an arrest is "easy to identify" as an adverse action); *see Keenan*, 290 F.3d at 259; *Bailey*, 78 F.4th at 806. Here, Plaintiff was arrested for filing his lawful public records requests, and then taking his concerns about the handling of those requests to the Town Council and Town leadership. That arrest also chilled Plaintiff from continuing to interact

[14] Those principles apply equally to digital forums and communication media. *Cf. Reno v. ACLU*, 521 U.S. 844, 870 (1997); *see also Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782, 787–89 (M.D. Pa. 2008).

with the Town of Prosper in any capacity.[15] Plaintiff's arrest "cause[d him] to constantly fear further harassment and retaliation from the Prosper Police Department and other Town of Prosper officials," and as a result he has "curtail[ed] his own exercise of his First Amendment rights." Dkt. 1 at ¶ 116; *see id.* ¶ 111.

iii. Defendants Were Substantially Motivated Against the Exercise of Plaintiff's Constitutional Rights.

Plaintiff has also plausibly alleged that Defendants were substantially motivated against the exercise of his constitutional rights. *See Keenan*, 290 F.3d at 258. Plaintiff's public records requests were driven by a desire to hold the Town of Prosper Police Department accountable. Dkt. 1 ¶¶ 29, 91. When Town officials responded to his requests and explained that they were "not required to compile statistics or create a new document in response to a request[,]" *id.* ¶ 32, Plaintiff communicated his concerns directly to Town Council. *Id.* ¶¶ 33–34. Using his prospercitycouncil@gmail.com address, Plaintiff expressed disappointment with the handling of his requests, and his suspicions that Town officials were hiding this data. *Id.* ¶ 34; Dkt. 8-15 at 1-3. And in this email, disclosed that he used a pseudonym and anonymous email because he wanted to protect his identity and feared retaliation. Compl. ¶¶ 27, 34.

Defendants took the first true steps of their investigation after Plaintiff sent this email to Town Council. *Id.* ¶¶ 40–41. Equally concerning, Defendants' investigation also later targeted a website Plaintiff created, entitled "Prosper Police Oversight," which Plaintiff created "to publish the police records he had lawfully obtained." *Id.* ¶ 107. *Keenan* makes clear, that when a person

[15] The Fifth Circuit has interpreted this standard to require Plaintiff to demonstrate that *his* "exercise of free speech has been curtailed." *Keenan*, 290 F.3d at 259. Still, the Court recently noted that this interpretation departs from all other circuits, which have held that the "person of ordinary firmness standard" is an objective test. *Villarreal v. City of Laredo, Tex.*, 44 F.4th 363, 374 (5th Cir. 2022). The en banc Fifth Circuit vacated this opinion and may revisit the standard in its forthcoming opinion. 52 F.4th 265 (5th Cir. 2022).

engages in lawful accountability efforts that could be "damaging"—personally, professionally, politically, or financially—"it is reasonable to assume" that Defendants' subsequent actions "were substantially motivated as a response to [Plaintiff's] exercise of protected conduct." *Keenan*, 290 F.3d at 261. The allegedly criminal acts for which Defendants arrested Plaintiff *are* inherently speech; thus, if Defendants lacked probable cause to arrest Plaintiff, there is no reasonable dispute that Defendants were motivated against Plaintiff's exercise of that speech. *See Bailey*, 78 F.4th at 814 (admission that arrest was "at least in part because of" protected speech, and officer could not point to other conduct that motivated the arrest, sufficient to establish "substantial motivation").

iv. Defendants are not Entitled to Qualified Immunity on Plaintiff's First Amendment Retaliation Claim

Finally, Defendants' actions were not "objectively reasonable in light of clearly established federal law," and they are thus not entitled to qualified immunity from suit. *Keenan*, 290 F.3d at 261. It was clearly established at the time of Plaintiff's arrest that "government retaliation against a private citizen for exercise of First Amendment rights cannot be objectively reasonable." *Id.* (citing *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996)). Because Defendants lacked probable cause to arrest Plaintiff—and because no reasonable officer would have believed probable cause existed—Defendants' "retaliation violated clearly established law in this circuit." *Id.* at 262; *see also Davidson*, 848 F.3d at 394; *Bailey*, 78 F.4th at 814.

VII. Plaintiff Stated a Valid Claim for Supervisory Liability Against Chief Kowalski.

To prevail on a theory of supervisory liability under Section 1983 "a plaintiff must show either the supervisor personally was involved in the constitutional violation or that there is a sufficient causal connection between the supervisor's conduct and the constitutional violation." *Evett*, 330 F.3d at 689. The "misconduct of the subordinate must be affirmatively linked to the action or inaction of the supervisor." *Southard v. Tex. Bd. of Crim. Justice,* 114 F.3d 539,

550 (5th Cir. 1997). Conversely, a "supervisor is not personally liable for his subordinate's actions in which he had no involvement." *James v. Tex. Collin Cnty.*, 535 F.3d 365, 373 (5th Cir. 2008). A "supervisory official is held to a standard of deliberate indifference, which requires proof that the supervisor disregarded a known or obvious consequence of his action" that amounted to a violation of Plaintiff's constitutional rights. *Evett*, 330 F.3d at 689 (internal quotations omitted).

As is the case here, when a supervisor issues an order to a subordinate that results in a constitutional violation, that is enough to establish the necessary personal involvement for a supervisory liability claim. *See Pena v. City of Rio Grande City*, 879 F.3d 613, 621 (5th Cir. 2018) ("A supervisor [] issuing a direct order to a subordinate to use excessive force demonstrates both the necessary action and causality for a supervisory-liability claim."). The causal connection is thus established if the "defendant set in motion a series of events that would foreseeably cause the deprivation of the plaintiff's constitutional rights." *Reagan v. Burns*, 2019 WL 6733023, at *9 (N.D. Tex. Oct. 30, 2019) (citing *Morris v. Dearborne*, 181 F.3d 675, 672 (5th Cir. 1999)).

Defendants do not dispute that Chief Kowalski had supervisory authority over Lt. Boothe. *See* Ofc. Mot. at 15–16. Plaintiff alleged he used this authority to order Lt. Boothe to investigate Plaintiff's open records request, and his subsequent communications with Prosper Town Council, in order to prosecute the person behind them. Compl. ¶¶ 38–39. These allegations are sufficient to create a plausible inference of Chief Kowalski's personal involvement, and courts have held as much. *See Wooten v. Roach*, 431 F. Supp. 3d 875, 891 (E.D. Tex. Dec. 23, 2019) (Mazzant, J.) (denying motion to dismiss because defendant was alleged to be the motivating factor behind inappropriate investigations); *Johnson v. Thaler*, 2011 WL 2433623, at *1–3 (E.D. Tex. May 18, 2011) (denying motion to dismiss because plaintiff alleged defendant issued instructions to file

disciplinary charges against him to retaliate), *report and recommendation adopted*, 2011 WL 2358503 (June 14, 2011).

Plaintiff's allegations of Kowalski's involvement here plausibly demonstrate his "overt participation" in the constitutional violation itself. *Cf. Self v. City of Mansfield*, 369 F. Supp. 3d 684, 700 (N.D. Tex. 2019) (finding no personal involvement when plaintiff failed to suggest or allege facts that allowed an inference that defendants overtly participated in asserted constitutional violation). Plaintiff plausibly alleged that Lt. Boothe acted at the direction of his superior, Chief Kowalski, when conducting his unconstitutional investigation. Chief Kowalski's initial order to investigate Plaintiff means that he was personally involved in conduct that deprived Plaintiff of his rights. And all of this was done with the "knowledge and approval of Defendant Kowalski." *Id.* at ¶ 68.[16]

Plaintiff has plausibly alleged that Defendant Kowalski "issu[ed] instruction[s]" to Lt. Boothe to start an investigation that amounted to a violation of Plaintiff's constitutional rights. *Johnson*, 2011 WL 2433623, at *3. At the pleading stage, this sufficiently establishes Defendant Kowalski's personal involvement, because the Complaint alleges specific conduct that give rise to the asserted constitutional violation. *See Wooten*, 431 F. Supp. 3d at 891; *Johnson*, 2011 WL 2433623, at *1–3. Chief Kowalski had supervisory duties over Lt. Boothe, and his failure to stop Lt. Boothe's unconstitutional investigation amounted to deliberate indifference toward Plaintiff's constitutional rights, because it was "obvious that the likely consequence" of allowing Lt. Boothe

[16] To the extent Defendants' motion argues differently, *e.g.* Ofc. Mot. at 15, the Court should decline Defendants' invitation to reach beyond the allegations raised in Plaintiff's Complaint, and to incorporate their own self-serving allegations that, at this stage, are not proper for the Court's consideration. *Bosarge*, 796 F.3d at 440–41.

to continue his investigation would end in Plaintiff's rights being violated. Compl. ¶ 129; *Porter v. Epps*, 659 F.3d 440, 448 (5th Cir. 2011).

Contrary to Defendants' argument, Ofc. Mot. at 15–16, Plaintiff does not allege that, merely because Chief Kowalski was Lt. Boothe's supervisor, he is therefore liable. *Id.* That is the kind of vicarious liability claim that the Supreme Court has repeatedly disallowed. *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 692–95 (1978).[17] Chief Kowalski is liable because he directly ratified the unlawful investigation from start to finish. Defendants' other arguments are beside the point. That Defendant Kowalski did not apply for the warrants, subpoenas, and other related matters is immaterial. Ofc. Mot. at 15. Plaintiffs are only required to show that Defendant Kowalski was directly involved in *ratifying* those actions, even if he did not sign his name personally. For all the reasons stated above, that burden has been met.

VIII. Plaintiff Stated a Valid Claim for Municipal Liability against the Town of Prosper.

To state a claim for municipal liability under Section 1983, Plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right. *Pena v. City of Rio Grande City*, 879 F.3d 613, 621 (5th Cir. 2018). An official policy "[i]ncludes the decisions of a government's law-makers [and] the acts of its policymaking officials."[18] *Id.* at 621–22. "If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). "Where

[17] Nor does Plaintiff allege a failure-to-train theory, contrary to Defendants' argument, Town Mot. at 15–16. Plaintiff has sufficiently alleged Defendant Kowalski's direct personal involvement in the constitutional violation itself, which is legally sufficient. *Evett*, 330 F.3d at 689.

[18] Plaintiff does not allege that the Town has a persistent widespread practice that rises to the level of an "official custom." Town Mot. at 10–11. His municipal liability claim is predicated on the Town's direct involvement with Plaintiff's investigation and prosecution..

an official policy or practice is unconstitutional on its face, it necessarily follows that a policymaker was not only aware of the specific policy, but was also aware that a constitutional violation will most likely occur." *Burge v. St. Tammany Par.*, 336 F.3d 363, 370 (5th Cir. 2003).

"On the other hand, where an alleged policy is facially innocuous, establishing the requisite official knowledge necessitates that a plaintiff demonstrate that the policy was promulgated or 'implemented with 'deliberate indifference' to the 'known or obvious consequences' that constitutional violations would result.'" *Covington v. City of Madisonville, Tex.*, 812 F. App'x 219, 225 (5th Cir. 2020) (quoting *Alvarez v. City of Brownsville*, 904 F.3d 382, 390 (5th Cir. 2018)). "[A] final decisionmaker's adoption of a course of action 'tailored to a particular situation and not intended to control decisions in later situations' may, in some circumstances, give rise to municipal liability[.]" *In re Foust*, 310 F.3d 849, 862 (5th Cir. 2002).

Here, Plaintiff alleged the Prosper Town Council met and ratified the decision to investigate "Geoff Hodges" in order to identify and prosecute the person behind the lawful records requests. Compl. ¶ 38. This decision was facially unconstitutional because there was nothing inherently unlawful about the use of the pseudonym "Geoff Hodges" to initiate a public records request; that act alone fell short of meeting the essential elements of the impersonation offense Plaintiff was investigated and charged under. *Id.* ¶ 67. Thus, the Town was "aware that a constitutional violation [would] most likely occur" and nonetheless directed Defendants Kowalski and Boothe to investigate, arrest and prosecute Plaintiff. *Burge*, 336 F.3d at 370; Compl. ¶ 38. The Town also had actual knowledge of the unconstitutionality of their decision to investigate Plaintiff when Plaintiff emailed them on November 2, 2020 to explain why he used a pseudonym—to protect himself from retaliation. Compl. ¶¶ 34–35; Dkt. 8-15.[19]

[19] The Town responds that "[a]n isolated incident cannot be the basis for holding a City/Town liable." Town Mot. at 8. But "a final decisionmaker's adoption of a course of action 'tailored to a particular situation and

To meet the second prong at the Motion to Dismiss stage, "the complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable." *Id.* Here, Plaintiff properly alleged that the official policy was promulgated by the municipal policymaker, the Town Council. Compl. ¶ 38. Plaintiff alleged that the Prosper Town Council met to discuss the "Geoff Hodges" email. *Id.* And as a result of this meeting, the Town Council directed the Prosper Police Department to investigate Plaintiff. *Id.* That alone is sufficient to meet *Monell*'s second prong.[20]

Lastly, the third prong is met by showing that the official policy or custom "was a cause in fact of the deprivation of rights inflicted." *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997) (quoting *Lefall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir 1994)). Plaintiff must allege that the "custom or policy served as the moving force behind the constitutional violation," or that his "injuries resulted from the execution of the official policy or custom." *Id.* Thus, in *Groden*, the court held that allegations of the constitutional violation occurring because of the official policy was sufficient to show that the policy was the "moving force" behind the unconstitutional arrest. 826 F.3d at 286. Groden sold books in Dealey Plaza about the "truth" behind the assassination of President Kennedy. *Id.* at 282. The City subsequently announced that it planned to "crack down" on vendors in Dealey Plaza. *Id.* A police officer then arrested Groden pursuant to a provision of the Dallas City Code which prohibits selling merchandise in a park. *Id.*

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not intended to control decisions in later situations' may, in some circumstances, give rise to municipal liability under § 1983." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 406 (1997) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)). Defendant also contends that there is no written policy that shows a policy of retaliation against Plaintiff. Town Mot. at 13. However, the official policy does not have to be in writing. *Groden v. City of Dallas*, 826 F.3d 280, 286 (5th Cir. 2016).

[20] The Town argues that Plaintiff did not plead the proper policymaker for a Section 1983 claim. But "the specific identity of the policymaker is a legal question that need not be pled." *Groden*, 826 F.3d at 284.

The Fifth Circuit held that, on those facts, Groden pled enough "to show that the alleged crackdown policy […] was the moving force behind the city's alleged unconstitutional arrest." *Id.* at 286–87.

Here, Plaintiff properly alleged that the Town Council's directive to investigate and prosecute Plaintiff was the driving force behind his constitutional violations. Compl. ¶ 143. The Town Council instructed the Police Department to investigate "Geoff Hodges." *Id.* at 38. All the actions undertaken by the Police Department with regards to "Geoff Hodges" flowed from the directive to investigate the source of the anonymous records requests, and were the official imprimatur behind his ultimate unconstitutional search and arrest.[21]

IX. Declaratory Relief and Punitive Damages are Available.

Lastly, Defendants are correct that if none of Plaintiff's substantive claims survive, declaratory relief is unavailable. Ofc. Mot. at 30, Town Mot. at 14; *see Harris Cty. Tex. v. MERSCORP Inc.*, 791 F.3d 545, 552 (5th Cir. 2015). But because Plaintiff has plausibly alleged valid Fourth and First Amendment claims, the Court may enter declaratory relief as well. The Officer Defendants are incorrect that punitive damages are unavailable. Ofc. Mot. at 30. Punitive damages may be awarded to remedy conduct that "is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Plaintiff made that showing here. *See* Compl. ¶¶ 68, 78, 97, 103, 105, 123, 133.

X. Conclusion

For the foregoing reasons, Defendants' Motions to Dismiss, Dkts. 8 & 9, should be denied.

[21] Defendant points out that Plaintiff only used the term "moving force" one time in his Complaint. Town Mot. at 12. But all that is required is for Plaintiff to allege that the official policy "was a cause in fact of the deprivation of rights inflicted." *Spiller v. City of Tex. City, Police Dep't,* 130 F.3d 162, 167 (5th Cir. 1997).

Dated: October 24, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Peter B. Steffensen
Peter B. Steffensen

[22] The First Amendment Clinic is grateful to SMU Law students Bradley Kucera, Cam Ruk, Zachary Belew, Clint Nuckolls, and Remington Giller for their invaluable contributions to this brief.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

LEONARD JOHNSON, ***Plaintiff***, v. TOWN OF PROSPER, TEXAS, PAUL BOOTHE, and DOUG KOWALSKI, ***Defendants***.	Civil Action No. 4:23-cv-650-ALM

ORDER

Before the Court is Defendants Lt. Boothe and Chief Kowalski's Motion to Dismiss, Dkt. 8, and Defendant Town of Prosper's Motion to Dismiss, Dkt. 9. Having considered each Motion, Plaintiff's Consolidated Response, and Defendants' Replies thereto, the Court finds Plaintiff has plausibly stated a claim upon which relief can be granted for each count Plaintiff has alleged in his Complaint, Dkt. 1. Accordingly, it is ORDERED that Defendants' Motions to Dismiss are DENIED.