

no First Amendment concerns; and (c) whether qualified immunity applies to the claims raised in Plaintiffs' affirmative summary judgment motion.

I. **PLAINTIFFS WERE CLEARLY "SEIZED" WITHOUT ANY SUSPICION OF CRIMINAL CONDUCT IN VIOLATION OF THE FOURTH AMENDMENT**

_____Defendants focus on the very first minutes of the encounter with Plaintiffs to suggest that no seizure occurred. *Def's. Brf. Opp. Summary Jdgmt. at 10-20*. However, to evaluate the full *one-plus hour* encounter prior to arrest, this Court must grapple with the *totality* of facts.¹ Plaintiffs agree that they pulled into Lawrence's Café of their own volition intending to have lunch (*Id.* at 10-11), but they never even reached a parking spot. As this record reflects, Plaintiffs were not approached for a casual and non-confrontational request for the tag information:

- Upon entering the parking lot, Plaintiffs were "blue lighted" by Maphet's motorcycle with Gorman also in his own vehicle.

¹ Defendants' framing of the qualified immunity question, *id.* at 6-7, is also fatally flawed because it too is framed on the first moments of the police encounter, and not the complete event. Plaintiffs have identified Circuit precedent that is materially similar to the instant case and certainly gives "fair warning" for qualified immunity purposes. See *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002); *United States v. Lanier*, 520 U.S. 259, 266-67 (1997). Indeed, *Williamson v. Mills* reversed a district court's conclusion that qualified immunity applied, and held that a similar police encounter predicated on their effort to recover lawfully-acquired photographs of undercover officers was clearly unconstitutional. 65 F.3d 155, 158 (11th Cir. 1995); see also *Thorton v. City of Macon*, 132 F.3d 1395, 1398-1400 (11th Cir. 1998) (police encounter to recover property of citizen, and not based upon suspicion of criminal activity).

- Defendants intercepted Plaintiffs' vehicle in the parking lot, and it was not permitted to park in a parking spot.
- Plaintiffs' vehicle was blocked in the middle of the lot and not free to exit or move while the blue-lights flashed.
- Maphet was "aggressive" from the start, and when asked why the vehicle was being pulled over, stated that the occupants could "do it the easy way" or "go to jail."²
- Gorman approached Childs' passenger door, and after unsuccessfully trying to open the locked door, ordered her out of the vehicle.
- Gorman demanded the tag document and identification, but Childs indicated that she did not want to produce the tag information.
- By his own admission, Gorman did not relent when his request for the tag information was rebuffed – he repeatedly demanded that Childs turn over the tag information, and Childs repeatedly refused.³

² Freeman Dep. at 66, 71-72. *Compare Defs. Brf. Opp. Summary Jdgmt.* at 15 (incorrectly stating that the records reflects that the officers were never verbally aggressive).

³ Gorman Dep. 46-48, 87, 114; Childs Dep. 75, 83; Freeman Dep. 97. *Compare Defs. Brf. Opp. Summary Jdgmt.* at 15 (incorrectly stating that the record reflects a single request for the tag information).

- Giving up on temporarily on Childs, Gorman then ordered her to sit in an assigned spot on the curb, and moved to Freeman, making the same demands for the tag information and identification.⁴
- Freeman also refused to provide the tag information, and he too was subjected to multiple demands for the tag information.
- Physical force was used in handcuffing Freeman when he attempted to retrieve his identification from his wallet.⁵
- Freeman was instructed to sit in handcuffs at a particular spot on the curb.
- At some undefined point, other officers arrived who were “antagonistic,” and made admitted and unchecked comments about a “goat fetish” etc.⁶

⁴ Childs Dep. at 88 (“I felt like if I tried to walk away, I would have been definitely like handcuffed or shot”).

⁵ Compare Defs. Brf. Opp. Summary Jdgmt. at 15 (incorrectly stating that the record reflects that force was applied *after* the arrest).

⁶ Compare Defs. Brf. Opp. Summary Jdgmt. at 15 (incorrectly stating that the record reflects that only “two” officers were present during the entire encounter when even Gorman testified that other officers were present and he does not “remember exactly when [the other officers] got to the scene.” Gorman Dep at 59).

- Even after Freeman was in handcuffs, Gorman moved back to Childs and again demanded the tag information.⁷

While the decision to arrest Freeman appeared to occur when he was handcuffed, the decision to arrest Childs was not made until Sergeant Fisher arrived and asked Gorman “why she [too] was not under arrest.”⁸

Even though Defendants *admit* that the police encounter was *not predicated on any suspected criminal activity* (i.e. no reasonable suspicion), Defendants at no point told Plaintiffs that they were free to leave, that they were not suspected of any criminal activity, that they were just being asked some questions, etc. Gorman admits that the encounter continued well beyond the first demand for tag information because the Plaintiffs’ refused to produce the document he sought – “I would have said, thanks a lot guys. Be careful. Have fun next time.”⁹ And though Gorman self-servingly asserts that “I guess they weren’t detained,”¹⁰ Gorman even went back to Childs again demanding tag information even after he had handcuffed Freeman.

⁷ Childs Dep. at 83 (Q: After Mr. Freeman was handcuffed, were you again asked for the license tag paper again? A: Yes.)

⁸ Gorman Dep. at 64-66.

⁹ Gorman Dep. at 114.

¹⁰ Gorman Dep. at 115.

Any reasonable person, given the totality of these circumstances, would have believed that they were not free to go on their way. The undisputed facts of this case match up with the very factors that this Circuit has pointed to in evaluating the existence of a seizure: flashing emergency lights, path impeded, prolonged detention and repeated questioning, language and tone of the officers (including threats of “go to jail”), identification demanded and retained, physical touching, etc. *See Pls. Brief in Support of Partial Summary Judgment* at 17-22 (outlining cases and factors).¹¹ A seizure clearly occurred.¹² Because that seizure was admittedly not predicated on

¹¹ Plaintiffs do not suggest that the individual defendants themselves took the tag information, but rather that Defendants arrested the Plaintiffs – which resulted in the tag information being seized and inexplicably never returned.

¹² Among the Eleventh Circuit cases, not previously cited, which guide an officer are: *United States v. Bowles*, 625 F.2d 526, 532 (5th Cir. 1980) (police officer “seized” the defendant for the purposes of the Fourth Amendment where the detective held out his credentials, blocked the defendant’s path, and stopped the defendant from proceeding any further); *United States v. Wright*, 2006 WL 3483503, *3 (N.D.Fla. 2006) (police officer exhibited a “show of authority” sufficient to make a reasonable person believe that he was not free to terminate the encounter when the officer parked his cruiser at an angle where the headlights were illuminated and directed at the defendant’s vehicle; illuminated the vehicle with the cruiser’s high intensity spot light; and directed the plaintiff to remain seated in the vehicle). Among the Georgia state cases, not previously cited, which guide an officer are: *O'Neal v. State*, 273 Ga.App. 688, 690 (2005) (stop and seizure occurred where the defendant’s vehicle was not parked and the police utilized their flashing blue lights); *McKinley v. State*, 213 Ga. App. 738, 739 (1994) (defendant was seized because a reasonable person in the defendant’s position would have believed that he was not free to leave where the police officer stopped his car next to the defendant’s van preventing him from leaving,

any suspected criminal activity, Plaintiffs clearly prevail on their Fourth Amendment detention claims.

II. **WRITING DOWN TAG INFORMATION ABOUT A SUSPICIOUS VEHICLE IS CLEARLY PROTECTED BY THE FIRST AMENDMENT AND THE POLICE ENCOUNTER TO RETRIEVE THE TAG INFORMATION VIOLATED THE FIRST AMENDMENT**

Defendants oddly suggest that writing down tag information is “conduct” that is not protected by the First Amendment. *Defs. Brf. Opp. Summary Jdgmt.* at 9-10. It is clear, however, that the written word is protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15, 18 (1971) (“The only ‘conduct’ which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon ‘speech.’”). Childs and Freeman both testified that they wrote down the tag information of the unidentified person photographing their protest for “safety reasons” and “in case” they saw the car again.¹³ That Plaintiffs did not intend to immediately convey the tag information to others is irrelevant. Citizens have a “First Amendment right, subject to reasonable time, place and manner restrictions, to photograph or videotape police conduct.” *Smith v. City of Cunningham*, 212 F.3d

activated the car’s blue lights and displayed his police identification as he ordered the defendants to get back into the van and close the door); *Holmes v. State*, 252 Ga. App. 286, 288 (2001) (where police initiated flashing blue lights and required defendant to step from car, the interaction was an investigatory stop and seizure).

¹³ Childs Dep. at 63-65; Freeman Dep. at 58-59.

1332, 1333 (11th Cir. 2000); *see also Williamson v. Mills*, 65 F.3d 155, 156 (11th Cir. 1995) (photographing undercover officers who appeared to be “surveilling [his group] too closely” because he feared that they were members of a “subversive group”); *Pomykacz v. Borough of West Wildwood*, 438 F.Supp.2d 504, 512 n. 14 (D.N.J. 2006) (photographing of police “intertwined” with free speech activity). There is no meaningful distinction, for First Amendment purposes, between photographing a vehicle and writing down information regarding the vehicle. *Smith*, 212 F.3d at 1333 (“The First Amendment protects the right to gather information about what public officials do on public property, a right to record matters of public interest”). For all these reasons, writing down tag information of a suspicious vehicle falls within the broad sweep of the First Amendment’s protections.

“[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.” *Hartman v. Moore*, 126 S.Ct. 1695, 1701 (2006) (citing case law for the 1970's); *Pomykacz*, 438 F.Supp.2d at 512-13 (summary judgment and qualified immunity denied to defendants of First and Fourth Amendment claims where plaintiff arrested for stalking after photographing police in police station). Where police actions short of arrest (or seizure) are predicated on

speech, they constitute First Amendment violations even though such actions might be “unexceptional if taken on other grounds.” *Hartman*, 126 S.Ct. at 1701.

This Circuit has specifically instructed officers that citizens have a constitutional right to gather information on officers in public areas, even if officers are “undercover.” Here, Defendants admit they lacked any suspicion of criminal conduct, and that they only engaged Plaintiffs to demand lawfully / constitutionally acquired tag information. As *Hartman* and prior cases instruct, “absence of probable cause ... will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis” for action against the speaker. *Id.* at 1704.

The Supreme Court and this Circuit have guided law enforcement officers on situations where their encounter with a citizen is not predicated on suspicion of criminal activity, but rather based upon an effort to obtain a citizen’s property. *Williamson*, 65 F.3d at 158; *Thorton*, 132 F.3d at 1400. And with particularity, in *Williamson*, this Circuit has guided officers that seek to obtain citizen’s property that documents police undercover activities. The police encounter here was not predicated on suspicion of criminal activity. Knowing that they had no legal grounds for the encounter, the officers had fair warning that they could not then (a) doggedly continue the encounter after an initial refusal to provide tag information, (b) dramatically raise the intensity of the encounter by detaining Plaintiffs, and (c)

finally and ultimately arrest Plaintiffs who refused to accede to their demands. *See Pomykacz*, 438 F.Supp.2d at 512-13.

CONCLUSION

_____For all the foregoing reasons, Plaintiffs request that their motion for partial summary judgment be granted.¹⁴ Summary judgment should issue on those claims, and the jury should determine the appropriate damages.

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Respectfully submitted,

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¹⁴ Counsel certifies that this brief and all associated filings are in Bookman Antiqua, 13 point type.

