



acquired based on viewing a vehicle in a public place. As there is no material factual dispute that Plaintiffs were detained and that Defendants had no legal justification for doing so, Plaintiffs seek partial summary judgment on liability – leaving to the jury only the question of the amount and type of damages. *See Jackson v. Sauls*, 206 F.3d 1156, 1167 (11<sup>th</sup> Cir. 2000) (plaintiffs’ summary judgment on qualified immunity would have been available if undisputed facts showed no “arguable reasonable suspicion”).

### **STATEMENT OF MATERIAL FACTS**

As set out more fully in the accompanying filings, Plaintiffs Caitlin Childs (Childs) and Christopher Freeman (Freeman) volunteered to organize a protest at the HoneyBaked Ham store on Buford Highway in DeKalb County. Childs Dep. 25:9-10. Because more people would be shopping at the store near the Christmas holiday, December 20, 2003 was chosen as the date for the event. *Id.* 55:10-18; Freeman Dep. 46:19-24.. They planned to have a short demonstration, and to pass out literature “to educate people about how animals are raised and killed for food, and to give people information about vegetarian and vegan diets.” *Id.* 29:17-20.

Childs and Freeman rode to the protest with Seth Chernyak (Chernyak) in a vehicle driven by Misty Brown (Brown). They parked in the CVS Pharmacy parking

lot across the street from the HoneyBaked Ham. Childs Dep. 42:12-18; Freeman Dep. 40:4-6.

An estimated 10-20 people attended the protest. Childs Dep. 39:9-10; Freeman Dep. 39:8-10; Gorman Dep. 29:13-14. The protest lasted about one-and-a-half to two hours. Childs Dep. 40:6-8; Freeman Dep. 41:15-18. The protestors held up signs, handed out leaflets and, when spoken to first, spoke to customers entering and exiting the store. Childs Dep. 43, 54:1-16, 17-21; Freeman Dep. 41, 43:8-10,7-11. The protestors were not chanting. Childs Dep. 43:6-7; Freeman Dep. 41:8-10.; *see also Complaint, Ex. A* (Homeland Security Surveillance Photographs).

A number of officers were on the scene, including some officers that were working off-duty for HoneyBaked Ham. The officers, including Defendant Mark Maphet (Maphet) who was on duty but also served as Head of Security for Honeybaked Ham, ordered the protestors not to pass out flyers or talk to customers or passers-by. They were instructed not to speak to any customers, even if they were spoken to first. The protestors understood that they would be arrested if they violated these orders. *Brown Aff* ¶ 4; *Chernyak Aff*. ¶ 5-6; *Spencer Aff*. ¶ 3-4.

After the protest ended, Childs, Freeman and Chernyak walked to the CVS parking lot to check on a demonstrator who was being cited by a uniformed police officer for jaywalking. Childs Dep. 58:16-21. It was then that they noticed Defendant

Gorman in his vehicle. Childs Dep. 60:7-13; Freeman Dep. 53:3-13; *Brown Aff* ¶¶ 5-6; *Chernyak Aff.* ¶¶ 8-9; *Spencer Aff.* ¶ 6-8. At the time, neither Childs nor Freeman knew that Gorman was a police officer. Childs Dep. 65:1-6; Freeman Dep. 53:10-13. Gorman was dressed in civilian clothes, and driving an unmarked police car. Gorman Dep. 17:19-25; Freeman Dep. 53, 69:3-13, 3-6. Gorman was “sitting sort of low in the seat... trying to be inconspicuous about what he was doing.” Freeman Dep. 54:23-25, 55:1-3. He was taking photos of the protestors. Childs Dep. 60:22-24; Freeman Dep. 54:5-21; *Chernyak Aff.* ¶¶ 8-10; *Brown Aff* ¶¶ 7-10; *Spencer Aff.* ¶ 7-10; *Complaint, Ex. A* (Homeland Security Surveillance Photographs).<sup>1</sup>

Out of a concern for their safety, Childs and Freeman walked over to Gorman’s vehicle, whereupon Childs recorded the licence plate number onto a piece of scrap paper. Childs Dep. 63:1-6; Gorman Dep. 41:6-24; Freeman Dep. 58, 59, 55:20-25, 1-14, 14-21; *Chernyak Aff.* ¶¶ 8-10; *Brown Aff* ¶¶ 7-10; *Spencer Aff.* ¶ 7-10.

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<sup>1</sup> Prior to the events in question, Gorman had monitored an estimated five to ten protests, including animal rights protests. (*Id.* 15:12-16.) At these events, Gorman “always” used an unmarked DeKalb County vehicle. (*Id.* 17:24-25, 18:2-3.) He did not typically carry identification as a police officer. (*Id.* 17:16-18.) During these events, Gorman would take photographs and, on occasion, draft a narrative of what took place. (*Id.* 18:4-12.) On December 19, 2003, Gorman was instructed by Lieutenant Octavia Holborough (“Holborough”) to monitor a protest that was scheduled to take place the following day at the HoneyBaked Ham store on Buford Highway in DeKalb County. (*Id.* 23:24-25, 24:1-4.) *Complaint, Ex. B* (Homeland Security Report).

After writing down the number, Childs and Freeman waited until the two individuals who were being cited for jaywalking were free to leave, at which point Childs, Freeman, Brown and Chernyak got into Brown's vehicle and left the CVS parking lot to have lunch at a nearby Lebanese restaurant. Childs Dep. 67:12-17; Freeman Dep. 62:3-11; *Chernyak Aff.* ¶¶ 8-10.

Gorman immediately "got on the air" and requested that another officer come to his location. Gorman Dep. 42:19-22. He followed Brown's car out. *Id.* 44:11-20; *Brown Aff* ¶¶ 9-10. Maphet was nearby with Officer Redding when he received a call over the police radio indicating that Gorman was conducting an investigation of a vehicle and needed assistance. Maphet Dep. 33:15-21, 36:4-10, 37:1-5. As Maphet began to maneuver his motorcycle, he saw the vehicle that Gorman described exit the CVS parking lot, and proceed down the road. *Id.* 37:14-23. Maphet followed them out. *Id.* 38:2-11. The Childs and Freeman's car pulled into the restaurant parking lot with Maphet's police vehicle following them closely into the parking lot. Freeman Dep. 62:12-18; Childs Dep. 70:17-21; Gorman Dep. 45:8-10; *Chernyak Aff.* ¶¶ 11-12; *Brown Aff* ¶¶ 9-10.

The driver did not commit any traffic offenses while en route to the restaurant. Maphet Dep. 37-38:24-25, 1; Gorman Dep. 45:3-5; Gorman Dep. 86:19-21. The undisputed and only reason the officers followed, confronted and detained the

vehicle and occupants was to obtain the tag information Childs and Freeman wrote down. *Complaint*, Ex. B (Homeland Security Report); Gorman Dep. 45, 86-87:3-5, 18-25, 1-7 (“they’ve not committed any crime”); Maphet Dep. 37-38, 46: 24-15, 1, 2-10; Gorman Dep. 46-47, 87:17-25, 1-4, 19-22; *Brown Aff* ¶¶ 11-17; *Chernyak Aff*. ¶¶ 13-17.

Maphet and Gorman intercepted the vehicle containing Childs and Freeman in such a way as to stop their car as it attempted to turn into a parking space in the restaurant parking lot. Freeman Dep. 64:6-20; Childs Dep. 71:1-13. The vehicle was stopped in the middle of the parking lot. Gorman Dep. 69:16-20; *Brown Aff* ¶¶ 11-17; *Chernyak Aff*. ¶¶ 13-17. Maphet had illuminated the emergency equipment on his motorcycle. These emergency lights are the equipment that one would use to stop a vehicle. Gorman Dep. 54:10-15; *Complaint*, Ex. B (Homeland Security Report). Had the Plaintiffs attempted to leave, their progress would have been impeded or blocked by the position of the police vehicles. Freeman Dep. 64:12-20; *Brown Aff* ¶¶ 11-17; *Chernyak Aff*. ¶¶ 13-17.

Maphet approached the driver’s side of the vehicle; Gorman came to the passenger side. Gorman Dep. 45-46:23-25, 1. Maphet was “aggressive from the very beginning.” Freeman Dep. 66:10-16. He asked the driver, Misty Brown, for her license and registration. Childs Dep. 73:5-13; Freeman Dep. 66:6-16. Brown then asked Maphet “Why [they] were being pulled over.” Freeman Dep. 66:10-16. Maphet

told the driver that she could either do this “the easy way,” or she would be taken to jail. Childs Dep. 73:5-13; Freeman Dep. 66:6-16; *Brown Aff* ¶¶ 13-17; *Chernyak Aff.* ¶¶ 12-23.

After approaching the vehicle, Gorman attempted to open the locked passenger door. Childs Dep. 72:19-25, 73:1-2; Freeman Dep. 67:1-2. Gorman then ordered Childs and Freeman to unlock and exit the vehicle. Childs Dep. 73:24-25; Freeman Dep. 67:3-11, 68:8-15; Gorman Dep. 46:12-13. Childs and Freeman complied with the order. Childs Dep. 74:1-2; Freeman Dep. 68:14-15; *Brown Aff* ¶ 16.<sup>2</sup>

Gorman ordered Childs to produce identification and demanded the piece of paper where she had written his license plate number. (Childs Dep. 74:4-11.) Childs produced identification but did not give Gorman the tag number, citing concerns for her safety as she did not know Gorman’s identity. Childs Dep. 74:4-11; Gorman Dep. 45-47; *Complaint*, Ex. B (Homeland Security Report); Maphet Dep. 37-38, 46: 24-15, 1, 2-10; *Brown Aff* ¶ 16; *Chernyak Aff.* ¶ 17.

After Gorman realized that Childs was not going to produce the tag information, he moved over and spoke with Freeman. Gorman Dep. 48:7-17. Though

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<sup>2</sup> Gorman acknowledges that neither Childs and Freeman had committed any crime up to this point. (Gorman Dep. 86:22-25, 87:1-2). *See also Complaint*, Ex. B (Homeland Security Report); (Gorman Dep. 45, 86-87:3-5, 18-25, 1-7.) (“they’ve not committed any crime”); (Maphet Dep. 37-38, 46: 24-15, 1, 2-10); (Gorman Dep. 46-47, 87:17-25, 1-4, 19-22.); *Brown Aff* ¶¶ 11-17; *Chernyak Aff.* ¶¶ 13-17.

Gorman does not remember when, *Id.* 55:21-24, he maintains that, at some point, he asked Freeman if he would produce the paper with the tag information on it. *Id.* 48:7-17. Freeman requested that Gorman produce identification as he had not identified himself as an officer and was not in uniform. Freeman Dep. 69:17-21; *Brown Aff* ¶¶ 16-17; *Chernyak Aff.* ¶¶ 13-17. Rather than identify himself, Gorman again demanded that Freeman produce his identification. Freeman Dep. 70,71:10-12, 1-5. Freeman responded that his identification was in his back pocket, stating “I will show you my ID, but I’m doing it under protest. And I still would like to see some form of identification from you.” Freeman Dep. 71, 72:14-15, 25, 1-3. Freeman stated again that his identification was in his back pocket. Freeman Dep. 72:6-7. Gorman instructed Freeman to “get it.” Freeman Dep. 72:7. Freeman’s pocket was visible to Gorman. Freeman Dep. 72:10-12.

While Freeman reached around to his back pocket to retrieve his identification, Gorman grabbed his wrist and said, “Don’t move.” Gorman Dep. 56:1-5. As Freeman tried to pull his wrist free, Gorman and Maphet simultaneously placed his hands behind his back. Gorman Dep. 58:11-14. Gorman and Maphet shoved Freeman onto the trunk of the car, pinning both arms and holding his neck

down with an elbow. Freeman Dep. 72:20-25. Maphet then reached for his handcuffs and put Freeman into handcuffs. Gorman Dep. 58:14-17.<sup>3</sup>

After Gorman and Maphet put handcuffs on Freeman, they instructed him to sit on the curb. Freeman Dep. 79:9-11. By this time, a number of other officers had arrived at the scene. These officers engaged in an “antagonis[ti]c” and “problematic” conversation with Childs. Gorman Dep. 68:2-11. One of the officers, Officer Barkett, taunted Childs by asking her if she had a “goat fetish,” and sarcastically joked about when Childs “got her law degree.” Maphet Dep. 47:1-10. Childs Dep. 89:7-21. Maphet does not now recall any arrests having even occurred, and does not recall any activity that would have led to arrest. Maphet Dep. 45-47. While Gorman claims Freeman reached for his identification too “quickly,” he was not arrested for that reason. Gorman recalls that the reason Freeman and Childs were arrested was that they were “loud,” “boisterous,” and “upset and uncooperative.” Gorman Dep. 60-65; *Complaint*, Ex. B (Homeland Security Report).

Approximately one hour elapsed from the time the vehicles pulled into the lot until Childs and Freeman were taken to jail. Freeman Dep. 110: 5-11; Childs Dep. 95:1-3. The events surrounding the arrest for disorderly conduct bear a marked resemblance to a previous instance and complaint against Officer Maphet where

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<sup>3</sup> Freeman had committed no crime at the time Gorman began questioning him. Gorman Dep. 60:20-23.

another individual was (a) arrested for disorderly conduct (b) when photographing in a public place and (c) after the citizen was instructed to produce identification and attempting to do so. *See Cahall Aff.* ¶¶ 2-13.

### ARGUMENT AND CITATIONS OF AUTHORITY

As there is no material factual dispute that Plaintiffs were seized and that Defendants had no legal justification for doing so, Plaintiffs seek partial summary judgment as to liability on First and Fourth Amendment claims.

I. THE OFFICERS VIOLATED PLAINTIFF'S FIRST AMENDMENT RIGHTS BY DETAINING THEM AND DEMANDING AND SEIZING TAG INFORMATION THAT PLAINTIFFS LEGALLY ACQUIRED

The Eleventh Circuit has clearly held that citizens have a First Amendment right to gather information and monitor police activity in public places. Similarly, the Eleventh Circuit has clearly held that police may not demand information citizens have legally acquired in public spaces, detain citizens, or seize information that citizens have legally acquired. Because there is no dispute that Childs and Freeman were detained by the officers for the sole reason of demanding and obtaining tag information that Plaintiffs' legally acquired, without even the suggestion of criminal activity, the officers actions violated clearly established law.

In *WSB-TV v. Lee*, a reporter was investigating allegations that the Douglas County Sheriff was using inmates to build a barn on his own property. 842 F.2d

1266 (11<sup>th</sup> Cir. 1988). When the WSB cameraman and reporter sought to interview the sheriff, and began taping and questioning him, the sheriff “pulled the microphone from the camera and pushed the camera and [cameraman] down toward the ground.” *Id.* at 1268. This Circuit reversed a grant of summary judgment to the Sheriff and held that a “reasonable inference” could be drawn that there was an “ongoing effort of defendant to thwart or impede plaintiffs in gathering and reporting news relating to the sheriff’s use of inmate labor on his private property, an interference with the plaintiffs’ first amendment rights....” *Id.* at 1270. The panel similarly held that a citizen has 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 1332, 1333 (11<sup>th</sup> Cir. 2000); *see also Blackstone v. Alabama*, 30 F.3d 117, 120 (11<sup>th</sup> Cir. 1994) (right to film public meetings). The Eleventh Circuit’s decision in *Smith* relies in part on a prior decision also from the Eleventh Circuit, that is materially similar to the present case. *See Id.* (citing *Williamson v. Mills*, 65 F.3d 155 (11<sup>th</sup> Cir. 1995)).

In *Williamson*, a member of Veterans for Peace was invited to attend an event to honor veterans of the Vietnam War. There were a number of undercover officers at the event – one of whom had been the target of death threats by a biker gang. *Id.* at 156. Gerald Williamson, of Veterans for Peace, was photographing persons who

appeared to be “surveilling [his group] too closely” because he feared that they were members of a “subversive group.” He would later learn that he was in fact photographing undercover officers. Officer Mills noticed Williamson photographing Undercover Officer Pavan who was the subject of a death threat:

Mills knew that a photograph of Pavan would enable the hit man to identify her. He also was aware that photographs of other undercover officers are salable to organized crime groups, which use such photographs to detect undercover infiltration. *Id.*

Mills then “stopped Williamson, flashed his laminated badge, and demanded the film from Williamson’s camera.” Williamson refused, and was threatened with arrest. When Williamson turned to leave, Mills grabbed him and handcuffed him. Ultimately, after being taken into a police van and after further demands, Williamson provided the film to the officer. *Id.* at 156-57.

Williamson filed suit, focusing on Fourth Amendment claims. The district court granted qualified immunity, but the Eleventh Circuit reversed, finding that even under the “stringent standards” for qualified immunity, “pre-existing law compels the conclusion that Mills arrested Williamson without probable cause.”

Like the present case:

Taking photographs at a public event is a facially innocent act. The mere fact that Williamson’s photographs *could* have been used for unlawful activity – such as carrying out a death threat against [the undercover officer] – is not enough to establish even arguable probable cause for Williamson’s arrest.... Because Mills lacked even arguable

probable cause to arrest Williamson, Mills is not entitled to qualified immunity.... *Id.* at 158 (emphasis in original).

“What was fatally missing ...was a link” to any suspected criminal activity. *Id.*

Here too, what is fatally missing is any reason for the officers to believe that they were entitled to detain Freeman and Childs and demand and seize the tag information. Leaving aside the marginally disputed facts about *later events* related to whether Childs and Freeman ultimately became “disorderly” after being stopped without cause and besieged with demands for the tag information,<sup>4</sup> Officers Maphet and Gorman themselves concede that they had no evidence whatsoever to initially detain and question Childs and Freeman.<sup>5</sup> Their only reason to detain Childs and Freeman, as they reluctantly admit, was to demand that Childs and Freeman turn over tag information that they legally acquired.<sup>6</sup>

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<sup>4</sup> While Plaintiffs believe that even under the officers testimony, there is little to suggest that they were ever disorderly in violation of state law (only an undifferentiated assertion that Plaintiffs were “loud and boisterous”), Plaintiffs focus their affirmative summary judgment on the initial detention and demands of the officers. *See Thorton v. City of Macon*, 132 F.3d 1395, 1400 (11<sup>th</sup> Cir. 1998) (where Plaintiffs were detained even though not suspected of having committed any crime, their subsequent arrest for “obstruction” and the force applied in that arrest violated clearly established law).

<sup>5</sup> Gorman Dep. 45, 86-87:3-5, 18-25, 1-7 (“they’ve not committed any crime”); Maphet Dep. 37-38, 46: 24-15, 1, 2-10.

<sup>6</sup> Gorman Dep. 46-47, 87:17-25, 1-4, 19-22; *Complaint, Ex. B* (“Homeland Security Report”); *see also Brown Aff* ¶¶ 11-17; *Chernyak Aff.* ¶¶ 13-17.

In *Williamson*, even with more compelling circumstances concerning death threats against an undercover officer, the Eleventh Circuit held that it was unconstitutional to detain persons and demand video legally acquired in a public place. And in a string of cases, both from the Eleventh Circuit and elsewhere, it is firmly established that citizens have a First Amendment right to gather information in public places free of police interference. See *Smith*, 212 F.3d at 1333 (collecting cases); *Channel 10, Inc. v. Gunnarson*, 337 F.Supp. 634, 636-37 (D. Minn 1972) (police demand and seizure of camera after reporter filmed burglary in public place was a “clear” violation of the Fourth Amendment and a “prior restraint” under the First Amendment); *Connell v. Town of Hudson*, 733 F.Supp. 465, 470-73 (D.N.H. 1990) (granting summary judgment and denying qualified immunity where officers interfered with “picture-taking activities” of reporter who did not obstruct “police or emergency functions”).

The police do not claim that Childs and Freeman interfered with police activities. See generally *Durruthy v. Pastor*, 351 F.3d 1080 (11<sup>th</sup> Cir. 2003). Indeed, the officers do not even suggest that they detained and questioned Childs and Freeman in relation to any crime. Rather, the officers confronted Childs and Freeman in a concerted effort to demand and obtain what they had no right to request – legally acquired information gathered in a public place. Because Childs and Freeman were

detained and questioned in violation of clearly established First Amendment rights, they should be granted partial summary judgment as to liability for nominal and actual damages. *See Bourgeois v. Peters*, 387 F.3d 1303, 1318 (11<sup>th</sup> Cir. 2004) (finding First Amendment violation where protesters “were inconvenienced by having to wait in line to be searched in order to enter the protest area”).

II. PLAINTIFFS WERE SEIZED WITHOUT REASONABLE SUSPICION THAT A CRIME HAD BEEN OR WAS ABOUT TO BE COMMITTED IN VIOLATION OF THEIR FOURTH AMENDMENT RIGHTS

Lacking reasonable suspicion that a crime had been or was about to be committed, Officers Maphet and Gorman also seized Childs and Freeman in violation of clearly established Fourth Amendment rights. The undisputed evidence shows:

- Reasonable Suspicion: There was no reason to believe (and the officers did not believe) that the Plaintiffs had committed any crime. The only reason for questioning and detainment was the officers plan to exact from the Plaintiffs the tag information they had legally acquired.<sup>7</sup>
- Seizure: The Plaintiffs’ vehicle was blocked, blue lighted, and they were repeatedly and coercively questioned by the officers over an extended

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<sup>7</sup> Gorman Dep. 45, 86-87:3-5, 18-25, 1-7 (“they’ve not committed any crime”); Maphet Dep. 37-38, 46: 24-15, 1, 2-10; Gorman Dep. 46-47, 87:17-25, 1-4, 19-22; *Complaint, Ex. B* (Homeland Security Report); *Brown Aff* ¶¶ 11-17; *Chernyak Aff.* ¶¶ 13-17.

period of time. They did not reasonably feel free to leave and had their property seized – including the demanded tag information.

The Eleventh Circuit has held that “[t]here are three broad categories of police-citizen encounters for purposes [of] Fourth Amendment analysis: (1) police-citizen exchanges involving no coercion or detention; (2) brief seizures or investigatory detentions; and (3) full-scale arrests.” *U.S. v. Perez*, 443 F.3d 772, 777 (11th Cir. 2006). In determining whether an encounter has risen to the level of a brief seizure, “the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’” *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (citing *Michigan v. Chesternut*, 486 U.S. 567, 569 (1975)). Whether the encounter is considered a seizure “turns on whether the officers had a reasonable suspicion that the defendant had engaged, or was about to engage in a crime.” *U.S. v. Acosta*, 363 F.3d 1141, 1144-45 (11th Cir. 2004).

The conduct of Officer’s Maphet and Gorman (1) would have led a reasonable person to believe that they were not at liberty to ignore the police presence and (2) was admittedly not supported by a reasonable suspicion that Childs or Freeman had committed or were about to commit a crime.

- A. Seizure: Officers Maphet and Gorman unconstitutionally seized Childs and Freeman when they impeded their vehicle's progress, illuminated emergency lights, threatened arrest, and otherwise communicated to the occupants of the car that they were not free to ignore the police presence and go about their business.

With their path obstructed and facing demands, displays of authority and threats of arrest, a reasonable person in the position of Childs and Freeman would have believed that they had been seized and were not free to leave. A seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968); *see also Bourgeois v. Peters*, 387 F.3d 1303 (11<sup>th</sup> Cir. 2004) (magnetometer search violates Fourth Amendment). An individual's liberty has been restrained where "a reasonable person would have believed that he was not free to leave." *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980).

In determining whether a reasonable person would have felt free to leave, courts consider the following factors:

whether a citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police. *U.S. v. De La Rosa*, 922 F.2d 675, 678 (11<sup>th</sup> Cir. 1991).

This list is not exclusive and the analysis takes into account whether "all of the circumstances surrounding the encounter" would have "communicated to a

reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Bostick*, 501 U.S. at 437.

The Eleventh Circuit has also noted that a police officer giving directions to an individual or activating his roof lights are examples of behavior “that would appear coercive to a reasonable person.” *Miller v. Harget*, 458 F.3d 1251, 1257 (11th Cir. 2006).<sup>8</sup> *Harget* is consistent with the Supreme Court ruling in *California v. Hodari* that a police car with flashing lights constitutes the “show of authority” necessary to effectuate a Fourth Amendment seizure. 499 U.S. 621, 628 (1991).<sup>9</sup>

Moreover, the actions of Officers Maphet and Gorman communicated to a reasonable person that they were not free to terminate the encounter. Indeed,

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<sup>8</sup> In *Harget*, a police officer, after observing a vehicle commit a traffic violation, followed the vehicle to a residence. *Id.* at 1253-54. The officer parked behind the vehicle and illuminated his window lights so that “[the driver] would know [that] he was there.” *Id.* at 1253. Though the Court held that the act of illuminating the window lights did not, standing alone, elevate the encounter to the level of a forced detention, the court emphasized that the activation of the roof lights or the giving of directions were acts which a reasonable person would find coercive. *Id.* at 1257.

<sup>9</sup> In *Hodari*, the respondent gave flight at the sight of an approaching police car. *Id.* at 622-23. The police officer left the car and gave chase on foot. Just before he was apprehended, the respondent tossed away a small rock of crack cocaine. *Id.* The Court held that the pursuit of a suspect by police vehicles with their emergency lights illuminated was “surely an adequate ‘show of authority’” to constitute a seizure, but because the respondent did not yield to that authority, there could be no seizure. *Id.* at 628-29 (citing *Brower v. Inyo County*, 489 U.S. 593, 596 (1989)).

Freeman and Childs were subjected to several of the types of behavior identified in *De La Rosa* as indicative of a seizure. In their one hour detainment:

- The path of the vehicle containing Childs and Freeman was blocked by Officers Gorman and Maphet: The two police vehicles were positioned such that the driver was unable to park the car or exit.<sup>10</sup> Freeman testified that the vehicle could not leave because it would have at least been impeded, if not blocked outright by Officer Maphet's motorcycle and Officer Gorman's automobile.<sup>11</sup>
- Identification was demanded and retained by Officer Gorman: After both Childs and Freeman were asked to unlock and exit the locked vehicle, Gorman asked for their identification.<sup>12</sup> Gorman continued to demand Freeman's ID even after Freeman requested that he identify himself as a police officer.
- "The language, and tone of voice of the police" was aggressive and combative: When asked why they were being stopped, Officer Maphet responded in an "aggressive" manner and threatened that the driver would

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<sup>10</sup> Gorman Dep. 69:13-24.

<sup>11</sup> Freeman Dep. 64:6-20; Childs Dep. 71:1-6; *Brown Aff* ¶¶ 8-23; *Chernyak Aff.* ¶¶ 11-24.

<sup>12</sup> Childs Dep. 74:4-8; Freeman Dep. 70, 71:7-12, 1-12.

“go to jail” if she refused his request to produce identification.<sup>13</sup> Freeman was subject to “physical touching” because as he attempted to produce identification, Gorman and Maphet threw him against the vehicle and handcuffed him.<sup>14</sup>

Faced with no fewer than four different types of behavior identified in *De La Rosa* as characteristic of a seizure, a reasonable person would not have concluded that he was free to refuse the officers’ requests and terminate the encounter.

Childs and Freeman also faced both types of behavior *Harget* indicates are coercive to a reasonable person: The activation of roof lights and the giving of directions. Officer Gorman’s narrative of the event filed with the Department of Homeland Security notes that Officer Maphet illuminated his “emergency equipment” before approaching Childs and Freeman.<sup>15</sup> These are the lights that, according to Officer Gorman, are used “to stop a vehicle.”<sup>16</sup> Further, Childs and Freeman were given a number of orders by Officers Maphet and Gorman. Maphet demanded that the driver cooperate and produce identification.<sup>17</sup> After attempting

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<sup>13</sup> Freeman Dep. 66:10-22; Childs Dep. 73:5-13.

<sup>14</sup> Freeman Dep. 72:4-15.

<sup>15</sup> Gorman Dep. Ex. C at 6.

<sup>16</sup> Gorman Dep. 54:10-19.

<sup>17</sup> Freeman Dep. 66:10-22; Childs Dep. 73:5-13.

to open the locked door, Gorman ordered Childs to unlock the door and to exit the vehicle.<sup>18</sup> He then demanded that she produce identification and the scrap of paper on which she had written his tag information.<sup>19</sup> After speaking with Childs, he ordered Freeman to, “Step out of the car, please.” Gorman then demanded Freeman’s identification several times.<sup>20</sup> The activation of the emergency lights and the threats, requests and demands<sup>21</sup> directed to Childs and Freeman would have communicated to a reasonable person that they were not free to leave.<sup>22</sup>

That a seizure occurred in this case is even more clear than *Harget*. The path of the vehicle containing Childs and Freeman was directly impeded by the actions of Gorman and Maphet. As the driver attempted to park the car, Officers Maphet and Gorman pulled in and blocked the path of the car as it was in the process of

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<sup>18</sup> Childs Dep. 72-73:19-25, 1-2.

<sup>19</sup> Childs Dep. 74:4-11.

<sup>20</sup> Freeman Dep. 68, 70-71:12-13, 10-25, 1-15.

<sup>21</sup> While Gorman’s self-serving testimony describes his demeanor as “low-keyed, trying to express logic,” the key is the objective facts and the reasonableness of the Plaintiffs’ perception that they were seized. (Freeman Dep. 56:9-10). In the totality of the circumstances, Gorman’s testimony about his demeanor does not create a material factual dispute.

<sup>22</sup> Childs Dep. 88:7-9 (“I felt like if I tried to walk away, I would have been definitely like handcuffed or shot”); *Brown Aff* ¶¶ 8-23; *Chernyak Aff.* ¶¶ 11-24.

parking.<sup>23</sup> Such was the position of the police vehicles that the car containing Childs and Freeman was trapped in the middle of the parking lot.<sup>24</sup> It can be fairly assumed that Brown was intending to complete her turn into the parking space, or, at a minimum, that she did not intend to park in the middle of the parking lot.<sup>25</sup> Verbal and physical demonstrations of authority, coercive conduct, and physical confinement of person and possessions communicated to a reasonable person that he was not free to leave.

B. Reasonable Suspicion: The Officers Concede that they Lacked Reasonable Suspicion, and Exacting the Tag Information Was the Only Reason for the Seizure

Where a seizure has occurred, “the Fourth Amendment is satisfied if the officer’s action is supported by reasonable suspicion to believe that criminal activity ‘may be afoot.’” *U.S. v. Arvisu*, 534 U.S. 266, 273 (2002) (citing *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989)); *Perez*, 443 F.3d at 775-77. Plaintiffs’ participation in a lawful demonstration, writing down the license plate number of a strange vehicle performing surveillance, and their subsequent refusal to produce tag information lawfully obtained and lawfully retained are actions which, under the totality of the

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<sup>23</sup> Freeman Dep. 64:6-20; see also Childs Dep. 71:1-6.

<sup>24</sup> Gorman Dep. 69:13-24.

<sup>25</sup> Childs Dep. 71:1-6.

circumstances, fail to support the conclusion that Childs and Freeman had committed or were about to commit a crime. Indeed, both Officers Maphet and Gorman concede that the detention was not based upon alleged criminal activity and that the sole reason for detention was to obtain the tag information.<sup>26</sup>

Reasonable suspicion that manifests itself *after* officers have detained an individual is insufficient. *Brown v. Texas*, 443 U.S. 47, 51-52 (1979) (“The flaw in the State’s case is that none of the circumstances preceding the officers’ detention of appellant justified a reasonable suspicion that he was involved in criminal conduct.”). The Supreme Court has “consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.” *Bostick*, 501 U.S. at 437 (citing *Brown*, 443 U.S. at 52-53).<sup>27</sup>

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<sup>26</sup> Gorman Dep. 45, 86-87:3-5, 18-25, 1-7 (“they’ve not committed any crime”); Maphet Dep. 37-38, 46: 24-15, 1, 2-10; Gorman Dep. 46-47, 87:17-25, 1-4, 19-22; *Complaint, Ex. B* (Homeland Security Report).

<sup>27</sup> In *Brown*, officers stopped and questioned an individual because he “looked suspicious and we had never seen that subject in that area before.” *Id.* at 49. After the suspect refused to identify himself, one of the officers frisked him. *Id.* Finding nothing, and with the individual still refusing to produce identification, the officers arrested him for violation of a Texas law that made it a criminal act for a person to refuse to identify himself upon request by an officer. *Id.* After reviewing the facts, the Supreme Court reversed the conviction, holding that the suspect’s refusal to cooperate did not furnish the required “objective criteria” necessary to abrogate Fourth Amendment protections. *Id.* at 52.

The “understandable desire to assert a police presence... does not negate Fourth Amendment guarantees.” *Id.*

The actions of Childs and Freeman—participating in a legal protest, monitoring the police presence at the protest, stopping at a restaurant for lunch and refusing to produce a private note—are not acts which support a “reasonable, articulable suspicion” that they had had committed or were about to commit any crime. Indeed, Maphet and Gorman both concede just that.<sup>28</sup> Childs and Freeman did not arouse Gorman’s suspicion – he did not even notice them until they approached his vehicle and wrote down the tag information.<sup>29</sup>

The act of writing down Gorman’s license plate number prompted Gorman to call for backup and stop Childs and Freeman.<sup>30</sup> Gorman readily acknowledges that the reason behind the stop was to retrieve the piece of paper containing the tag information. Gorman concedes that the decision to stop the vehicle was (a) not due to any sort of traffic violation on the part of the driver;<sup>31</sup> (b) that Childs and Freeman

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<sup>28</sup> Gorman Dep. 45, 86-87:3-5, 18-25, 1-7 (“they’ve not committed any crime”); Maphet Dep. 37-38, 46: 24-15, 1, 2-10; Gorman Dep. 46-47, 87:17-25, 1-4, 19-22.; *see also* *Brown Aff.* ¶¶ 11-17; *Chernyak Aff.* ¶¶ 13-17.

<sup>29</sup> Gorman Dep. 41:3-24.

<sup>30</sup> Gorman Dep. 42-43:16-25, 1-19.

<sup>31</sup> Gorman Dep. 45:3-5.

had committed no crime at the time Gorman began questioning them;<sup>32</sup> and (c) that Childs and Freeman were not witness to any case he was handling.<sup>33</sup> Gorman's personal desire to retrieve the tag information fails to furnish the reasonable suspicion the law requires to abrogate Fourth Amendment protection: "Understandable desires" on the part of the detaining officers "[do] not negate Fourth Amendment guarantees." *Brown*, 443 U.S. at 52.

The vaguely asserted *later* "loud and boisterous" reaction of Childs and Freeman to repeated demands of Officers Maphet and Gorman fails to justify their prior seizure. As the Supreme Court noted in *Bostick*, a failure to cooperate "does not furnish the minimal level of objective justification needed for a detention or seizure." 501 U.S. at 437 (citing *Brown*, 443 U.S. at 52-53). Thus, Childs' refusal to provide the tag number and Freeman's resistance to Gorman's request that he produce identification do not, without more, justify a "reasonable, articulable suspicion" that Childs and Freeman had committed or were about to commit a crime.

This Circuit explicitly holds that where an officer persists in confronting a citizen, where the citizen has "committed no crime," there is a violation of clearly established law. *Thorton v. City of Macon*, 132 F.3d 1395, 1399 (11<sup>th</sup> Cir. 1998) ("It is

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<sup>32</sup> Gorman Dep. 86-87:22-25, 1-2, 19-22.

<sup>33</sup> Gorman Dep. 87:3-8.

clearly established that an arrest made without probable cause violates the Fourth Amendment”). Indeed, in *Thorton*, like the present case, the officers arrested the Plaintiff for “obstruction” when they persisted in engaging a citizen without authority. Moreover, in *Thorton*, like the present case, “none of the officers suggest[ed] that [the Plaintiff] committed any other crime.” *Id.* at 1400. “No reasonable police officer would have believed that the officers had probable cause to arrest Thorton for ‘obstruction’ of such unauthorized actions.” *Id.* at 1399.<sup>34</sup> Indeed, *Thorton* goes further and concludes that any force used in the arrest in such circumstances was clearly excessive. *Id.* at 1400 (“the officers were not justified in using *any* force”) (emphasis in original).

Ultimately, the Fourth Amendment claims in this case are controlled by *Williamson v. Mills, infra* at 11-12. Like the Plaintiffs here, the protester in *Williamson* was detained because he had documented undercover officers he viewed in a public area. Like the defendants here, the *Williamson* defendants reason to detain and question the protester was to obtain the information about the undercover officers,

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<sup>34</sup> “Even if we concluded that Cravey ‘obstructed’ these officers, we could not conclude that they were engaged in the lawful discharge of their official duties. Rather, they were engaged in an unlawful arrest of Thorton. No reasonable officer could believe that probable cause existed to arrest Cravey for ‘obstruction’ of that endeavor.” *Id.* at 1400.

not because of any criminal activity suspected. What is “fatally missing” here, and in *Williamson*, was any “link” to criminal activity. 65 F.3d at 158.

Because there are no disputed issues of material fact, and because there is controlling case law from this Circuit, Plaintiffs’ motion for partial summary judgment as to liability for Fourth Amendment claims for the pre-arrest seizure should be granted.

### CONCLUSION

For all the foregoing reasons, Plaintiffs request that their motion for partial summary judgment be granted.<sup>35</sup>

DATED: This the 11<sup>th</sup> day of January, 2007.

Respectfully submitted,

/s Gerald Weber

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<sup>35</sup> Counsel certifies that this brief and all associated filings are in Bookman Antiqua, 13 point type.



DATED: This the 11<sup>th</sup> day of January, 2007.

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