UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Gerald D. Yingst, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 14-2062
	)	
County of St. Louis, Missouri, and	)	**JURY TRIAL DEMANDED**
	)	
James Vollmer, a police officer, in his individual capacity,	)	
	)	
Defendants.	)	

VERIFIED COMPLAINT

Introduction

1. In this civil rights action under 42 U.S.C. § 1983, Plaintiff, Gerald D. Yingst, III, seeks judgment against Defendant James Vollmer for violation of his rights under the First, Fourth, and Fourteenth Amendments to the Constitution of the United States; violation of the Privacy Protection Act; violation of his rights under the Missouri Constitution; battery; false imprisonment; and conversion. Yingst also seeks judgment against Defendant County of St. Louis for its failure to train and supervise Defendant Vollmer and for defamation.

Jurisdiction and Venue

2. This action arises under the Constitution of the United States, the provisions of 42 U.S.C. § 1983, and Missouri law.

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1343(a).

4. This Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to

28 U.S.C. § 1367.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in St. Louis County, Missouri.

6. Venue is proper in the Eastern Division pursuant to E.D. Mo. L.R. 2.07(A)(1).

Parties

7. Plaintiff, Gerald Yingst, is a journalist with News2Share.com, a multimedia organization.

8. Defendant John Vollmer is a Lieutenant with the County of St. Louis' Police Department. On November 22, 2014, Vollmer encountered Plaintiff and interacted with him as described in this complaint. Vollmer is sued in his individual capacity only.

9. Defendant County of St. Louis is a municipal corporation duly organized under the laws of the State of Missouri.

10. Defendants acted under color of state law at all times relevant to this complaint.

Facts

11. On August 8, 2014, former Ferguson police officer Darren Wilson killed teenager Michael Brown, sparking protests in Ferguson and nationwide.

12. In the months following the death of Michael Brown, protesters regularly gathered in Ferguson and throughout the St. Louis Metropolitan area to protest and raise awareness of police brutality against African Americans and an American criminal justice system that is stacked against people of color.

13. During the protests, police officers routinely engaged in unconstitutional behavior and implemented unconstitutional policies.

14. In response to the unconstitutional practices employed by the Ferguson police department, Saint Louis County police department, and Missouri Highway Patrol, lawsuits challenging those practices were brought, including cases challenging law enforcement practices (1) preventing individuals from standing for more than five seconds on public streets and sidewalks and (2) interfering with those who were recording police in public places.

15. On October 6, 2014, United States District Judge Catherine D. Perry issued a preliminary injunction in *Abdullah v. County of St. Louis, Missouri*, Case No. 4:14-cv-1436-CDP, enjoining defendants, including County of Saint Louis and its police officers, from "enforcing or threatening to enforce any rule, policy, or practice that grants law enforcement officers the authority or discretion to arrest, threaten to arrest, or order to move individuals who are violating no statute or regulation and who are peaceably standing, marching, or assembling on public sidewalks." A copy of the injunction is attached as Exhibit A.

16. On November 21, 2014, United States District Judge John A. Ross entered a consent judgment in *Hussein v. County of St. Louis, Missouri*, Case No. 4:14-cv-1410-JAR, enjoining "the Defendant County of St. Louis, Missouri, its officers, agents, servants, employees, attorneys, and all other persons under their supervision, or within their control... from interfering with individuals who are photographing or recording at public places but who are not threatening the safety of others or physically interfering with the ability of law enforcement to perform their duties." A copy of the injunction is attached as Exhibit B.

17. On the night of November 22, 2014, Yingst was in Ferguson, Missouri, reporting on protests near the Ferguson police department.

18. At all times relevant to this complaint, Yingst worked as a Senior Reporter, videographer, and News Director by News2Share.com, and traveled to Ferguson, Missouri, to report on the protests after the killing of Michael Brown.

19. Yingst reported on the protests by filming interactions between protesters and the police.

20. Around 11:30pm on November 22, 2014, St. Louis County police, under the direction of Defendant James Vollmer, attempted to clear protesters from the eastern sidewalk of South Florissant Road to the western sidewalk of South Florissant Road.

21. St. Louis County officers began to yell at protesters to move to the other sidewalk and to clear the street.

22. At this time, Yingst was standing on the eastern sidewalk of South Florissant Road with other journalists and recording law enforcement's attempt to move protesters across the street.

23. After a brief period of yelling at protesters to clear the eastern sidewalk and street, Defendant Vollmer pointed at Yingst and a few subordinate patrolmen moved towards Yingst, partially surrounding him.

24. As the patrolmen surrounded him, Yingst, fearing imminent arrest, told Defendant Vollmer, "Sir, I'm just standing on a public sidewalk."

25. Defendant Vollmer then told his subordinate patrolmen to "lock him up."

26. At Vollmer's direction, the patrolmen handcuffed Yingst and placed him under arrest.

27. While officers were arresting Yingst, he asked them, "Why are you arresting me?" The arresting officers proffered no response.

28. When Yingst was arrested, he was standing on a public sidewalk and recording law enforcement officers.

29. Protesters and other reporters who were standing alongside Yingst on the sidewalk, as well as those in the street, were not arrested.

30. Defendant Vollmer knew at all times that Yingst was a member of the media and was recording the protests.

31. Defendant Vollmer knew that Yingst was lawfully standing on a public sidewalk.

32. Defendant Vollmer knew that Yingst was not a part of an unlawful assembly.

33. Yingst was detained overnight.

34. Yingst was arrested and booked for an alleged "Unlawful Assembly" in violation of Missouri Revised Statute § 574.040.

35. Missouri Revised Statute § 574.040 provides that:

> A person commits the crime of unlawful assembly if he knowingly assembles with six or more other persons and agrees with such persons to violate any of the criminal laws of this state or of the United States with force or violence.

36. Defendant Vollmer lacked arguable probable cause to cause Yingst's arrest.

37. A reasonable officer would have known that the arrest of Yingst violated not only the United States Constitution, the Missouri Constitution, and state law, but also the preliminary injunction in *Abdullah* and the *Hussein* consent judgment.

38. No reasonable officer would have believed that Defendant Vollmer had probable cause to cause Yingst's arrest.

39. True and accurate depictions of Yingst's arrest and the surrounding circumstances are filed herewith as Exhibits C & D, and are incorporated herein by reference.

40. After arresting Yingst, the St. Louis County Police Department tweeted, using Yingst's official Twitter handle, "@TreyYingst reporter from D.C. taken into custody for failure to disperse. Was asked to leave street by the commander and refused. #Ferguson." The tweet was posted to the St. Louis County Police Department's official Twitter page. A screenshot of the tweet is attached as Exhibit E.

41. The St. Louis County Police Department publicly disclosed this information knowing that it was false.

42. As of December 11, 2014, the tweet has not been deleted by the St. Louis County Police Department and remains on its Twitter feed.

43. As of December 11, 2014, the tweet has been retweeted 239 times and favorited 97 times. It has elicited 21 replies.

44. News2Share's readers are avid Twitter users and many of them read the St. Louis County Police Department's tweets.

45. Yingst's reputation as a journalist was harmed by the St. Louis County Police Department's false statement via Twitter.

COUNT I
42 U.S.C. § 1983 - First Amendment
Against Defendant Vollmer

46. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

47. Defendant Vollmer violated Plaintiff's rights, under the First Amendment, to freedom of the press and freedom of speech by interfering with Plaintiff's ability to gather information and cover a matter of public interest as a member of the media.

48. Observing and recording public protests, and the police response to those protests, is a legitimate means of gathering information for public dissemination that is protected by the freedom of speech and freedom of the press clauses of the First Amendment.

49. Defendant Vollmer engaged in these unlawful actions willfully and knowingly, acting with reckless or deliberate indifference to Plaintiff's First Amendment rights.

WHEREFORE, Plaintiff prays this Court:

A. Enter judgment in favor of Plaintiff and against Defendant Vollmer;

B. Award Plaintiff compensatory damages against Defendant Vollmer for violation of Plaintiff's constitutional rights under color of law;

C. Award Plaintiff reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable provisions of law; and

D. Allow such other and further relief as the Court deems just and proper.

COUNT II
42 U.S.C. § 1983 - Fourth Amendment
Search and Seizure
Against Defendant Vollmer

50. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

51. Plaintiff has a right under the Fourth Amendment to be free from unreasonable searches and seizures.

52. Defendant Vollmer violated Plaintiff's clearly established right to be free from unlawful searches and seizures when he caused Plaintiff's arrest, seized his camera, and detained Plaintiff, all without probable cause to believe that Plaintiff had engaged in criminal activity or committed any crime.

53. Defendant Vollmer engaged in these actions willfully and knowingly, acting with deliberate indifference to Plaintiff's Fourth Amendment rights.

WHEREFORE, Plaintiff prays this Court:

A. Enter judgment in favor of Plaintiff and against Defendant Vollmer;

B. Award Plaintiff compensatory damages against Defendant Vollmer for violation of Plaintiff's constitutional rights under color of law;

C. Award Plaintiff reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable provisions of law; and

D. Allow such other and further relief as the Court deems just and proper.

COUNT III
42 U.S.C. § 2000aa - Privacy Protection Act
Against Defendant Vollmer

54. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

55. After arresting Plaintiff, Defendant Vollmer seized Plaintiff's camera.

56. Plaintiff's recording was work product material related to his employment as a journalist.

57. As a journalist, Plaintiff has a purpose to disseminate to the public online.

58. Plaintiff works for a multimedia news agency, and dissemination of his work involves and affects interstate commerce.

59. There was not probable cause to believe that Plaintiff had committed or was committing any crime.

60. There was no reason to believe that the immediate seizure of Plaintiff's video camera was necessary to prevent the death of, or serious injury to, a human being.

61. As a direct and proximate result of the seizure of Plaintiff's camera by Defendant Vollmer, Plaintiff suffered actual damages.

WHEREFORE, Plaintiff prays this Court:

A. Enter judgment in favor of Plaintiff and against Defendant Vollmer;

B. Award Plaintiff compensatory damages against Defendant Vollmer for violation of the Privacy Protection Act;

C. Award Plaintiff reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 2000aa-6 and any other applicable provisions of law; and

D. Allow such other and further relief as the Court deems just and proper.

COUNT IV
42 U.S.C. § 1983 - Failure to Supervise and Train
Against Defendant County of St. Louis

62. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

63. Prior to November 22, 2014, Defendant County developed and maintained policies and customs exhibiting deliberate indifference to the constitutional rights of persons in Ferguson, which caused the violation of Plaintiff's rights.

64. At the time of Plaintiff's arrest, it was the St. Louis County Police Department's custom or policy to obstruct or prevent members of the media from recording protests in public locations and the police response to such protests, in violation of the First and Fourteenth Amendments.

65. At all times relevant to this complaint, Defendant County was aware that Defendant Vollmer was inadequately trained regarding the First Amendment; nevertheless,

Defendant County maintained a custom or policy of failing to provide its police officers training or adequate supervision on the First Amendment.

66. It was the custom or policy of Defendant County to inadequately supervise and train its police officers, thereby failing to prevent the constitutional violations against Plaintiff.

67. Defendant County's customs and policies demonstrate deliberate indifference to the constitutional rights of persons within St. Louis County and caused the violation of Plaintiff's rights alleged herein.

68. Plaintiff intends to continue his career as a professional journalist by photographing and reporting on newsworthy protests from public locations, including activities in St. Louis County, but fears further obstruction, harassment, and detention by Defendant County's police officers. That fear makes it more difficult for him to gather news for dissemination to the public and interferes with him doing his job effectively.

WHEREFORE, Plaintiff prays this Court:

A. Enter judgment in favor of Plaintiff and against Defendant County;

B. Issue an injunction requiring Defendant County to develop and implement adequate training programs for its police officers about individuals' rights under the First and Fourteenth Amendments;

C. Award Plaintiff compensatory damages against Defendant St. Louis County for its violation of Plaintiff's constitutional rights under color of state law;

D. Award Plaintiff reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable provisions of law; and

E. Allow such other and further relief as the Court deems just and proper.

COUNT VI

State Law Claim - Declaratory Judgment

Against All Defendants

69. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

70. By reason of their conduct, Defendant Vollmer and Defendant St. Louis County deprived Plaintiff of his rights to freedom of speech under Article I, Section 8, of the Missouri Constitution and to freedom from arrest without probable cause under Article I, Section 15, of the Missouri Constitution.

71. Defendant Vollmer acted with reckless and callous indifference to Plaintiff's rights under Article I, Sections 8 and 15, of the Missouri State Constitution.

72. The unconstitutional policies and customs of Defendant County of St. Louis were the moving force behind Defendant Vollmer's violation of Plaintiff's state constitutional rights on August 20, 2014.

73. As a direct and proximate result of Defendant Vollmer's actions, Plaintiff sustained damages, including physical, psychological, and professional injuries.

WHEREFORE, Plaintiff prays this Court:

A. Enter judgment in favor of Plaintiff and against Defendants;

B. Award Plaintiff compensatory damages against Defendants for their violation of Plaintiff's state constitutional rights;

C. Award Plaintiff punitive damages against Defendant Vollmer for his violation of Plaintiff's state constitutional rights; and

D. Allow such other and further relief as the Court deems just and proper.

COUNT VII

State Law Claim - False Imprisonment
Against All Defendants

74. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

75. Defendant Vollmer knowingly restrained Plaintiff against his will and without legal justification.

76. Plaintiff was confined overnight, and his confinement was caused by Defendant Vollmer.

77. Defendant Vollmer intended to cause a confinement of Plaintiff.

78. Plaintiff was aware of his confinement by Defendant Vollmer.

79. At all times relevant to this complaint, Defendant Vollmer was acting within the scope and course of his employment with Defendant County, and his actions were approved, consented to, and ratified by superior officers of the St. Louis County Police Department acting within the scope of their employment.

80. Defendant Vollmer's actions were a direct and proximate cause of the injury and harm suffered by Plaintiff.

WHEREFORE, Plaintiff prays this Court:

A. Enter judgment in favor of Plaintiff and against Defendants;

B. Award Plaintiff compensatory damages against Defendants;

C. Award Plaintiff punitive damages against Defendant Vollmer for false imprisonment of Plaintiff; and

D. Allow such other and further relief as the Court deems just and proper.

COUNT VIII
State Law Claim - Battery
Against All Defendants

81. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

82. In the course of Defendant Vollmer's unlawful arrest of Plaintiff, Defendant Vollmer ordered that Plaintiff be forced into handcuffs behind his back.

83. Plaintiff did not consent to the unlawful offensive contact by Defendant Vollmer.

84. Plaintiff sustained damages as a result of Defendant Vollmer's intentional offensive contact with his person.

85. Defendant Vollmer's actions were willful and wanton and showed a reckless indifference to the rights of others, including the rights of Plaintiff.

86. Defendant Vollmer caused Plaintiff bodily harm.

87. Plaintiff found the physical contact offensive.

88. A reasonable person would find the physical contact offensive.

89. At all times relevant to this complaint, Defendant Vollmer was acting within the scope and course of his employment with Defendant County, and his actions were approved, consented to, and ratified by superior officers of the St. Louis County Police Department acting within the scope of their employment.

90. Defendant Vollmer's actions were a direct and proximate cause of the physical harm and emotional pain suffered by Plaintiff.

WHEREFORE, Plaintiff prays this Court:

A. Enter judgment in favor of Plaintiff and against Defendants;

B. Award Plaintiff compensatory damages against Defendants;

C. Award Plaintiff punitive damages against Defendant Vollmer; and

D. Allow such other and further relief as the Court deems just and proper.

COUNT IX
State Law Claim - Conversion
Against All Defendants

91. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

92. Plaintiff was the rightful owner of his camera, flash, film, and lenses.

93. Defendant Vollmer tortiously took Plaintiff's camera, flash, film, and lenses following his arrest.

94. Defendant Vollmer refused to return Plaintiff's camera, flash, film, and lenses upon Plaintiff's demand.

95. Defendant Vollmer's conduct was committed within the scope of his employment by Defendant County, and his actions were approved, consented to, and ratified by superior officers of the St. Louis County Police Department acting within the scope of their employment.

96. Defendant Vollmer's actions were a direct and proximate cause of the physical harm and emotional pain suffered by Plaintiff.

WHEREFORE, Plaintiff prays this Court:

A. Enter judgment in favor of Plaintiff and against Defendants;

B. Award Plaintiff compensatory damages against Defendants;

C. Award Plaintiff punitive damages against Defendant Vollmer; and

D. Allow such other and further relief as the Court deems just and proper.

COUNT IX

State Law Claim - Defamation
Against Defendant County of St. Louis

97. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

98. Defendant County published, on its Twitter account, that Plaintiff had been arrested and that the arrest was a result of Plaintiff's (1) being in the street and (2) noncompliance with Defendant Vollmer's orders.

99. The statement made by Defendant County via Twitter concerned Plaintiff.

100. Defendant's statement concerning Plaintiff was false.

101. Plaintiff is not a public figure.

102. At least 239 other individuals read Defendant County's statement.

103. Plaintiff's reputation as a journalist was injured by Defendant County's false statement.

104. The statement was published by Defendant County with actual malice or, in the alternative, negligently.

WHEREFORE, Plaintiff prays this Court:

A. Enter judgment in favor of Plaintiff and against Defendant County;

B. Award Plaintiff compensatory damages against Defendant County; and

C. Allow such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Anthony E. Rothert
ANTHONY E. ROTHERT, #44827MO
GRANT R. DOTY, #60788MO
ANDREW J. MCNULTY #67138MO
ACLU of Missouri Foundation
454 Whittier Street
St. Louis, Missouri 63108
Phone: (314) 652-3114
Fax: (314) 652-3112
trothert@aclu-mo.org
gdoty@aclu-mo.org

GILLIAN R. WILCOX, #61278MO
ACLU of Missouri Foundation
3601 Main Street
Kansas City, Missouri 64111
Phone: (816) 470-9938
gwilcox@aclu-mo.org

ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MUSTAFA ABDULLAH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:14CV1436 CDP
	)	
COUNTY OF ST. LOUIS, MISSOURI, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM, ORDER AND PRELIMINARY INJUNCTION

Plaintiff Mustafa Abdullah seeks a preliminary injunction enjoining certain law enforcement agencies from prohibiting him and protesters in Ferguson, Missouri, from standing still when they are not violating any law. Defendants are St. Louis County and Ronald K. Replogle, in his capacity as Superintendent of the Missouri Highway Patrol. The evidence presented at the preliminary injunction hearing shows that plaintiff is likely to succeed on the merits and that he will suffer irreparable harm unless the injunction is granted. As it was applied in this case, the practice of requiring peaceful demonstrators and others to walk, rather than stand still, violates the constitution. Because it is likely that these agencies will again apply this unconstitutional policy to plaintiff and the peaceful protesters he wishes to meet with, I will enter a preliminary injunction.

Exhibit A

Nothing in this preliminary injunction prevents defendants or any other law enforcement officers from enforcing the Missouri failure-to-disperse law or any other law. Law enforcement must be able to use the full range of lawful means to control crowds and to protect people and property from acts of violence and vandalism, including ordering a crowd to move or disperse if law enforcement officers believe the crowd is assembled for the purpose of violence or rioting. Nor does this order prevent authorities from restricting protesting in certain areas or making other reasonable restrictions on the protests' time, place and manner. This injunction prevents only the enforcement of an ad hoc rule developed for the Ferguson protests that directed police officers, if they felt like it, to order peaceful, law-abiding protesters to keep moving rather than standing still.

Findings of Fact

After Michael Brown was shot and killed by a Ferguson, Missouri, police officer on August 9, 2014, crowds of citizens gathered near the shooting site and at other locations in Ferguson. Some people in the crowd had come to protest; others had come for other reasons, such as praying or bearing witness or providing food and water to those who were protesting. Most people were assembled peacefully and were not there to commit any acts of violence.

During the nights following the shooting, however, and for several weeks afterward, the crowds became unruly and some in the crowds became violent. On Sunday night, August 10, a Quick Trip gas station and convenience store was looted and then burned to the ground. On other nights more businesses were looted and suffered extensive property damage. Some in the crowds threw rocks, bricks, water bottles and other objects at the police. Some in the crowds fired guns in the air and at the police; some threw Molotov cocktails; some kicked or otherwise damaged police vehicles. A number of people were injured. One night police found an unconscious person who had been severely beaten by someone in the crowd. On many occasions the people in the front of the crowds were not committing acts of violence; objects were thrown from those standing farther back in the crowd, where police could not identify them.

A number of police departments, including the St. Louis County Police Department and the Missouri State Highway Patrol, were called in to assist the Ferguson Police Department. Law enforcement authorities used many methods to try to control the crowds and prevent further violence, including using tear gas and smoke canisters. Not surprisingly, the violence generally began after dark, and crowds during the day were mostly peaceful.

On August 14 Missouri Governor Jay Nixon ordered the Missouri State Highway Patrol to take charge of law enforcement in the area. On August 16 Governor Nixon signed an executive order declaring a state of emergency and officially ordered other law enforcement agencies to assist the Patrol when requested. Once the Highway Patrol was in control, it formed a unified command structure with other police departments, including the St. Louis County Police Department. That group established a temporary command center about a mile from the center of the protest activity.

During the night of Sunday, August 17, a large and unruly crowd began marching toward the law enforcement command center, with some in the crowd announcing that they were going to overrun the command center. Although that crowd was ultimately turned back, the following day the unified command structure decided on the strategy that is at issue in this lawsuit.

The strategy adopted on August 18 called for law enforcement officers to tell protesters that they had to keep moving and that they could not stand still on the sidewalks. This was communicated to the officers at the regular roll calls, and the officers were told to use discretion, but were not told any particular circumstances or factors that they should consider in using that discretion.

Plaintiff Mustafa Abdullah works as a program associate for the American Civil Liberties Union, and part of his job duties include observing protest sites such as the one in Ferguson and passing out "Know Your Rights" cards.[1] He also acts as a legal observer for the ACLU and attempts to engage in conversations with people at the demonstrations to listen to their stories and understand their concerns. He sees part of his role as facilitating communications between law enforcement officers and the public, and he encourages people to follow the directions of the police even if he believes the instructions are problematic. Before the keep-moving strategy began, Abdullah had visited the protest site and been able to talk to groups of people (while standing still) about their rights, and he wants to continue doing that, without being forced to move. He testified that he has been involved in many community meetings as part of his work but had never before been forced to have a meeting while walking. He is not a protester himself, has no desire to engage in violence or civil disobedience, and does not want to be arrested.

After the ACLU received reports that police were not allowing people to stand still on August 18, plaintiff went to the area. As soon as he began talking to people on the sidewalks, he was approached by St. Louis County police officers

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[1] Some of the advice on the cards tells people who are stopped for questioning to "Stay Calm. Don't Run. Don't argue, resist or obstruct the officer even if you are innocent or your rights are being violated."

and told he must keep moving and could not stand still. One person asked plaintiff to join her in prayer, and police said they could pray while they were walking. The people plaintiff was talking to were not engaged in any violence. This happened in the daytime, and there was not a large crowd present. Plaintiff testified that after being told repeatedly to keep moving or be arrested, he left the scene because he did not want to be arrested.

Plaintiff brought this suit later on August 18, and I held a hearing on his motion for a temporary restraining order that same day. At the hearing the defendants provided evidence that earlier that afternoon they had established an alternate place where protesters and others could gather and express themselves without being required to keep moving. I denied the request for a temporary restraining order.

After the hearing one of the ACLU lawyers went to Ferguson and tried to find the alternative protest area. Highway Patrol officers told him that they did not know anything about an approved protest zone. He was twice told to keep moving while he attempted to ask other people whether they knew of an alternative site. He returned to the area the next morning, on August 19, again to try to locate the alternate protest zone. The place that seemed to correspond to the testimony was either an open field, or a parking lot by a furniture store. The owner of the

furniture store told him that the parking lot was his private property and that he had not agreed it could be used as a protest zone. The witness asked several police officers the location of the area designated for protesters to stand still and they either told him there was no such thing or that they had no idea what he was talking about. He also observed police telling people they must keep walking, even though there was no unrest or violent behavior at that time.

Later on August 19 the Highway Patrol issued a press release indicating that a new "Protester Assembly Zone" had been established. The ACLU attorney again went to look for the zone, and this time saw a sign saying "Approved Assembly Area" near the same parking lot he had been to that morning. It was south of the main area of the protests and was not within sight of a new "Media Staging Area" that was established at the same time. Unlike other places where demonstrators had been gathering, the designated area had no access to water or restroom facilities. The testimony established that throughout the August and September periods, very few people used the area, although some used it to rest when their feet became too tired from walking.

Plaintiff presented the testimony of additional witnesses who had been in the area during different times in the days and weeks after the shooting. One of the witnesses testified about his live tweets from the area, documenting times as late as

August 23 when he was being told he would be arrested if he didn't keep moving, and then other times that same day when people were standing still with no interference from police. Others testified about being told to move, being told they would be arrested if they did not move, and seeing people arrested after they had failed to move.

The evidence from plaintiff's witnesses shows that the police, including those from St. Louis County, told many people who were either peacefully assembling or simply standing on their own that they would be arrested if they did not keep moving. Some law enforcement officers told people that they could stand still for no more than five seconds. Others gave instructions that people were walking too slowly, or that they could not walk back and forth in a small area. Some law enforcement officers did not make people keep moving, others did. Some officers applied the strategy to reporters, others did not. Many officers told people who were standing in small groups on the sidewalks during the daytime hours that they would be arrested if they did not keep moving.

At some point the Ferguson Police Department resumed control of the situation. On August 27 the command center that had been established was disassembled; the governor lifted the state of emergency on September 3, 2014. Although the Ferguson Police Department resumed its role as the agency

maintaining security within its city limits, it can, and has, sought assistance from St. Louis County, the Missouri Highway Patrol, and other agencies. Evidence showed that Highway Patrol officers were working in Ferguson as recently as September 27, and that on the same day Ferguson police officers told demonstrators that they must keep moving or they would be arrested. In the video of that encounter the officers told demonstrators their authority for the instruction was a loitering ordinance, and there was no reference to the failure-to-disperse law.

Defendants' witnesses testified that the unified command structure, consisting of the top officials of the Highway Patrol, St. Louis County Police, and St. Louis City Police, jointly decided to use this keep-moving strategy. These witnesses' testimony was inconsistent, however, about what the strategy meant and how it was to be enforced. The St. Louis County Police Chief testified that the strategy was only intended to be used when crowds became dangerously large and unruly, which had mostly happened in the nighttime. The Chief testified that he had been instructed to use "failure to disperse" to enforce the strategy. He also testified that now that the Ferguson Police Department is the law enforcement agency in charge of the area, the St. Louis County police will not be using the keep-moving strategy. His subordinate, however, who was responsible for communicating the strategy to the officers in the field, testified to no such

limitations. Instead he said officers were just told to use their discretion. He testified that the strategy could be used at any time, and did not require a riot or unlawful assembly. He also testified that the strategy was still in effect and that he would use it again if sent back to Ferguson. The Highway Patrol Field Operations Commander (the second highest-ranking officer in the Highway Patrol) testified that because the legal authority for the keep-moving strategy was the failure-to-disperse law, people who refused to keep moving could only be arrested if the elements of that law were met.

Conclusions of Law

Plaintiff brought suit under 42 U.S.C. § 1983, alleging that defendants' actions and policies infringe upon his First Amendment rights, including the right to assemble. In a separate count he alleges that the policy violates the Fourteenth Amendment's Due Process clause because the policy fails to provide sufficient notice of what is illegal and because it was enforced arbitrarily. Only St. Louis County and Ronald K. Replogle, in his official capacity as Superintendent of the Missouri Highway Patrol, are defendants. The Ferguson Police Department is not a defendant.

In determining whether to issue a preliminary injunction, the Court must consider the following four factors: (1) the threat of irreparable harm to the movant

if the injunction were not granted; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties to the case; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) (en banc).

1. Likelihood of success on merits

a. Failure to Disperse

In their briefs, defendants argued that plaintiff is asking me to enjoin enforcement of what the police refer to as the "failure-to-disperse" statute, although they retreated somewhat from that argument at the hearing. In any event, the conduct that plaintiff complains of here is not enforcement of that law.

Mo. Rev. Stat. § 574.060, entitled "Refusal to disperse," states that "[a] person commits the crime of refusal to disperse if, being present at the scene of an unlawful assembly, or at the scene of a riot, he knowingly fails or refuses to obey the lawful command of a law enforcement officer to depart from the scene of such unlawful assembly or riot." Mo. Rev. Stat. § 574.060. An "unlawful assembly" requires that six or more people assemble and agree to violate criminal laws with force or violence. Mo. Rev. Stat. § 574.040. A "riot" requires that the six or more assembled people actually violate criminal laws with force or violence. Mo. Rev.

Stat. § 574.050. An unlawful assembly requires actions that make it reasonable for rational people in the area "to believe the assembly will cause injury to persons or damage to property and will interfere with the rights of others by committing disorderly acts." *State v. Mast*, 713 S.W.2d 601, 603-04 (Mo. Ct. App. 1986). "[E]very person who is present and cognizant of the unlawful acts being committed by the other members of the assembly can be found guilty of being unlawfully assembled." *Id.* at 604. Thus, even people who are not themselves committing acts of violence must disperse when ordered to do so. *Id.* at 604-605.

This statute provides no defense to this suit for several reasons. First, people were not told to "disperse" – in other words, to leave the area. Instead they were told to keep moving. Second, the order was given even when there were fewer than six people gathered. The evidence included examples where the order was given to one person alone, to three people attempting to pray, to a reporter and one other person, as well as to larger groups. And the order was given to people who were doing nothing to indicate they intended to violate laws of any sort, much less to engage in violence. In fact, nearly all of plaintiff's fact witnesses testified that despite gatherings that were peaceful and law-abiding at the time, officers told people they must keep moving or they would be arrested. Unlike the defendant in *Mast*, who was told to disperse and was arrested only after his group wreaked

significant havoc upon people and property, people in Ferguson were subject to the keep moving-rule for no reason other than that they were standing still on the public sidewalks.

There may have been confusion about the legal basis for the keep-moving rule, but there is no doubt that people were ordered to keep moving in situations that could never have been covered by the refusal-to-disperse law.

b. Municipal Liability

St. Louis County argues that plaintiff is not likely to succeed on the merits against the County because its officers acted on orders from the Highway Patrol and because the orders to keep moving were not part of a policy or custom of the County. The first argument is refuted by the evidence, which showed that the County did not blindly follow orders of the Highway Patrol. Instead, high-ranking County police officers were actively involved in determining the strategies to use. Although the Highway Patrol was the ultimate authority, that did not mean that the County was somehow required to follow orders that violated people's constitutional rights. This is far different from the situation where state law mandates a municipality must act in a certain way with no exercise of any discretion. *See Vives v. City of New York*, 524 F.3d 346, 353 (2nd Cir. 2008); *see also Snyder v. King*, 745 F.3d 242, 249 n.3 (7th Cir. 2014). Here the County police

had a seat at the table in determining the strategy and were part of the final policymaking group.

The second argument – that municipal liability cannot be imposed in this situation because there was no custom or policy – must be analyzed under the authority of *Monell v. Dep't of Soc. Servs*., 436 U.S. 658 (1978), and the cases following it. In *Monell*, the Supreme Court held that municipalities may be liable for monetary, declaratory or injunctive relief under § 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by the municipality. *Monell*, 436 U.S. at 690. To establish liability for a "custom," plaintiff must show that there is: (1) a continuing, widespread, and persistent pattern of unconstitutional misconduct, (2) deliberate indifference or tacit authorization of such conduct by policymaking officials after notice of the conduct, and (3) that the custom caused the violation of plaintiff's constitutional rights. *See Johnson v. Douglas Cnty Med. Dep't,* 725 F.3d 825, 828 (8th Cir. 2013); *Jane Doe A v. Special Sch. Dist. of St. Louis*, 901 F.2d 642, 646 (8th Cir. 1990).

Plaintiff is likely to succeed on the issue of municipal liability. In arguing that there is no policy or custom, St. Louis County apparently wishes the court to conclude that all of the different officers who took the same actions over a period

of several days were doing so on their own, without any orders or directions from the County police department policymakers. This argument is contradicted by the facts of the case. The evidence presented at the hearing indicates that plaintiff will be able to show either a policy – albeit unwritten and vague – or, at the least, a custom. Both the St. Louis County Police Chief and the Precinct Captain who testified were directly involved in developing and enforcing the keep-moving strategy, along with the Highway Patrol Captain who had been placed in charge of the situation by the Governor. This was a deliberate strategy, developed after the unified command structure met and discussed options. It was communicated to the officers on the street at several different roll call meetings, and continued in use for a period of days (and according to at least one witness, is still in effect). This is a far different situation from cases like *Bernini v. City of St. Paul,* 665 F.3d 997 (8th Cir. 2012). In that case municipal liability was rejected where the decision had been made by a police officer who had no ultimate policymaking authority for the police force. There the decision-maker was the officer in charge on the street when a demonstration became unruly, and he made the decision at that time to encircle the crowd and arrest everyone. In contrast, the Ferguson decision was made by policymakers gathered to plan an appropriate course of action for future events. The officers on the street who were telling people they would be arrested if they

stood still were following the policy directives given at several roll calls on several different days.

It is also significant that the policymakers actually *knew* that they could not lawfully arrest people simply for standing peacefully on the sidewalk. The top members of the unified command decided that they would use the failure-to-disperse law as their legal justification for the orders that all the demonstrators must keep moving, but they also knew that to arrest someone legally they would have to have probable cause to believe that six or more people were gathered for the purpose of violence and had refused an order to disperse. The policymakers knew the policy was being used against peaceful citizens but did not stop the practice. This evidence is sufficient at the preliminary injunction stage to show likelihood of success in establishing municipal liability.

c. Due Process

Plaintiff argues that the keep-moving rule as it was implemented is unconstitutionally vague in violation of his due process rights. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Criminal laws must be defined in a way that allows ordinary people to understand what conduct is against the law and does not encourage arbitrary and

discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). For example, in *City of Chicago v. Morales*, 527 U.S. 41 (1999), an ordinance that allowed police to arrest gang members who were "remain[ing] in any one place with no apparent purpose" was invalid because it gave both "too much discretion to the police and too little notice to citizens who wish to use the public streets." *Id.* at 47, 64 (brackets in original). Importantly, "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

Plaintiff is likely to succeed on the merits of showing that the keep-moving policy violates due process in both ways. Of course, in this situation there is no statute or ordinance being challenged. Rather, it is an unwritten policy, given to officers at their roll calls, instructing them to order people to keep moving whenever the officers thought it was appropriate to do so. Some officers told everyone to keep moving, so if plaintiff was unlucky enough to be standing in the vicinity of those officers, he would be told to move. Some officers told people they would be arrested if they did not move, but at least one officer told people that they had to keep moving but probably would *not* be arrested if they failed to

comply. Some officers interpreted the policy to mean that people had to walk at a certain speed, others told people that they could not walk back and forth in a certain-sized area. Some officers applied it to members of the press, while others did not. Plaintiff and his other witnesses testified that they could not tell what would or would not be allowed at any given moment.

The rule provided no notice to citizens of what conduct was unlawful, and its enforcement was entirely arbitrary and left to the unfettered discretion of the officers on the street. This policy "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *See Kolender*, 461 U.S. at 360 (brackets and quotation marks omitted). Like the gang loitering ordinance found unconstitutional in *Chicago v. Morales,* 527 U.S. 41 (1999), the keep-moving policy cannot meet constitutional standards for definiteness and clarity.

d. First Amendment

Plaintiff's complaint alleges that the keep-moving policy infringed on his First Amendment rights, including the right to peacefully assemble and engage in conversations with others on a public sidewalk. Defendants concede, as they must, that the public streets or sidewalks where the demonstrations have taken place are considered a traditional public forum. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (discussing forum analysis). "Consistent with the traditionally open

character of public streets and sidewalks," the Supreme Court has held that the government's ability to restrict speech in these locations is very limited. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014). But the "rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. Louisiana,* 379 U.S. 536, 554 (1965). "Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *McCullen,* 134 S.Ct. at 2529 (brackets and quotation marks omitted). *See also Phelps-Roper v. Koster,* 713 F.3d 942, 950 (8th Cir. 2013).

I conclude that it is likely plaintiff will prevail on the merits of his First Amendment claim, and given my conclusions about the Due Process claim, I need not at this time discuss the First Amendment issues in detail. The keep-moving policy – as it was applied to plaintiff and others – prohibited citizens from peacefully assembling on the public sidewalks. Although the state has a valid interest in maintaining order on its streets and sidewalks and in preventing violence

by crowds, this interest is not sufficient to apply such a blanket rule to people assembling peacefully. *See Cox,* 379 U.S. at 544-545 (in addition to violating due process, statute that prohibited people from congregating on sidewalk infringed upon First Amendment rights to speech and assembly of peaceful protesters). The evidence showed that the strategy burdened substantially more speech than was necessary to achieve its legitimate goals. In fact, one of the police witnesses testified that it only worked well during the daytime when there were no large crowds and no threats of violence – when the crowds grew unruly, telling them to keep moving was not an effective strategy. Thus, defendants' own evidence shows that this strategy fails the requirement that "the means chosen are not substantially broader than necessary to achieve the government's interest," as described in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).

The parties have not cited any cases where rules similar to the keep-moving strategy are considered, but in *Foti v. City of Menlo Park,* 146 F.3d 629, 642-43 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that an ordinance requiring persons carrying signs to be actually moving was unconstitutional because it was not narrowly tailored to serve the state's interest in the free flow of pedestrian traffic on sidewalks. Plaintiff is likely to be able to prove the same failing here. And even if the restriction could be justified somehow, the alternative protest zone

belatedly established likely did not provide an adequate alternative forum for people to assemble and protest.

2. Threat of Irreparable Harm

Defendants argue that plaintiff cannot show that he is threatened with irreparable harm because they are no longer in charge of keeping order in Ferguson. They also assert that they stopped using the keep-moving strategy. As discussed above, the evidence was conflicting about whether the policy was still in effect, and there has been no assurance that it would not be implemented again as the protests continue. Many cases have held that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).

Plaintiff testified that he wants to continue his work during the demonstrations without fear that he will be arrested if he stops walking. Public gatherings and protests related to Michael Brown's death are continuing and will continue into the future. It is very likely that defendants will continue to be involved. State troopers and St. Louis County police can be called in to assist at

any time. Ferguson's relatively small police force is likely to need future assistance from those agencies.[2]

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999); *Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995). Plaintiff has shown that he will suffer irreparable harm if the injunction is not issued.

3. The Public Interest and Balance of Harms

The public interest favors protecting core First Amendment freedoms. *See, e.g., Iowa Right to Life,* 187 F.3d at 970; *Kirkeby*, 52 F.3d at 775; *see also Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds, Phelps-Roper v. City of Manchester,* 697 F.3d 678 (8th Cir. 2012) (en banc). Both the defendants and the public have a legitimate interest in maintaining order and protecting the public safety. Both the defendants and the public have a legitimate interest in assuring that police officers, who have been the target of much of the violence in Ferguson, are not hurt. However, there is no evidence that these interests would be harmed if defendants are prevented from applying the keep-

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[2] Plaintiffs have filed a motion to supplement with evidence showing that in the last few days the St. Louis County Police Department has assumed control of security regarding Ferguson protests.

moving rule to people who are peacefully assembled on the sidewalks. Neither the public interest nor the interests of the defendants favor restricting the core constitutional rights of assembly and speech in the arbitrary and vague manner caused by the keep-moving rule.

4. Bond

Pursuant to Rule 65(c), Fed. R. Civ. P., the Court "may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Plaintiff has asked that the court waive the bond or require bond in only a nominal amount. Defendants have not briefed the issue of the amount of a bond. Given the constitutional issues at stake here and taking into account plaintiff's status as employee of a not-for-profit entity, I will set the bond in the amount of $100.

Conclusion

Plaintiffs are entitled to the entry of a preliminary injunction enjoining defendants from telling citizens that they must keep moving, or from threatening them with arrest if they stand still, so long as those citizens are not committing a crime, engaging in violent acts, or participating in a crowd that contains other people doing those things.

This injunction does not prevent defendants or other law enforcement agencies from using all lawful means to control crowds and protect against violence. Missouri's refusal-to-disperse law is not restricted by this injunction. Where there is an unlawful assembly or riot, the police can order persons to disperse and can arrest those who do not. If a crowd is becoming unruly, the police may find it necessary to order the crowd to disperse – including persons who are not committing crimes or violent acts – and the police may also tell an unruly crowd to move to a different place. From time to time this may mean that citizens who are themselves peaceful but who are part of a crowd that is becoming violent must obey these orders or face arrest. This injunction merely prohibits that kind of directive to peaceful citizens who are committing no crimes, whether they are doing so singly or in a law-abiding group.

The rule of law is essential to our constitutional system of government, and it applies equally to law enforcement officers and to other citizens. Citizens who wish to gather in the wake of Michael Brown's tragic death have a constitutional right to do so, but they do not have the right to endanger lives of police officers or other citizens. The police must be able to perform their jobs, and nothing in this order restricts their ability to do that. Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion for a preliminary injunction [#14] is granted, and defendants, their officers, employees, or agents, and those acting on their behalf or in concert with them, are enjoined from enforcing or threatening to enforce any rule, policy, or practice that grants law enforcement officers the authority or discretion to arrest, threaten to arrest, or order to move individuals who are violating no statute or regulation and who are peaceably standing, marching, or assembling on public sidewalks in Ferguson, Missouri.

IT IS FURTHER ORDERED that this order shall not prevent defendants from enforcing the Missouri refusal-to-disperse statute, Mo. Rev. Stat. §574.060.

IT IS FURTHER ORDERED that this injunction becomes effective only upon plaintiff's posting a bond in the amount of $100, and remains in effect until entry of judgment on the merits or further order of the court.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 6th day of October, 2014.

Exhibit A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Mustafa Hussein,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:14-cv-1410-JAR
	)	
County of Saint Louis, Missouri, et al,	)	
	)	
Defendants.	)	

ORDER

This matter comes before the Court on the joint motion of Plaintiff and Defendant County of St. Louis, Missouri. Plaintiff and Defendant County of St. Louis, Missouri, having stipulated and consented to the relief set forth below,

IT IS HEREBY ORDERED that Defendant County of St. Louis, Missouri, its officers, agents, servants, employees, attorneys, and all persons under their supervision, or within their control, are permanently enjoined from interfering with individuals who are photographing or recording at public places but who are not threatening the safety of others or physically interfering with the ability of law enforcement to perform their duties;

IT IS FURTHER ORDERED that this Order resolves all claims asserted by Plaintiff in the First Amended Complaint against Defendant County of St. Louis, Missouri and, thus, County of St. Louis, Missouri, is terminated from this case.

IT IS FINALLY ORDERED that this Court retains jurisdiction to enforce this order.

Dated this 21st day of November, 2014.

JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

Exhibit B


St. Louis County PD on Tw
Twitter, Inc. [US] https://twitter.com/stlcountypd/status/536399439934812160
Home
Notifications
Messages
Discover
Search Twitter
Tweet
POLICE
"TO PROTECT AND SERVE"
St. Louis County PD
@stlcountypd
Follow
@TreyYingst reporter from D.C. taken into custody for failure to disperse. Was asked to leave street by the commander and refused. #Ferguson
RETWEETS 239
FAVORITES 96
12:02 AM - 23 Nov 2014
Related headlines
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Mashable @mashable
Eyewitnesses say Ferguson police arrested journalist for standing on sid...
The Daily Dot @dailydot
Reply to @stlcountypd @TreyYingst
▽△▽△ Breezy ▽△▽△ @B_anders4 · Nov 23
@stlcountypd @TreyYingst too bad there's proof he was on the sidewalk
26 74
TeeJayFlow @teejayflow · Nov 23
@stlcountypd @TreyYingst Fuck the commander. Come arrest me you coward-dressed-in-military pussy ass dictators. Not shit without a badge
3 13
TeeJayFlow @teejayflow · Nov 23
@stlcountypd @TreyYingst OH WAIT I'M NOT IN YOUR JURISDICTION AHAHAHA NO POWER OUTSIDE YOUR COUNTY CUNTS
1 11
Bryan Statz @bstatz · Nov 23
@stlcountypd leave a sidewalk? Please clarify why he was asked to disperse from a sidewalk. The world would like to know

Exhibit E