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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM FAMBROUGH; LEGACY COMMUNICATIONS, LLC,

Plaintiffs-Appellants,

v.

CITY OF EAST CLEVELAND, OHIO; MICHAEL LEON SMEDLEY, in his individual capacity; SCOTT GARDNER, Chief of Police, in his individual capacity; JOHN DOES I–X,

Defendants-Appellees.

No. 25-3300

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:22-cv-00992—Bridget Meehan Brennan, District Judge.

Argued: February 4, 2026

Decided and Filed: October 1, 2026

Before: KETHLEDGE, Chief Judge; BUSH and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Benjamin A. Field, INSTITUTE FOR JUSTICE, Arlington, Virginia, for Appellants. Kenneth D. Myers, CITY OF EAST CLEVELAND, East Cleveland, Ohio, for Appellees. **ON BRIEF:** Benjamin A. Field, Caroline Grace Brothers, INSTITUTE FOR JUSTICE, Arlington, Virginia, Jeffrey Rowes, INSTITUTE FOR JUSTICE, Austin, Texas, for Appellants. Kenneth D. Myers, CITY OF EAST CLEVELAND, East Cleveland, Ohio, for Appellees.

OPINION

NALBANDIAN, Circuit Judge. Sound trucks and the First Amendment. It's a familiar pairing. And it's what we have here, a case also implicating the thorny causal inquiries that often emerge in First Amendment retaliation claims. William Fambrough, a politically active resident of East Cleveland, Ohio, alleges that East Cleveland officials retaliated against him for criticizing the City's administration and campaigning for a mayoral challenger. Fambrough's primary method of campaigning: broadcasting political messages from his sound truck as he drove around the city. The City's response: citing him for parking and noise violations, impounding his truck, and prosecuting him for the noise violation.

Fambrough brings several claims under 42 U.S.C. § 1983 against the City of East Cleveland, Brandon King (the mayor), Michael Smedley (King's chief of staff), and Scott Gardner (the police chief). He alleges First Amendment retaliation and prior-restraint claims, a Fourth Amendment unreasonable-seizure claim, and a Fourteenth Amendment selective-enforcement claim. The district court resolved all claims in the defendants' favor, some at the motion-to-dismiss stage and others at summary judgment. Fambrough now appeals.

We revive some of his retaliation claims. At the heart of these claims are the *Hartman* and *Nieves* rules requiring that the plaintiff plead and prove the absence of probable cause. Because the district court erred when applying those rules, we reverse its dismissal of the retaliation claims against King and Smedley. But we affirm its grant of summary judgment for Gardner on qualified-immunity grounds, and we vacate its grant of summary judgment for the City to address whether municipal policy directly caused the constitutional violation.

We affirm the district court on the other claims. City law sufficiently cabins officials' permitting discretion. Fambrough forfeited his selective-enforcement claims on appeal. And the impoundment of Fambrough's sound truck, which served a community-caretaking function and was carried out in accordance with standardized criteria, was a reasonable seizure.

I.

This is a fact-intensive case with a record revealing hazy memories and many factual contradictions among the defendants. Because Fambrough is challenging the district court's resolution of the motions to dismiss and motions for summary judgment against him, and because we won't be granting Fambrough summary judgment on any claims, we'll describe the disputed facts in the light most favorable to Fambrough. *See Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 861 (6th Cir. 2007).

Fambrough has lived in the City of East Cleveland, Ohio since 2006 and has been active in local politics. He has run for office and supported the political campaigns of others. As part of his political advocacy, he has used a step van (registered to his company and the other plaintiff in this case, Legacy Communications, LLC) as a sound truck, equipping it with speakers to play pre-recorded political messages as he drives it around the city. He regularly parked a sound truck in his driveway between 2006 and 2021 without any issues. And his active participation in local politics made him a known quantity. City officials, including mayor Brandon King and his chief of staff, Michael Smedley, had for years known about Fambrough's recurrent use of a sound truck for political advocacy.

In spring 2021, City Councilor Juanita Gowdy decided to challenge King in the upcoming mayoral primary set for September. Fambrough and Gowdy had been friends and political allies since 2019, both part of a group referred to by some in the City's administration as "dissidents" because of their criticism of the King administration. So Fambrough threw himself into helping Gowdy's campaign—a decision that put him back on City officials' radar.

Later that spring, King says he received a phone call from a resident who complained about Fambrough's sound truck and someone else's box truck being parked in a residential area. So King sent the complaint downstream, telling either Smedley or someone in the police department to handle it. Scott Gardner, the City's police chief, recalls a meeting during this time between himself, police captain Kenneth Lundy, and the City's law department. Gardner went to the law department to seek guidance on enforcing Section 351.11 of the East Cleveland Code of Ordinances (E.C.C.O.) given that it was rarely enforced, and he was concerned about selectively

enforcing it against Fambrough. In fact, City records show that since 2018 (as far back as the City's produced records go), it had enforced § 351.11 (the Parking Ordinance) by issuing a citation only four times before enforcing it against Fambrough. The Parking Ordinance, passed in 1998, provides that "[n]o person shall park a truck, commercial tractor, trailer, semi-trailer, a motor home or recreational vehicle on a roadway or driveway at any time in front of or alongside property used for residential purposes except in case of a breakdown of such vehicle, or for loading and unloading purposes." E.C.C.O. § 351.11.[1] Willa Hemmons, the City's law director, told Gardner it was fine to enforce the ordinance. Hemmons also "was immediately aware that [Gardner's] inquiry was connected to Mr. Fambrough's truck, even before [Gardner] mentioned him," and recited the ordinance from memory. R.104-6, Gardner Decl., PageID 3440.

On May 14, Smedley sent a text message in a group chat with Gardner and police commander Larry McDonald asking if the "box truck" had been dealt with; McDonald responded, "[h]aving it checked now." R.104-21, Ex. 15, PageID 3919. That day, City police officer Mark Allen went to Fambrough's home and cautioned him that parking his sound truck in his driveway violated the Parking Ordinance. Allen let Fambrough off with a warning, telling him he had three days to move the truck or else it might be towed. Three days later, McDonald told Allen to return to Fambrough's home and deliver a letter with Gardner's signature that contained just the text of the Parking Ordinance. Allen returned to Fambrough's home, this time with a light-duty tow truck. Fambrough's truck was still parked in his driveway. Allen handed him the letter and tried to tow Fambrough's truck, but the tow truck couldn't get the job done. So Allen allowed Fambrough to move his truck, and Fambrough parked it one hour outside the city.

Fambrough wanted to use his truck to support Gowdy's campaign. But E.C.C.O. § 509.15 (the Noise Ordinance) prohibited playing sound systems on public roads "in a manner or at a volume as to disturb the quiet, comfort or repose of other persons" without "a valid

[1] "Truck" is defined as "[e]very motor vehicle . . . designed and used to carry property," E.C.C.O. § 301.01, which, as acknowledged by Captain Lundy, includes pickup trucks. So apparently you can't park your Ford F-150 or Toyota Tacoma in your own driveway in East Cleveland.

permit."[2] And to receive a valid permit, Fambrough had to comply with the process set forth in E.C.C.O. § 311.02 (the Permit Ordinance).[3] The process required submitting an application,

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[2]Violating the Noise Ordinance is a criminal misdemeanor. *See* E.C.C.O. §§ 501.99, 509.99. The Noise Ordinance provides in relevant part:

> "(a) No person shall play any radio, music player such as a 'boom box', tape cassette, disc player or television, audio system or musical instrument, or any other type of sound service upon any public road, street, highway or private property in this municipality in a manner or at a volume as to disturb the quiet, comfort or repose of other persons. An exception is made for organized events which have received a valid permit from the city as set forth in § 311.02 and any other applicable section.
>
> . . .
>
> (c) In addition to the penalty as set forth in § 509.99, the following additional penalty applies[: a $100 fine for first offense, $200 fine for second offense, and $300 fine and three days in jail for third or subsequent offense.]
>
> (d) Upon conviction for a violation of this section, the sound device used during the commission of the offense shall be subject to seizure and payment of a judgment."

[3]Violating the Permit Ordinance is a criminal misdemeanor. *See* E.C.C.O. § 303.99. The Permit Ordinance provides in relevant part:

> "(a) *Permit required*. No person or persons shall parade or hold a procession, or attempt to parade or hold a procession, in or upon any of the streets, park or public grounds of the city without first obtaining a permit therefor.
>
> . . .
>
> (c) *Permit issuance and approval*. Any person or persons desiring to parade or hold a procession in or upon any street, park or public ground of the city for any purpose whatsoever shall . . . obtain from the Mayor a permit therefor, which shall be issued only upon and after the approval by the Chief of Police and the Mayor.
>
> (d) *Form of application*. Each application for a permit shall be made out in duplicate. Each copy shall be signed by the applicant and shall be in such form as the Mayor shall prescribe. Such application shall be filed with the Mayor at least five days prior to the date upon which the parade is to be held.
>
> (e) [$1 permit application fee]
>
> (f) *Form of permit*. Each permit . . . shall be in such form as the Mayor shall prescribe.
>
> (g) *Permit refusal or revocation.* The Mayor may refuse to issue a parade permit if the applicant or group or organization or persons represented by the applicant, shall have previously violated provisions of a similar permit, or shall have violated any city ordinance or laws of the state or of the United States in connection with a previous parade or procession held within the city. The Mayor may also refuse to issue a parade permit if:
>
> (1) The time, place, size or conduct of the parade including the assembly areas and route of march would unreasonably interfere with the public convenience and safe use of the streets and highways.
>
> (2) The parade would require the diversion of so great a number of police officers to properly police the line of movement, assembly area and areas contiguous thereto so as to deny normal police protection to the municipality.

subject to the mayor's and police chief's approval based on the ordinance's criteria. E.C.C.O. § 311.02.

So Fambrough went to city hall on June 28 to get a sound-device permit. King's assistant gave him an unsigned permit application form, which contained signature lines for the mayor and police chief, and directed him to obtain Gardner's signature—Fambrough understood this to mean that King's approval was implied. That same day, Fambrough obtained Gardner's signature. But no one ever told Fambrough that he still needed King's signature. And in any event, he didn't pay the required $1 fee. *See* E.C.C.O. § 311.02(e).

From June 28 until August, Fambrough used his sound truck to campaign for Gowdy once or twice a week, sometimes being joined by other cars to form a caravan while his truck broadcast messages. He describes his sound truck as the centerpiece of Gowdy's campaign. And he would broadcast messages like, "It's time for a change, elect Juanita Gowdy," or "No more lying, no more stealing." During his drives around the city, he regularly encountered police officers without incident; they didn't stop him or tell him that his broadcasting was too loud. And, because of Officer Allen's May visit, he parked the truck no more than a few hours in his driveway on days he was campaigning, then returned it to a parking spot one hour away.

During Gowdy's campaign, Smedley regularly called Gardner to discuss Fambrough's campaigning efforts and "implied that he wanted [Gardner] and the police department to do something to stop Mr. Fambrough." R.104-6, PageID 3438. Gardner estimated that he received 15 to 20 such calls, sometimes with Smedley providing updates on the specific location of Fambrough's truck. Smedley also told Captain Lundy to enforce the Noise and Parking Ordinances against Fambrough. So on July 27, after Fambrough had used his truck for Gowdy's

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> (3) The parade route of march or assembly areas would unreasonably interfere with the movement of police vehicles, firefighting equipment or ambulance service to other areas of the municipality.
>
> (4) The parade would unreasonably interfere with another parade for which a permit has been issued.
>
> (5) The information contained in the application is found to be false, misleading or incomplete in any material detail.
>
> (6) An emergency such as a fire or storm would prevent the proper conduct of the parade."

campaign at least four times, Gardner—at Smedley's insistence—had Captain Lundy and Officer Allen go to Fambrough's home to tell him that he needed a permit to continue using his sound truck. And potential enforcement actions against Fambrough were a topic of discussion in several city cabinet meetings attended by King, Smedley, Gardner, Hemmons, and assistant law director Heather McCollough.

All the attention City officials gave Fambrough struck Gardner as unusual. The mayor's office wasn't this attentive even in homicide cases. And considering that the City had around only 50 police officers at the time and had "serious crime problems," Gardner thought it was odd to devote this much attention to permitting and parking issues. *Id.* at PageID 3442.

According to King and Smedley, their focus on Fambrough stemmed from several noise complaints they'd received about Fambrough's truck. These complaints were made personally to King and Smedley, and they talked to each other about the complaints. Typically, the East Cleveland Police Department (ECPD) created a data trail in the computer-aided dispatch (CAD) system when residents called in complaints to the police and when officers were dispatched, arrived on scene, cleared a scene, or initiated an action (like a citation or traffic stop) on their own. But because King and Smedley received the complaints directly, there's no guarantee the complaints were logged in the CAD system.

King can't recall specifics about any complaints relevant to the Gowdy campaign—all the complaints he recalls in any detail had occurred earlier. But Smedley recalls one person by name who had called him to complain. Gardner spoke to the same person, who complained about the content of Fambrough's messages and told Gardner that the messages were "obscene." R.104-8, Gardner Dep., PageID 3541. Gardner also says he saw other noise complaints against Fambrough in the CAD system. But in response to Fambrough's public-records request, the City failed to produce any evidence that the complaints were ever logged in the CAD system.

Events came to a head in August. On August 9, Smedley called Gardner. Smedley was "extremely upset" and cursed at Gardner for being "incompetent" and failing to "take care of" Fambrough's truck. R.104-6, PageID 3442. So he told Gardner he wanted the "utmost enforcement as possible." R.104-8, PageID 3540.

That same day, Gardner sent the following email to the entire ECPD:

> Please be advised that there is a vehicle with loudspeakers that are [sic] broadcasting political messages. I am getting an influx of complaints from the residents of the Forest Hills area. Please, find this vehicle and tow it. Cite the operator with disturbing the peace and loud music. Please contact me as soon as this is complete to claim a surprise.

R.104-22, Ex. 16, PageID 3921. Officers were also instructed at a daily briefing to ticket and tow Fambrough's truck. And Captain Lundy issued a directive, typically reserved for serious crimes, to officers to be on the lookout for Fambrough's truck.

Acting on these directions, Officers Majercik and Wood located Fambrough's truck parked on the street outside his home on the afternoon of August 18. When the officers arrived, they didn't see anybody there. But Fambrough's daughter alerted Fambrough that the police were there with a tow truck, so Fambrough went to speak with the officers. Soon after, Gowdy and around ten others arrived at Fambrough's home. Around five other officers also stopped by the scene at various points in time.

Wood told Fambrough that his van was parked illegally under the Parking Ordinance and issued him a citation. Wood also told Fambrough that his van would be towed. Fambrough protested along with others, including Gowdy, Gowdy's campaign manager, and Fambrough's daughter. They offered to drive the van away or remove the expensive sound equipment from the van, but the police refused.

Around this time, Majercik radioed Gardner to tell him that they'd located Fambrough's truck. Gardner told him to issue Fambrough a noise citation, referencing five complaints they'd received and that he says he saw in the CAD system. Fambrough "tried to show" Majercik his sound device permit, but Majercik said, "this is coming from the brass." R.104-2, Fambrough Decl., PageID 3377. So Majercik issued Fambrough a misdemeanor citation for violating the Noise Ordinance.

The tow company began to tow Fambrough's truck, which was in fine working condition at the time. Fambrough could see that they were damaging it and objected, but to no avail. The tow crew finished the job and drove off. The next day, Fambrough retrieved his truck from the

impound lot after paying an $80 fee to the City and $448 to the towing company. But the truck had received roughly $6,000 in damage: The ignition no longer turned over, and the exhaust system was in pieces—some parts hanging, others fallen off completely. The truck sat inoperable for the rest of the campaign.

Assistant law director McCollough handled the prosecution against Fambrough for violating the Noise Ordinance. When deciding that the prosecution should go forward, McCollough based her decision on the noise complaints in the CAD system, complaints made directly to the mayor's office, and a complaint from her executive assistant. Her executive assistant had told McCollough that she heard Fambrough's "really loud" broadcasts occurring late at night from her "high-rise apartment building." R.104-15, McCollough Dep., PageID 3767, 3788. But because it was a minor noise violation, McCollough didn't gather any other evidence.

In September, Fambrough's attorney and McCollough had a phone call to discuss resolving the citation before the court hearing. McCollough told Fambrough's attorney that though her office was typically willing to resolve minor issues like noise complaints, they would treat Fambrough differently. She wasn't inclined to resolve the matter favorably with him because he needed to "stand down." R.104-5, Robinson Decl., PageID 3434. Why did McCollough want him to stand down? Well, she gave the following reasons on the call: Fambrough making complaints about the ECPD, making public records requests, asking for a copy of the City's charter, and inquiring about election ordinances. And though she conveyed her "concern[]" about Fambrough's involvement in Gowdy's mayoral candidacy, she thought a deal possible now that King had won reelection. *Id.*

Two days later at the court hearing, McCollough told Fambrough and his attorney that she couldn't guarantee lenient treatment in the future if he continued to "cause problems 'downtown.'" *Id.* at PageID 3435. She told Fambrough that he shouldn't expect any favors if he makes himself an "annoyance" by constantly making complaints and public records requests. R.104-15, PageID 3774. In the face of McCollough's threats, Fambrough agreed to a plea of no contest to a reduced charge of disorderly conduct and paid $99 in fees and court costs. As they

were leaving the courtroom, McCollough told Fambrough "to watch himself and mind his own business going forward." R.104-5, PageID 3436.

B.

Fambrough's operative complaint brings five counts against the City and over ten individual defendants under 42 U.S.C. § 1983. On appeal, Fambrough seeks to revive some claims against only King, Smedley, Gardner (the Individual Defendants), and the City. So we'll limit our discussion to those claims.

Count One is a First Amendment retaliation claim against the Individual Defendants. Fambrough alleges that each either directed or ratified the decisions of others to retaliate by ordering police officers to enforce the Parking and Noise Ordinances against him, with the reason for the retaliation being Fambrough's support for Gowdy and criticism of the City. And Count Two is a First Amendment retaliation claim against the City, which mirrors Count One and alleges that the retaliation was the City's official policy with the Individual Defendants as some of the relevant policymakers.

Count Three is a First Amendment prior-restraint claim against the City. Fambrough alleges that the Noise and Permit Ordinances together operate as an unconstitutional prior restraint because the Permit Ordinance vests unduly broad discretion in the mayor and police chief. Count Four is a Fourteenth Amendment selective-enforcement claim against the Individual Defendants and the City for enforcing the Parking and Noise Ordinances against Fambrough. And Count Five is a Fourth Amendment unreasonable-seizure claim against the City based on the August impoundment of Fambrough's truck.

At the motion-to-dismiss stage, the district court dismissed Count One against King and Smedley and Count Four against King. Then after discovery and cross-motions for summary judgment, the court resolved the remainder of the claims in favor of the City, Smedley, and

Gardner. Fambrough now appeals, asking us to reverse the district court's motion-to-dismiss and summary-judgment rulings.[4]

II.

We review the district court's dismissal and summary-judgment grant de novo. *Wilson v. Gregory*, 3 F.4th 844, 855 (6th Cir. 2021); *Luis v. Zang*, 833 F.3d 619, 625 (6th Cir. 2016). The district court dismissed the retaliation claims (Count One) against King and Smedley and the selective-enforcement claim (Count Four) against King. In reviewing those dismissals, we "accept the complaint's well-pleaded factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor." *Zang*, 833 F.3d at 626. A complaint can overcome a Rule 12(b)(6) motion only when it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). And even though the parties completed discovery, we limit our review to "the complaint itself" because "we cannot decide that a complaint was worthy of proceeding to discovery against one party by considering evidence uncovered during discovery against another." *Agema v. City of Allegan*, 826 F.3d 326, 332 (6th Cir. 2016).

The district court resolved all other claims on summary judgment, so a different standard applies to those claims. The central issue at summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). Summary judgment is proper only if the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the nonmoving party presents evidence genuinely disputing the movant's evidence, the court must accept the nonmoving party's evidence as true. *See Schreiber v. Moe*, 596 F.3d 323, 333 (6th Cir. 2010). And the court must draw reasonable inferences from the facts

[4]The defendants argue that Fambrough forfeited his claims against the Individual Defendants because Fambrough's opening brief doesn't distinguish between their potential liability, instead discussing them as a whole. But that's an overstatement. Fambrough divides his arguments on the Individual Defendants' liability between claims that the district court resolved on the pleadings and those it resolved at summary judgment. And when addressing the claims against King and Smedley, to the extent Fambrough fails to distinguish between them he does so only because the district court applied the same legal reasoning to both. So we don't find forfeiture on the defendants' desired basis.

in the nonmoving party's favor. *Scott v. Harris*, 550 U.S. 372, 378 (2007). If, after viewing the evidence in the light most favorable to the nonmoving party, a reasonable jury still couldn't return a verdict for the nonmoving party, then the movant is entitled to summary judgment. *See Anderson*, 477 U.S. at 248.

For the retaliation claims, the Individual Defendants assert qualified immunity as a defense. To overcome this defense, Fambrough must show that (1) the Individual Defendants violated a federal statutory or constitutional right and (2) the unlawfulness of their conduct was clearly established at the time. *District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018). As against King and Smedley, Fambrough's burden is "not high at the 12(b)(6) stage: Reading the complaint in the light most favorable to the plaintiff, it need only be 'plausible' that an official's acts violated a clearly established constitutional right." *MacIntosh v. Clous*, 69 F.4th 309, 315 (6th Cir. 2023).

The unlawfulness of conduct is clearly established when, "at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citation modified) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). This generally means that the plaintiff must "identify a case where an officer acting under similar circumstances was held to have violated" the law. *City of Escondido v. Emmons*, 586 U.S. 38, 43 (2019) (per curiam) (quoting *Wesby*, 583 U.S. at 64). So "general propositions of law are generally (though not always) insufficient to clearly establish a right," *Rhodes v. Michigan*, 10 F.4th 665, 679 (6th Cir. 2021), because "abstract legal principles" typically don't put the legality of the official's conduct "beyond debate in the particular circumstances before him," *Novak v. City of Parma (Novak I)*, 932 F.3d 421, 426 (6th Cir. 2019) (citation modified). But Fambrough need not point to a case "on all fours with the instant fact pattern to form the basis of a clearly established right." *Vanderhoef v. Dixon*, 938 F.3d 271, 278 (6th Cir. 2019) (citation modified). What matters is whether "every reasonable official would interpret [then-existing precedent] to establish the particular rule the plaintiff seeks to apply." *Wesby*, 583 U.S. at 63.

III.

A.

We'll start with Fambrough's First Amendment retaliation claims, which he seeks to revive against the Individual Defendants and the City. In a First Amendment retaliation claim, the plaintiff must prove that (1) he engaged in activity protected by the First Amendment; (2) the defendant caused the plaintiff to be subjected to an adverse action that would likely deter a person of ordinary firmness from continuing his protected activity; and (3) the defendant's decision to subject the plaintiff to that adverse action was motivated, at least in part, by the plaintiff's protected activity. *Novak I*, 932 F.3d at 427; *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc).

1.

The defendants don't dispute that Fambrough has satisfied the first two elements. In other words, they don't dispute that the First Amendment protects Fambrough's political speech and that the actions taken against him were sufficiently adverse. Instead, Fambrough's retaliation claims turn on the third element.

Generally, the *Mt. Healthy* test governs the third element. *Nieves v. Bartlett*, 587 U.S. 391, 404 (2019); *Thaddeus-X*, 175 F.3d at 399; *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977). This test requires the plaintiff to first show that his protected conduct was a substantial or motivating factor in the defendant's decision to cause the adverse action. *Frenchko v. Monroe*, 160 F.4th 784, 803 (6th Cir. 2025). Then the burden shifts to the defendant, who must show that he would've made the same decision in the absence of the plaintiff's protected conduct. *See id.* (quoting *Mt. Healthy*, 429 U.S. at 287). "[I]f the same decision would have been reached absent [the plaintiff's] protected speech," there was no retaliation. *Nieves*, 587 U.S. 391 at 399 (internal quotations omitted) (quoting *Mt. Healthy*, 429 U.S. at 285).

But the type of adverse action affects how we analyze the third element and whether the *Mt. Healthy* test governs. Fambrough bases his retaliation claims on four adverse actions:

the parking citation; his truck's impoundment; the noise citation; and the noise prosecution. How we characterize these adverse actions is central to what Fambrough must prove to recover on his retaliation claims.

That's because the Supreme Court, in *Hartman* and *Nieves*, has said that when the adverse action is a prosecution or arrest, a plaintiff must plead and prove the absence of probable cause supporting the prosecution or arrest. *Nieves*, 587 U.S. at 402 (arrests); *Hartman v. Moore*, 547 U.S. 250, 265–66 (2006) (prosecutions). Though the *Hartman* and *Nieves* no-probable-cause rules both burden plaintiffs with the same obligation, they differ in that the Supreme Court has recognized two exceptions to the no-probable-cause rule only for retaliatory arrests. *See, e.g.*, *Petsche v. Hruby*, 172 F.4th 475, 484 (6th Cir. 2026); *Brown v. City of Albion*, 136 F.4th 331, 338 (6th Cir. 2025). And Fambrough doesn't argue for an extension of the retaliatory-arrest exceptions to retaliatory prosecutions.

First, the *Nieves* exception. Under this exception, the *Nieves* no-probable-cause rule doesn't apply in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so," like with jaywalking, and the plaintiff presents "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 587 U.S. at 406–07. In such circumstances, probable cause would do "little to prove or disprove the causal connection between animus and injury." *Id.* at 407. And though the exception is a "slim" one, evidence outside of "virtually identical and identifiable comparators" can suffice. *Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024) (per curiam).

Second, the *Lozman* exception. This exception states that if the plaintiff presents objective evidence of a premeditated municipal policy to retaliate or intimidate the plaintiff by arresting him for conduct unrelated to his protected activity, then the *Nieves* no-probable-cause rule doesn't apply. *Lozman v. City of Riviera Beach*, 585 U.S. 87, 99–101 (2018); *City of Albion*, 136 F.4th at 338. And as we've held, when a plaintiff sues both individual officers and a municipality, this exception is available only for official-capacity claims or claims against the municipality. *Frenchko*, 160 F.4th at 803; *Novak I*, 932 F.3d at 429.

If the plaintiff doesn't show the absence of probable cause—or, for retaliatory-arrest claims, meet one of the exceptions—then the claim fails. *See Lozman*, 585 U.S. at 97. But if the plaintiff can show the lack of probable cause or meet an exception, then the default *Mt. Healthy* test governs the third element of the retaliation claim as usual. *Id.*

2.

The parties disagree on whether the *Hartman* or *Nieves* no-probable-cause rules apply to the adverse actions in this case. Fambrough says that neither rule applies; his claim is just an application of *Mt. Healthy*. And the defendants say that the *Hartman* rule governs because it applies broadly to "law enforcement situations" not involving arrests. Appellee Br. at 15. But neither view is correct.

i.

In resolving this disagreement, we'll start with the citation and prosecution under the Noise Ordinance. McCollough's decision to prosecute the noise violation is firmly in *Hartman* territory. So the *Hartman* no-probable-cause rule applies to that adverse action, without the availability of exceptions.

But the noise citation is an adverse action independent of the prosecutor's decision to pursue charges. Though, in this case, the noise citation was paired with a prosecution, that won't happen in every case. A local prosecutor's first involvement with a citation might be to dismiss it. But, in the meantime, the plaintiff is sufficiently deterred from continuing to engage in his protected conduct. *See, e.g.*, *Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019) (making a traffic stop and issuing a ticket is an adverse action); *Thaddeus-X*, 175 F.3d at 398 (only actions that are "de minimis" or "inconsequential" fail to rise to the level of an adverse action). The facts here—officers cited Fambrough during the heat of an election, but the citation wasn't resolved until after the election—show why a defendant might stand to gain from just a citation, only to have it later dismissed.

We've applied a no-probable-cause rule to criminal citations, but we haven't clearly answered whether it's the *Hartman* or *Nieves* version that governs. In *Hall v. Navarre*, the

police arrested and cited the plaintiff for two criminal offenses, disorderly conduct and disobeying an officer's lawful order. 118 F.4th 749, 753 (6th Cir. 2024). The charges against the plaintiff were later dismissed. *Id.* For the plaintiff's retaliation claim against the officer who had issued the citation (but who hadn't arrested the plaintiff), we described the adverse action as "issuing the citation" and applied the no-probable-cause rule to the claim without specifying whether we were applying *Hartman* or *Nieves*. *Id.* at 759; *see also Watson v. Boyd*, 119 F.4th 539, 550–55 (8th Cir. 2024) (applying *Nieves* to evaluate whether the arresting officer had probable cause for five of the nine citations he had issued).

In this case, we think that the *Nieves*, not the *Hartman*, version of the rule applies to the noise citation. In the respect that matters here—how the action affects the causal inquiry, *Nieves*, 587 U.S. at 399–402—issuing a citation is more like an arrest than a prosecutor's decision to bring charges. Like arrests, no prosecutor was necessarily involved. *Hartman* imposed the no-probable-cause rule to retaliatory prosecutions based on the "longstanding presumption of regularity accorded to prosecutorial decisionmaking" and the causal complexities arising from the difficulty of "divining the influence" of the defendant on the immune prosecutor. *Hartman*, 547 U.S. at 261–63. Those factors aren't present when a police officer issues a citation. So it would make little sense to treat the officer's decision in the same way that *Hartman* treats a prosecutor's decision—the officer isn't absolutely immune so he's a viable defendant (unlike prosecutors), and there's no presumption of regularity accorded to the officer's decision.

Fambrough urges us not to apply the no-probable-cause rules to the noise-related adverse actions. He first argues the *Hartman* rule shouldn't apply because "the officials here imposed citations . . . without any involvement from an independent prosecutor, a neutral judge, or a grand jury." Appellant Br. at 41. Next, he argues the *Nieves* rule shouldn't apply because "the *content* of [Fambrough's] speech was irrelevant" to the noise citations and the defendants' "actions were part of a months-long deliberative campaign, not split-second, on-the-spot judgments." *Id.*

First, with respect to Fambrough's arguments on *Hartman*, we agree that when looking at just the noise citation, the *Hartman* rule doesn't apply. But McCollough made a separate decision to pursue criminal charges against Fambrough. And for that prosecutorial decision,

Hartman squarely governs. Though *Hartman* dealt with a federal prosecution and a grand jury indictment, the Supreme Court didn't couch its reasoning on the specific procedures involved in federal prosecutions or limit the rule's application to federal prosecutions. It established, and we've applied, the no-probable-cause rule to prosecutions without indicating that the jurisdiction's criminal procedures matter. *See, e.g.*, *Hartman*, 547 U.S. at 259–66.

Second, the Supreme Court's extension of *Hartman* to retaliatory arrests in *Nieves* wasn't qualified by the nature of the arrest. *Nieves* discussed how officers must often make split-second judgments when deciding to arrest and that the "causal inquiry is complex because protected speech is often a wholly legitimate consideration for officers when deciding whether to make an arrest." *Nieves*, 587 U.S. at 401. But it used that reasoning to extend the no-probable-cause rule to all arrests, not just arrests where the causal inquiry might be particularly thorny. In other words, applying the *Nieves* rule doesn't depend on the circumstances of the particular arrest, like whether the arrest was a split-second decision or what the plaintiff's offense was. *See Gonzalez*, 602 U.S. at 669 (Alito, J., concurring). "*Nieves* applies to *all* retaliatory-arrest claims brought under § 1983." *Id.* at 673. So with *Nieves* applying to criminal citations, we don't inquire into the circumstances of the particular citation.

Nevertheless, Fambrough's observations about how the circumstances in this case differ from those the Supreme Court addressed in *Nieves* are still relevant to the analysis. First, we would inquire into the circumstances of the arrest or criminal citation when determining whether an exception to *Nieves* applies. For instance, if the plaintiff presents objective evidence revealing that an arrest was the product of an official municipal policy of retaliation, then the *Lozman* exception applies and the plaintiff can extract his claim from *Nieves*' ambit for official-capacity claims and claims against a municipality. *Frenchko*, 160 F.4th at 803. Second, Fambrough's concerns about how the adverse actions arose from a months-long effort by City officials, rather than on-the-spot judgments by officers, matter when we assess probable cause. His claims on appeal aren't against the police officers who went to his home, issued the citations, and impounded his truck. They're against the officials who gave the orders. And our task here is to evaluate the motive behind those orders. *See Thaddeus-X*, 175 F.3d at 399. So when we assess probable cause under *Nieves*, we assess it from the perspective of the defendant. Indeed,

it would be insufficiently protective of First Amendment rights and unconnected to the causal inquiry if we evaluated probable cause from the citing officer's perspective when it's the superior's motive that's at issue.[5]

ii.

With that, we turn from the Noise Ordinance to the adverse actions related to the Parking Ordinance—issuing the parking citation and the impoundment. Violating the Parking Ordinance is a civil infraction with no criminal consequences. And we haven't extended either *Hartman* or *Nieves* to all civil enforcement actions. *See Tamm v. Nerad*, 2025 WL 2674302, at *8 (6th Cir. Sep. 18, 2025); *cf. Amacher v. City of Tullahoma*, 179 F.4th 999, 1002–03 (6th Cir. 2026) (extending a no-probable-cause rule to quo warranto petitions). So the defendants are wrong to suggest that we've applied *Hartman* or *Nieves* to all law enforcement actions.

And we decline to extend either *Hartman* or *Nieves* to the parking-related actions here. For the same reasons that *Hartman* doesn't extend to issuing the noise citation, *Hartman* isn't the ideal candidate for justifying a no-probable-cause rule for the parking-related actions. So we focus on how *Nieves*' rationale applies to ordering the enforcement of a minor parking infraction by issuing a citation and impounding the vehicle.[6]

First, the causal complexities *Nieves* identified with arrests aren't as prevalent in this context. For arrests, the Supreme Court's central worry was that "protected speech is often a wholly legitimate consideration for officers when deciding whether to make an arrest." *Nieves*, 587 U.S. at 401 (citation modified). An officer assessing disorderly conduct, obstruction, or threat offenses must attend to what the suspect is saying, so the probable-cause screen is a proxy

[5]Because "a superior officer's credible instruction can support another officer's reasonable belief that probable cause is present," assessing whether the citing officer had probable cause doesn't aid the causal inquiry. *Hall*, 118 F.4th at 760; *see also United States v. Lyons*, 687 F.3d 754, 769 (6th Cir. 2012) (explaining that the collective knowledge doctrine allows officers "to presume the accuracy of the information furnished to them by other law enforcement personnel"); *Collins v. Nagle*, 892 F.2d 489, 495 (6th Cir. 1989). But that's not what we do when the defendant isn't the arresting or citing officer.

[6]Because we don't think that the *Hartman* or *Nieves* no-probable-cause rules extend to the parking-related actions here for other reasons, we find no need to grapple with how to apply such a rule in a non-criminal context where "probable cause" isn't the threshold standard that justifies the adverse action. There may be a legal predicate that can play the same evidentiary role that probable cause plays in this civil-enforcement context. But we need not decide that.

for disentangling the legitimate consideration of speech from an illegitimate one. But whether a vehicle sits in a no-parking zone, displays expired plates, or blocks a fire hydrant is wholly independent of anything its owner has said. So the need for disentanglement doesn't arise—where speech figures in the decision to ticket or tow for a parking infraction, it can only be as an illegitimate consideration. Nor does *Nieves*' emphasis on how an arrest is "a dangerous task that requires making quick decisions in circumstances that are tense, uncertain, and rapidly evolving" map onto parking enforcement. *Id.* at 403 (citation modified).

Second, analogizing to the common law as it stood when § 1983 was enacted in 1871, as *Nieves* did, doesn't support extension of the no-probable-cause rule. *See id.* at 405–06. For issuing the parking citation, the two most obvious analogs are the torts of wrongful civil proceedings and abuse of process. *Cf. Hartman*, 547 U.S. at 258–59 (identifying malicious prosecution and abuse of process as the most analogous torts for retaliatory prosecutions but resting its holding on causation issues). The former, like malicious prosecution, "required a plaintiff to prove that the challenged lawsuit lacked probable cause." *Amacher*, 179 F.4th at 1003 (internal quotations omitted) (quoting *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62 (1993)). Abuse of process did not. *E.g.*, *Heck v. Humphrey*, 512 U.S. 477, 495 (1994) (Souter, J., concurring in the judgment).

Judged by the injury each tort was meant to remedy, neither analog is a clean fit. For wrongful civil proceedings, the gravamen of the injury is that the proceeding should've never been brought, and a lack of probable cause is the operative measure of that wrong. *See Pro. Real Est. Invs.*, 508 U.S. at 62–63. For abuse of process, authority to bring the proceeding is valid on its face, but the wrong lies in that the proceeding was brought or used primarily to accomplish an improper purpose for which it was not designed. *See, e.g.*, *Bickerstaff v. Lucarelli*, 830 F.3d 388, 399–400 (6th Cir. 2016). The problem with utilizing either tort here is that not all retaliation claims are premised on an officer lacking legitimate grounds to act. Some are. But even where an officer had legitimate grounds for acting, a retaliation claim targets the reason the grounds were acted on. *See Lozman*, 585 U.S. at 100–01. So depending on the particular retaliation claim, wrongful civil proceedings may be the better fit than abuse of process, or vice versa. But that lands us back at square one, with no historical model to clearly tell us whether the absence

of probable cause belongs as the plaintiff's pleading and evidentiary burden. Considering the unclear answers provided by the common law, and without the same need to disentangle causation found in *Nieves*, importing a probable-cause requirement for writing parking tickets isn't the right move.

And as for the non-evidentiary impoundment, neither tort fits. Instead, the temporary, warrantless seizure of a vehicle unconnected to any need for evidence sounds in trespass to chattels rather than any process tort. That tort's elements involved the plaintiff's property interest and the defendant's interference with the plaintiff's possession. *See* Restatement (First) of Torts § 221 (1934). Lawful justification for the trespass was a matter for the defendant to plead and prove. *See, e.g.*, *Bates v. Clark*, 95 U.S. 204, 204–05 (1877); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 132–33 (1851). So the common law and *Mt. Healthy* align—neither asks the plaintiff to negate the government's justification in his prima facie claim.

Third and finally, the ease with which an official could resort to enforcing minor civil infractions as a tool of retaliation counsels against extending the no-probable-cause rule. An official bent on punishing a critic faces a choice of instruments. Instituting criminal process can be the more punishing option, but it's also the costlier and riskier option. The burden throughout the criminal proceedings rests with the government, the charges will be subjected to prosecutorial and judicial screening for probable cause, and the charges may cause the defendant to retain counsel. But for minor civil infractions like parking tickets, no such protection is likely to be present. *See, e.g.*, Ohio Rev. Code Ann. § 4521.03(D) (making a parking ticket "prima-facie evidence of the facts it contains"). And the small-dollar fines make it likely that the enforcement actions won't be contested. *See Culley v. Marshall*, 601 U.S. 377, 396 (2024) (Gorsuch, J., concurring). Moreover, the typical catalogue of municipal ordinances touches nearly every aspect of daily life. This raises the prospect that an official need only pick a target because the search for a violation won't be hard. These conditions are the natural habitat of retaliation. And we should be wary of officials engaging in a death-by-a-thousand-cuts approach through enforcement of minor infractions rather than swinging for criminal charges. In such circumstances, probable cause would do "little to prove or disprove the causal connection between animus and injury." *Nieves*, 587 U.S. at 407.

So in sum, the *Hartman* rule applies to the noise prosecution, and the *Nieves* rule applies to issuing the noise citation. For the parking-related adverse actions, neither rule applies—*Mt. Healthy* governs directly.

3.

We'll start with the retaliation claims against King and Smedley, which the district court dismissed at the pleadings stage. King and Smedley don't deny that Fambrough's allegations plausibly establish the first two elements of First Amendment retaliation: protected First Amendment conduct (criticism of King and support for Gowdy) and an adverse action (enforcement of the ordinances). Instead, they argue only that Fambrough's retaliation claims fail on both qualified-immunity prongs because his allegations don't overcome the no-probable-cause rules—he didn't plead the absence of probable cause for King and Smedley to order enforcement of the ordinances.

i.

Fambrough first responds that the no-probable-cause rules don't bear on qualified immunity. Drawing on a Fifth Circuit concurrence, he contends that qualified immunity asks whether the constitutional *right* was violated and was clearly established, and the no-probable-cause rules affect the distinct question of whether § 1983 provides a *remedy*. *See Villarreal v. City of Laredo*, 134 F.4th 273, 277 (5th Cir. 2025) (Oldham, J., concurring). According to that concurrence, the Supreme Court has, at least since *Nieves*, "made clear that its probable-cause bar inheres in the *remedy* afforded by § 1983 and not the First Amendment *right* against retaliatory arrest." *Id.* So, in Fambrough's view, a defendant "cannot invoke qualified immunity where—as here—at most the probable-cause aspect of the remedy is unclear" or, in other words, "just because of some ambiguity in the elements of a Section 1983 cause of action." Appellant Br. at 51–52 (citation modified).

But this circuit hasn't taken that view. After *Nieves*, we decided *Novak v. City of Parma (Novak II)*, 33 F.4th 296 (6th Cir. 2022). Confronted with a retaliatory-arrest claim, we didn't treat the *Nieves* no-probable-cause rule as a remedial limitation separate from the First Amendment right at issue. We said that "there's no recognized right to be free from a retaliatory

arrest that is supported by probable cause." *Id.* at 304. And to defeat the qualified-immunity defense, the plaintiff had to show that "it was clearly established that the officers lacked probable cause to arrest him." *Id.* Because the defendants "had good reason to believe they had probable cause," we granted them qualified immunity. *Id.* at 305.

Then came *Gonzalez v. Trevino*, the most recent Supreme Court decision on retaliatory arrests where the Court clarified the *Nieves* exception. *See* 602 U.S. at 658. Did that case change things? No. After *Gonzalez*, we addressed a First Amendment retaliation claim in *Hall v. Navarre*. *See Hall*, 118 F.4th at 758–59. And in *Hall*, once again, the plaintiff had to show that it was clearly established that the defendant lacked probable cause. *See id.* at 760–61. Because the defendant had a reasonable basis for believing there was probable cause to cite the plaintiff, the defendant was entitled to qualified immunity. *Id.* at 761–62.

So even if the Supreme Court hasn't definitively answered whether the no-probable-cause rule is a remedial limitation or a rights limitation, *see Reichle v. Howards*, 566 U.S. 658, 669 n.6 (2012), the law of this circuit is definitive. Fambrough must show that it was clearly established that King and Smedley lacked probable cause to order enforcement of the Noise Ordinance. *See Hall*, 118 F.4th at 763.

ii.

The first prong of qualified immunity asks whether Fambrough plausibly pled that King and Smedley violated the First Amendment. And here, the absence of probable cause resolves this question for the noise-related adverse actions. *See Novak I*, 932 F.3d at 426. Probable cause "exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Frenchko*, 160 F.4th at 796 (citation modified).

The district court concluded that the complaint established probable cause to enforce the Noise Ordinance because Fambrough pled that he had used the sound truck to broadcast campaign messages. But mere use of a sound truck doesn't violate the Noise Ordinance. To violate the ordinance, the sound system must be played "in a manner or at a volume as to disturb the quiet, comfort or repose of other persons." E.C.C.O. § 509.15(a); *see also Gaughan v. City of Cleveland*, 212 F. App'x 405, 410 (6th Cir. 2007) (relying on an Ohio Supreme Court decision

to hold that an ordinance nearly identical to the Noise Ordinance prohibited the amplification of sound "which could be anticipated to offend the reasonable person" (citation modified)). And Fambrough didn't plead that he did that. Rather, Fambrough alleged that the City hadn't received any complaints about his use of his sound truck. And he alleged that he had regularly encountered police officers while using his sound truck without issue. City law permits residents to make some noise. Fambrough pled that he did. But that's not an admission that he broke the law. Taking Fambrough's allegations as true, he plausibly alleged that there wasn't probable cause to enforce the Noise Ordinance.[7] So Fambrough overcomes the no-probable-cause rules for the noise-related adverse actions.

And for the parking-related adverse actions, the complaint plausibly alleged that King's and Smedley's retaliatory animus caused the adverse actions. Their only response is that Fambrough didn't plead the absence of probable cause. But because Fambrough didn't have to, that argument fails. So Fambrough surpasses the first prong.

Turning to the second prong of qualified immunity, the defense insulates King and Smedley from liability if the unlawfulness of their conduct wasn't clearly established at the time of the violation. *Novak II*, 33 F.4th at 303. Existing caselaw must give "fair and clear warning to officers about what the law requires" for an action's unlawfulness to be clearly established. *Vanderhoef*, 938 F.3d at 278 (citation modified).

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[7]Even though Fambrough may have pled that he violated the Permit Ordinance because he caravaned with a technically invalid permit, he wasn't cited for violating the Permit Ordinance. Though it's possible for a person to be violating both ordinances at the same time, it's also possible to violate the Noise Ordinance without violating the Permit Ordinance (and vice versa). *See* E.C.C.O. §§ 311.02, 509.15. The Permit Ordinance is a separate misdemeanor offense that doesn't include the Noise Ordinance's additional, mandatory penalties. *Compare id.* § 303.99, *with id.* §§ 501.99, 509.15. The defendants haven't argued that probable cause to cite Fambrough under the Permit Ordinance would excuse the lack of probable cause to cite him under the Noise Ordinance.

And even if they had, it's questionable that having cause to cite a person under an offense carrying lesser penalties would excuse citing him under the offense with more severe penalties. *See Chiaverini v. City of Napoleon*, 602 U.S. 556, 562–63 (2024) (holding that, for malicious-prosecution claims, baseless charges coupled with valid charges can constitute a valid cause of action if the baseless charge caused a longer pretrial detention). It would also be questionable to import every rule we apply to Fourth Amendment issues—rules that are premised on that amendment's objective inquiry, unlike the subjective inquiry pertinent to First Amendment retaliation claims. *See Heien v. North Carolina*, 574 U.S. 54, 66 (2014) (explaining that for a mistake of law to establish reasonable suspicion, courts must examine whether the mistake was objectively reasonable rather than examining the subjective understanding of the particular officer involved); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (explaining that the offense identified by the arresting officer at the time of arrest needn't be closely related to the offense establishing probable cause because the Fourth Amendment is concerned with objective standards of conduct).

Putting aside the no-probable-cause rules for a moment, the other aspects of Fambrough's retaliation claims were clearly established. "The law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional." *Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994). More specifically, it's well established that the First Amendment protected Fambrough's speech. *Jenkins v. Rock Hill Loc. Sch. Dist.*, 513 F.3d 580, 588 (6th Cir. 2008) ("[T]he right to criticize public officials is clearly protected by the First Amendment."). King and Smedley also had fair and clear notice that issuing a parking citation, impounding the truck, and prosecuting the noise violation because of Fambrough's speech would be retaliation. *See, e.g.*, *Cruise-Gulyas*, 918 F.3d at 497; *Paterek v. Village of Armada*, 801 F.3d 630, 645 (6th Cir. 2015) ("[T]he numerous tickets that were issued to Plaintiffs [a]nd the suits that were initiated against them . . . patently constitute adverse actions."). And directing someone else to take an adverse action rather than doing it oneself doesn't make the conduct lawful. *Paterek*, 801 F.3d at 651.

So it's not surprising that King and Smedley rely solely on probable cause to enforce the ordinances to escape liability. If they could've reasonably, but mistakenly, concluded that they had probable cause to enforce the Noise Ordinance, then qualified immunity is warranted. *See Hall*, 118 F.4th at 760; *Novak II*, 33 F.4th at 305. But Fambrough alleged that there weren't any noise complaints or any other basis to establish that he violated the Noise Ordinance. So accepting those allegations as true, no reasonable official could've concluded that probable cause supported enforcing the Noise Ordinance. *See, e.g.*, *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (probable cause turns on "facts and circumstances within the officer's knowledge"). Without any objective facts supporting the belief that Fambrough was violating the Noise Ordinance, probable cause would be absent. *See, e.g.*, *Beck v. Ohio*, 379 U.S. 89, 95–97 (1964).

For the parking-related adverse actions, neither the *Hartman* nor *Nieves* no-probable-cause rule applies, as we conclude above. Qualified immunity, however, looks to the law as it stood when King and Smedley acted. *See Hall*, 118 F.4th at 759. When they acted, we hadn't extended or hinted at extending a no-probable-cause rule to the civil-enforcement context. So it wouldn't have been reasonable for King and Smedley to act based on the speculation that we would extend *Hartman* or *Nieves* to enforcement of minor civil infractions. *See Wilson v. Layne*,

526 U.S. 603, 615–16 (granting qualified immunity where the constitutional question was "by no means open and shut" and existing authority didn't point toward unlawfulness).

Existing authority at the time pointed toward unlawfulness—in general, subjecting a person to an adverse action because of retaliatory animus has long been unlawful, including outside the criminal context. *See, e.g.*, *Lucas v. Monroe County*, 203 F.3d 964, 973 (6th Cir. 2000). *Hartman* and *Nieves* each carved out an additional requirement for a particular setting while leaving the general framework intact. *See Nieves*, 587 U.S. at 400 ("Unlike most retaliation cases, in retaliatory prosecution cases the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor."); *id.* at 401–02. And for arrests, *Nieves* and *Lozman* made clear that the no-probable-cause rule does not even reach every arrest. *Id.* at 407; *Lozman*, 585 U.S. at 100. True, between the *Hartman* and *Nieves* decisions, the Supreme Court granted qualified immunity to the defendants in *Reichle* because reasonable officers could've read *Hartman*'s rationale to cover retaliatory arrests. *See* 566 U.S. at 666–67. But that was only because "*Hartman* was decided against a legal backdrop that treated retaliatory arrest and prosecution claims similarly" and because other circuits had already extended it. *Id.* at 667, 669–70. No such backdrop or trend existed here. So acting on an expectation that we would extend *Hartman* or *Nieves* to a minor parking infraction would've been based on speculation, not a reasonable belief. And because that speculation would be the only basis for granting King and Smedley qualified immunity, their defense fails.

Taking Fambrough's allegations as true, no reasonable official in King's or Smedley's position would believe that he was acting lawfully. Because Fambrough's complaint overcomes qualified immunity, we reverse the district court's dismissal of Count One against King and Smedley.

4.

Next, we turn to the retaliation claims that the district court resolved on summary judgment, those against the City and Gardner. The parties, once again, dispute only whether the

defendants acted with the requisite retaliatory motive and the related question of how to apply the no-probable-cause rules.

i.

We'll start with Fambrough's claim against the City, which requires that he establish municipal liability under *Monell*. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–92 (1978). To establish *Monell* liability, Fambrough "must show (1) that [he] suffered a constitutional violation and (2) that a municipal policy or custom directly caused the violation." *Hardrick v. City of Detroit*, 876 F.3d 238, 243 (6th Cir. 2017). Relying on *Hartman*, the City argues that it had probable cause to enforce the Noise and Parking Ordinances. And, in its view, because Fambrough's violations of the law caused the adverse actions and not his political activity, no constitutional violation occurred.

But we disagree. Fambrough genuinely disputes whether City officials had probable cause to order enforcement of the Noise Ordinance. And for the parking-related actions, Fambrough doesn't need to prove the absence of probable cause.[8] So Fambrough's entire retaliation claim against the City escapes the no-probable-cause rules for summary judgment, meaning the *Mt. Healthy* causation framework governs. And, under *Mt. Healthy*, we find that Fambrough raised a genuine dispute of material fact on whether City officials' retaliatory motive led to the adverse actions.

To begin with, Fambrough genuinely disputes whether the City officials had probable cause to order the enforcement of the Noise Ordinance. The City points to the noise complaints made personally to King and Smedley and the complaints in the CAD system. But Fambrough's evidence that the City has no record of the complaints in the CAD system would allow a

[8]Because this is a *Monell* claim, the *Lozman* exception is also available for adverse actions governed by *Nieves*. *See Frenchko*, 160 F.4th at 803; *City of Albion*, 136 F.4th at 339. In *Lozman*, the plaintiff put forward significant, objective evidence of such a policy. The plaintiff cited a transcript of a closed-door city council meeting in which councilmembers agreed to use city resources to intimidate the plaintiff in retaliation for filing a lawsuit against the city. *Lozman*, 585 U.S. at 91, 101. Fambrough doesn't have the same caliber of evidence. But that wouldn't necessarily mean that his evidence fails to satisfy the *Lozman* exception.

In any event, because Fambrough's *Monell* claim survives through other avenues, we don't need to decide whether he could meet *Lozman*'s requirements.

reasonable jury to conclude that the complaints weren't made. And, in turn, the jury could then conclude that City officials didn't have probable cause to order enforcement of the Noise Ordinance.

City officials give little detail on the noise complaints supposedly made against Fambrough. Save for one exception, the City offers no specifics on the complaints justifying the noise citation other than the fact they were made. And the one complaint with some detail doesn't support probable cause. For that one complaint, Smedley and Gardner can recall the complainant by name and that he complained that Fambrough's broadcasts were "obscene." R.104-8, PageID 3541. But the supposed obscenity of the broadcasts wouldn't support enforcement of the Noise Ordinance. So the City must rely on the other complaints to establish probable cause that Fambrough was broadcasting too loudly.

Gardner says that he saw five noise complaints in the CAD system. And McCollough based her decision to prosecute, in part, on the same complaints. But, in response to Fambrough's public-records requests, the City couldn't produce any documentary evidence that the complaints were made, within the CAD system or otherwise. As for King and Smedley testifying that residents made noise complaints directly to them, Fambrough doesn't have direct evidence refuting that testimony.

The lack of evidence of the complaints in the CAD system is enough to genuinely dispute their existence and the direct complaints to King and Smedley. Whether a fact is genuinely disputed depends on the "caliber [and] quantity" of evidence on either side of the ledger. *Anderson*, 477 U.S. at 254. For the complaints supposedly logged and maintained in the CAD system, the City's inability to produce records of those complaints is matched against Gardner's and McCollough's word that they were in the system. The City's evidence (the testimony of Gardner and McCollough) isn't so overwhelming that no reasonable jury could credit the lack of documentation over the testimony. And the City's post-hoc justifications for the absence of noise complaints in the system, like understaffing and the ECPD transitioning to a new software system, may be legitimate, but they don't put the existence of the complaints beyond dispute.

Though Fambrough can't directly refute the testimony of King and Smedley, Fambrough sufficiently disputes their testimony through circumstantial evidence. On summary judgment, the movant's "uncontradicted and unimpeached" evidence governs—"at least to the extent that that evidence comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (citation modified). The only evidence of the complaints made directly to King and Smedley is their own testimony. And except for the "obscene" complaint, King and Smedley offer just vague assertions that residents were complaining about Fambrough's broadcasts. Coming from two interested witnesses, this testimony isn't enough for the City to meet its burden on summary judgment, particularly given Fambrough's evidence disputing the complaints in the CAD system. *See Goodwin v. City of Painesville*, 781 F.3d 314, 323 (6th Cir. 2015) ("Though the prospect of challenging a witness's credibility is not alone enough to avoid summary judgment, summary judgment is not appropriate where the opposing party offers specific facts that call into question the credibility of the movant's witnesses." (citation modified)).

The only additional consideration is that McCollough also says she based the noise prosecution on a comment from her executive assistant, who told McCollough that she had heard "really loud" broadcasting from her high-rise apartment building. R.104-15, PageID 3788. But standing alone, this imprecise comment doesn't justify summary judgment for the City on the view that it supplied McCollough with probable cause to prosecute Fambrough for being unreasonably loud—that is, "disrupt[ing] the reasonable conduct of basic human activities, *e.g.*, conversation or sleep." *Gaughan*, 212 F. App'x at 410 (citation modified); *see Rupp v. City of Buffalo*, 91 F.4th 623, 640 (2d Cir. 2024) ("Where the record reveals issues as to whether the circumstances indicated that shouting was or was not unreasonably loud, those issues are for the jury.").

So because the no-probable-cause rules don't bar Fambrough's claim, we turn to *Mt. Healthy*. The *Mt. Healthy* test is designed to ascertain whether an adverse action stemmed from a desire to retaliate. Under the first step of that test, the plaintiff must show that his protected conduct was a substantial or motivating factor in the defendant's decision to take the adverse action. *Frenchko*, 160 F.4th at 803. And for the second step, the defendant must show that it

would've made the same decision in the absence of the plaintiff's protected conduct. *Id.* Because "proof of an official's retaliatory intent rarely will be supported by direct evidence," *Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998), "[c]ircumstantial evidence, like the timing of events or the disparate treatment of similar individuals, may support the inference of a retaliatory motive," *Paterek*, 801 F.3d at 647 (citation modified).

Fambrough meets his burden for the first step of *Mt. Healthy*. He presents circumstantial evidence permitting an inference that his political speech—not legitimate law enforcement concerns—caused City officials to order enforcement of the Noise and Parking Ordinances.

Fambrough had been a well-known figure in East Cleveland's political scene and in years past had used his sound truck for political advocacy. For fifteen years, he parked a sound truck in his driveway without trouble. Only after he began supporting Gowdy's election was the weight of the law thrown against him. And the City's police officers didn't uncover Fambrough's violations of their own accord. Instead, City decisionmakers sent them to Fambrough's home each time to enforce the Parking Ordinance. So the timing of the parking-related enforcement actions supports an inference that Fambrough's political speech was the motivating factor—as does the fact that the City rarely enforced the Parking Ordinance against anyone else despite having plenty of opportunities to do so.

Also, the unusual attention City officials gave to Fambrough and the pressure Smedley exerted on Gardner to act against Fambrough supports the same inference. Smedley's pattern of incessantly calling and berating Gardner clashes with the idea that Smedley was chiefly concerned with minor permitting, noise, or parking issues—particularly because the permitting issue could've been resolved by a simple signature from King, who testified that he would've signed the permit if asked. Captain Lundy, whom Smedley also pressured, issued a directive or "special attention form" for officers to be on the lookout for Fambrough's truck, an "extremely rare" move for a parking or noise issue that was "typically reserved for more serious issues." R.104-6, PageID 3442–43 (citation modified). And when the police cited Fambrough and impounded his van in August, more than five officers showed up, with an officer directly calling Gardner to inform him they had located the truck. All this, as Gardner admitted, was unusual for a perennially understaffed police force in a high-crime area, particularly for the relative

insignificance of Fambrough's actions. In Gardner's view, not even homicide cases would receive this much attention from the mayor's office.

Gardner's email instruction to the ECPD to find Fambrough's truck and tow it based on noise complaints supports Fambrough's desired inference as well. On its face, the email told officers to tow Fambrough's truck regardless of whether it was parked illegally. And the Noise Ordinance authorizes seizure only of "the sound device used," and only upon conviction. E.C.C.O. § 509.15(d). So Gardner's instruction to tow the truck wasn't authorized by municipal law. *Cf., e.g.*, *Brewer v. New Era, Inc.*, 564 F. App'x 834, 841 (6th Cir. 2014) (failing to follow policy supports a finding of pretext); *DeBoer v. Musashi Auto Parts, Inc.*, 124 F. App'x 387, 394 (6th Cir. 2005) (failing to follow procedures has "some small probative value" on whether the proffered reason for action is pretextual).

Finally, there's McCollough's comments to Fambrough's attorney. McCollough said that though she was typically willing to resolve minor issues like noise complaints, she wasn't inclined to do so here. She said Fambrough needed to "stand down" from, among other things, making complaints about the ECPD and making public-records requests. R.104-5, PageID 3434. But she also said that because the election was over and Gowdy had lost, they might be able to reach a deal. Still, McCollough told him that if he continued to "cause problems downtown," then he shouldn't expect lenient treatment in the future. *Id.* at PageID 3435 (citation modified). These exchanges suggest a connection between Fambrough's political activity and the reason the City focused its attention on him.

For the second step of *Mt. Healthy*, the City's non-retaliatory reasons for its officials' actions don't justify a grant of summary judgment in its favor. Central to its argument are the complaints it received from residents, like the noise complaints and the one complaint about Fambrough's truck being parked in a residential area. But for the same reasons that probable cause to enforce the Noise Ordinance remains genuinely disputed, whether the City would've enforced that ordinance without Fambrough's political activity remains genuinely disputed.

Likewise, a reasonable jury could reject the City's reasons for enforcing the Parking Ordinance—that it was merely responding to a resident's complaint and acting on the perception

that Fambrough was disregarding Officer Allen's warnings. The results of Fambrough's public-records request produced in May 2022 show that the City issued citations for violating the Parking Ordinance only four other times since 2018 (contrary to the zero-enforcement allegation in the complaint). Granted, Fambrough's evidence reveals some enforcement of the Parking Ordinance. But the enforcement was infrequent and the conduct prohibited by the ordinance commonplace, leaving plenty of room to doubt that the City was primarily motivated by legitimate law enforcement concerns. So a jury could reasonably conclude that the City issued Fambrough the parking citation and impounded his truck because of his political activity.

Causation under *Mt. Healthy* is often "a fact-intensive question" that isn't well-suited for summary judgment. *Minard*, 918 F.3d at 498. And this case shows why. Based on the constellation of evidence, City officials' reasons for ordering officers to enforce the Noise and Parking Ordinances against Fambrough are genuinely disputed.

But there's still the second element of Fambrough's *Monell* claim—whether a municipal policy directly caused the constitutional violation. Neither Fambrough nor the City makes any argument explicitly directed toward this aspect of the claim, even though the district court rested its conclusion on Fambrough's failure to satisfy both *Monell* elements. So this raises the prospect that we should affirm the district court based on forfeiture. *See Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 673 (6th Cir. 2008).

We don't think, however, that's the correct result here. First, the City doesn't argue on appeal that Fambrough forfeited his *Monell* claim and limits its attack on the claim to whether a constitutional violation occurred. *Cf. United States v. Shultz*, 733 F.3d 616, 619 (6th Cir. 2013) (noting that a forfeiture argument can itself be forfeited).

Second, "where an argument advanced in an appellant's opening briefs applies to and essentially subsumes an alternative basis for affirmance," the appellant doesn't forfeit the argument against that alternative basis for affirmance. *Madden*, 549 F.3d at 673 (quoting *United States v. Goforth*, 465 F.3d 730, 737 (6th Cir. 2006)).

The district court pointed to the facial legality of the ordinances that the City enforced against Fambrough when reasoning through the second *Monell* element. Citing *Hall v. Navarre*,

it viewed the ordinances as facially legal and found that Fambrough needed to prove the City was deliberately indifferent to the constitutional violations that could result from enforcing the ordinances. *See Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 412–13 (1997); *Hall*, 118 F.4th at 757–758. But *Hall*'s application of the deliberate-indifference standard doesn't govern this case. There, the plaintiff sued a city for excessive force when one of its police officers rushed a group of protestors and tackled the plaintiff. 118 F.4th at 753–54. The plaintiff identified the policy as originating from the city's police chief, who gave the order to "engage" the protestors. *Id.* at 753. We viewed the chief's order as facially lawful—after all, he didn't order officers to use excessive force. *See id.* at 757–58. And because of that, to prove that municipal policy directly caused the alleged use of excessive force, the plaintiff had to show deliberate indifference and not simply but-for causation. *Id.*

But a policy of retaliation isn't facially legal. *See Brown*, 520 U.S. at 404–05 ("[P]roof that a municipality's . . . authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably."). Fambrough's retaliation claim against the City is based on official municipal policy arising from actions taken or ratified by City officials with final policymaking authority. *See Burgess v. Fischer*, 735 F.3d 462 (6th Cir. 2013); *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). And Fambrough's entire appellate argument for this claim seeks to establish that retaliatory policy. So Fambrough's argument subsumes the district court's view that the policies at issue were the ordinances themselves and invalidates its application of a deliberate-indifference standard—which is enough to secure vacatur. Because of that, Fambrough didn't forfeit an argument on the second *Monell* element.

Still, neither party has briefed the issue of final-policymaking status, which is a matter of state and local law, or whether final policymakers were the direct cause of the constitutional violation. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). Two questions that must be answered to determine if the City can be held liable: (1) whose decisions represent the official policy of the City in this context; and (2) whose decisions directly caused the constitutional violation. *See Jett*, 491 U.S. at 737. Though we've identified that there is a genuine dispute on whether Fambrough suffered

a constitutional violation, we haven't identified whose decisions would've directly caused the violation—be it most likely King, Smedley, Gardner, McCollough, or a combination thereof. Because these questions weren't addressed by the district court nor have they been briefed on appeal, we vacate and remand for the district court to address these issues in the first instance. *See Frenchko*, 160 F.4th at 803.

ii.

Next, we turn to the claim against Gardner. And we affirm the district court's grant of qualified immunity because Fambrough hasn't pointed to a precedential decision clearly establishing that Gardner's conduct violated Fambrough's rights. Specifically, the question is whether Gardner should've known that acting as a mere conduit of another's retaliatory animus means that he violated Fambrough's rights. Because the caselaw hasn't clearly established that Gardner was acting unlawfully, he is entitled to qualified immunity.

The defendant who takes or directs the adverse action against the plaintiff must be motivated, at least in part, by the plaintiff's protected speech. *Novak I*, 932 F.3d at 429. Put differently, "the subjective motivation of the *defendant*[] is at issue." *Thaddeus-X*, 175 F.3d at 399 (emphasis added); *see also Greenwich Citizens Comm., Inc. v. Cntys. of Warren & Washington Indus. Dev. Agency*, 77 F.3d 26, 32 (2d Cir. 1996) (holding that *Mt. Healthy* didn't dispense with the state-of-mind requirement for First Amendment retaliation claims and adopt a strict cause-and-effect analysis).[9] And in instances of dueling motivations, which generally will be the case, the *Mt. Healthy* test is meant to determine whether the defendant's retaliatory motive caused him to act.

[9]We've sometimes described this element in an oversimplified way that masks the inquiry and suggests that the defendant's motivation for acting doesn't matter as long as the but-for cause of the adverse action was someone's retaliatory intent. For instance, we've described the element as requiring "a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *Thaddeus-X*, 175 F.3d at 394. And we've said that the "plaintiff still must show that the retaliation was a substantial or motivating factor behind the [adverse action] . . . [t]hat is, the plaintiff must point to evidence of but-for causation." *Frenchko*, 160 F.4th at 803 (citation modified). These descriptions might give the impression that the defendant's motive for acting doesn't change the result if another person, who had a retaliatory motive, influenced or ordered the defendant to take the adverse action. In that case, the non-defendant's retaliatory intent would be the but-for cause of the adverse action. But that's not enough to hold the defendant personally liable. The causal inquiry must be personalized to the defendant—it's whether the defendant's, not someone else's, retaliatory intent caused him to act. *See Thaddeus-X*, 174 F.3d at 399.

Here, there's no evidence, direct or circumstantial, that Fambrough's protected speech motivated Gardner to act. Rather, the evidence supports only the implication that Gardner was motivated to act because of the pressure he received from the mayor's office. Take away Fambrough's protected speech and leave everything else the same from Gardner's perspective, in that he received the same exertion of pressure from the mayor's office. Would Gardner have acted the same? None of the evidence suggests that he wouldn't have.

At best, the evidence in the light most favorable to Fambrough shows that Gardner knew that the mayor's office was acting with a retaliatory motive. But we've never held that the defendant's knowledge of another's retaliatory intent imputes that intent on to the defendant's actions. In fact, we've suggested the opposite. In *Paterek*, the retaliation involved the defendant directing another, LeMieux, to issue the plaintiff at least 25 tickets for civil infractions. 801 F.3d at 639. LeMieux, who didn't think the plaintiff was violating the law and thought that the defendant's directions were unusual and drastic, nevertheless complied. *Id.* at 639–40. Though LeMieux wasn't a defendant in the plaintiff's retaliation suit, we noted that LeMieux "simply acted as the conduit for [the defendant's] prejudice—his cat's paw." *Id.* at 651 (citation modified). LeMieux acted only because the defendant told him to, so the defendant "[was] the responsible party." *Id.*; *see also Lozman*, 585 U.S. at 99 (noting that the plaintiff "likely could not have maintained a retaliation claim against the arresting officer" because, among other circumstances, "there is no showing that the officer had . . . any motive to arrest [the plaintiff] for his earlier expressive activities"). In other words, it's not clearly established that Gardner is a responsible party to the retaliation.[10] So we affirm the district court's grant of qualified immunity to Gardner.

[10]True, we've recognized a cat's paw theory in, for example, some Title VII cases where a biased non-decisionmaker proximately causes the adverse action through his influence over the decisionmaker. *See, e.g.*, *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 350–51 (6th Cir. 2012). But in that context, the theory is used to establish an employer's liability, not the unbiased decisionmaker's personal liability. *See id.* at 351. And even if the theory could establish the unbiased decisionmaker's personal liability for Title VII claims, there would still be the additional step of explaining how statutory liability clearly establishes constitutional liability. *See, e.g.*, *Davis v. Scherer*, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *Naumovski v. Norris*, 934 F.3d 200, 218–19 (2d Cir. 2019).

B.

Next, Fambrough purports to challenge the district court's rejection of his Fourteenth Amendment selective-enforcement claims. But his failure to develop a selective-enforcement argument before this court is a forfeiture of these claims. When a party addresses an issue "in a perfunctory manner, unaccompanied by some effort at developed argumentation, we consider [it] forfeited." *Buetenmiller v. Macomb Cnty. Jail*, 53 F.4th 939, 946 (6th Cir. 2022) (citation modified).

That's what happened here. In his opening brief, Fambrough asks us to reverse the district court on his selective-enforcement claims. And based on that brief's headers, Fambrough promises to address his selective-enforcement claims alongside his retaliation claims. But that promise is unfulfilled. Fambrough gives us a statement of law related to his selective-enforcement claims: "[T]he Equal Protection Clause prohibits '[s]electivity in the enforcement' of laws based on 'arbitrary classification, including the exercise of protected . . . constitutional rights.'" Appellant Br. at 23 (quoting *Wayte v. United States*, 470 U.S. 598, 609 (1985)). And that's all we get. There's no further attempt to develop an argument on selective enforcement—no other caselaw, not even an attempt to apply that broad statement of law to the facts.

Though, in truth, his retaliation and selective-enforcement claims overlap significantly, you wouldn't know that from his brief. And we're not in the business of making or assuming arguments on behalf of a litigant—a practice that would deprive the opposing party of the chance to respond and our analysis of the sharpening that adversarial presentation provides. *See Thomas v. Bright*, 937 F.3d 721, 729 (6th Cir. 2019). Moreover, the failure to present more than a perfunctory argument on selective enforcement is particularly acute as against the Individual Defendants, given that Fambrough bears the burden of pointing to caselaw clearly establishing a constitutional violation on this case's facts. *See Bell v. City of Southfield*, 37 F.4th 362, 367 (6th Cir. 2022).

So Fambrough forfeited his selective-enforcement claims, and the district court's judgment with respect to those claims stands.

C.

Fambrough also appeals the district court's grant of summary judgment for the City on his First Amendment prior-restraint claim. He argues that, taken together, the Noise and Permit Ordinances are facially unconstitutional because the Permit Ordinance's standards inadequately guide officials' discretion on when to grant a permit. We reject this facial challenge.

An ordinance that prohibits expressive activity unless the speaker obtains a permit from public officials is a prior restraint. *See, e.g.*, *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 698 (6th Cir. 2020); *Bronco's Ent., Ltd. v. Charter Township of Van Buren*, 421 F.3d 440, 444 (6th Cir. 2005). And when a permitting scheme is a prior restraint and content-neutral, the framework from *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), applies.[11] *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 623 (6th Cir. 2009). Under the *Thomas* framework, the permitting scheme must: (1) "be narrowly tailored to serve a significant governmental interest"; (2) "leave open ample alternatives for communication"; and (3) "contain adequate standards to guide the official's decision" on whether to grant a permit, thereby allowing "effective judicial review" of the decision. *Thomas*, 534 U.S. at 323, 324 n.3.

Fambrough argues that the City's permitting scheme fails to satisfy only the third requirement. And we allow plaintiffs to bring facial challenges to laws for failing this requirement even if they never applied for a permit. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 (1988). To meet the adequate-standards requirement, the standards cabining officials' discretion must be "narrow, objective, and definite" to avoid "delegat[ing] overly broad licensing discretion." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969)).

[11]For content-based schemes, the *Freedman* framework applies. *Thomas*, 534 U.S. at 322; *H.D.V.-Greektown*, 568 F.3d at 621. Under that framework, permitting schemes must adhere to additional requirements, like the availability of expeditious judicial review of the decision to censor. *See Freedman v. Maryland*, 380 U.S. 51, 60 (1964). But Fambrough doesn't contend that the City's permitting scheme is content-based on its face, nor would he be successful if he tried. *See H.D.V.-Greektown*, 567 F.3d at 621 ("An ordinance is not a content-based regulation of speech if . . . the government's interests in the regulation are unrelated to the content of the affected speech."). So *Freedman*'s additional requirements don't apply here.

Because Fambrough brings a facial attack, his claim is "not dependent on the facts surrounding any particular permit denial." *Lakewood*, 486 U.S. at 770 n.11. When evaluating a facial challenge to a permitting scheme, we look to the law's text. But we must also consider "authoritative constructions of the ordinance, including [the City's] own implementation and interpretation of it." *Forsyth County*, 505 U.S. at 131; *see Lakewood*, 486 U.S. at 770 n.11 ("[W]hen a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of judicial construction, the state law is read in light of those limits."). And we must "presume any narrowing construction or practice to which the law is fairly susceptible." *Lakewood*, 486 U.S. at 770 n.11 (citation modified). That said, we shouldn't presume that the official "will act in good faith and adhere to standards absent from the ordinance's face," which is the "very presumption that the doctrine forbidding unbridled discretion disallows." *Id.* at 770.

Here, the Permit Ordinance allows an applicant to escape the prohibitions of the Noise Ordinance. *See* ECCO §§ 311.02, 509.15(a). But the applicant must receive approval from the mayor and police chief. *Id.* § 311.02(c). The ordinance lists seven reasons for which the mayor "may refuse" to issue a permit. *Id.* § 311.02(g).

Of the seven reasons, Fambrough focuses on § 311.02(g)(1) as the most vague and subjective standard: The mayor can deny the application if "[t]he time, place, size or conduct of the parade including the assembly areas and route of march would unreasonably interfere with the public convenience and safe use of the streets and highways." *Id.* § 311.02(g)(1). He likens "unreasonably interfere with the public convenience" to the regime the Supreme Court struck down in *Lakewood*. There, the mayor had authority to set "necessary and reasonable" conditions on the grant of permits to place newsracks on public property. *Lakewood*, 486 U.S. at 753–54. But this comparison to *Lakewood* ignores that an East Cleveland mayor can't deny a permit solely because it would unreasonably interfere with the public convenience. The applicant's planned activities must also unreasonably interfere with the "safe use of the streets and highways." Though "unreasonably interfere with the public convenience," standing alone, might be indefinite, that's not what is before us. So the comparison between the Permit Ordinance and the "reasonable and necessary" provision in *Lakewood* is inapt.

Instead, the Permit Ordinance is closer to the ordinance the Supreme Court upheld in *Thomas*. There, the ordinance at issue allowed denial of a permit application if the proposed activity "would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public." *Thomas*, 534 U.S. at 318 n.1. The Court viewed this provision and the ordinance's other grounds for denial as "reasonably specific and objective." *Id.* at 324. We view § 311.02(g)(1) the same way. It isn't so vague that the decision to grant or deny an application is left "to the whim of the administrator." *Id.* (quoting *Forsyth County*, 505 U.S. at 133). So Fambrough's "insisting upon a degree of rigidity that is found in few legal arrangements" doesn't carry the day. *Id.* at 325.

Moving past the text, Fambrough argues that, based on King's testimony, the City has developed a well-established practice of evaluating permit applications based on the content of the applicant's expected speech. He contends that three damaging admissions made by King reveal this impermissible practice: (1) King considered how an applicant's planned activities would affect his political fortunes; (2) he retained discretion to deny a permit for grounds not listed in the ordinance; and (3) he denied permits if others complained about the applicant's speech or sometimes required the complainants' approval before granting a permit, effectively imposing a heckler's veto. And Fambrough says that, because King's testimony reveals a practice of evaluating applications for content, we should impute the practice into the Permit Ordinance to find it facially unconstitutional. *See, e.g.*, *Forsyth County*, 505 U.S. at 131–33.

But we don't need to determine whether King's testimony is enough to establish a "well-understood and uniformly applied practice" with the "force of a judicial construction," thereby allowing us to impute that practice onto the ordinance itself. *Lakewood*, 486 U.S. at 770 n.11. That's because his testimony can't be reasonably interpreted as supporting an impermissible practice.

To support his contention that King made a political calculus when evaluating applications, Fambrough asserts that King admitted he weighed "whether the permit-seeker would get people to vote for another candidate." Appellant Br. at 55 (citation modified). But that's not accurate. King remarked, as an aside, that he thought using sound trucks was a

counterproductive campaign strategy because it annoyed residents. He never stated that he let political self-interest guide his decisions on permits.

As for the second and third "admissions," there's at least some basis in the record to support Fambrough's characterization of the testimony. King testified that he wouldn't deny a permit for a reason not provided by the Permit Ordinance. But King also said that he was less likely to grant permits to applicants who had received complaints in the past and would sometimes have applicants get signatures from to-be-affected residents for their approval. At first glance, it might seem that King admitted to denying permits for reasons not given in the ordinance—failure to obtain signatures from residents. But King was referring to residents complaining about, for example, instances where the applicant hadn't respected the time limitations in the permit. So King acknowledged merely that, in cases where the residents approved, he sometimes looked past the provision allowing him to deny permits if the applicant "shall have previously violated provisions of a similar permit." E.C.C.O. § 311.02(g). On balance, because the evidence doesn't suggest "a pattern of unlawful favoritism," King's occasional waiver of the past-violations provision "furthers, rather than constricts, free speech." *Thomas*, 534 U.S. at 325.

All told, Fambrough's facial attack, which asks us to impose an exceptional remedy by making the City's permitting scheme unenforceable across the board, fails. *See Speet v. Schuette*, 726 F.3d 867, 871–72 (6th Cir. 2012). At the same time, we leave open the possibility that other arguments could've proven fatal to the Permit Ordinance. Our reasoning is limited to the arguments Fambrough presented so as not to deprive the City of its ability to offer limiting constructions and practices. *See United States v. Phibbs*, 999 F.2d 1053, 1080 n.12 (6th Cir. 1993); *J & B Ent., Inc. v. City of Jackson*, 152 F.3d 362, 375 (5th Cir. 1998) ("The district court in this case completely obviated the City's burden by attempting to justify the Ordinance for the City before the City had a chance to do so . . . and we thus have no way of knowing how the City might justify the Ordinance."). We affirm the district court's grant of summary judgment for the City on the prior-restraint claim.

D.

Finally, Fambrough argues that the impoundment of his truck was an unreasonable seizure under the Fourth Amendment, a claim he pursues against only the City on appeal. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. And because warrantless seizures are presumptively unreasonable, they violate the Fourth Amendment unless a recognized exception to the warrant requirement applies. *Bambach v. Moegle*, 92 F.4th 615, 628 (6th Cir. 2024).

A community-caretaking impoundment is a recognized exception to the warrant requirement. *See South Dakota v. Opperman*, 428 U.S. 364, 368–69 (1976). Under this exception, impounding a vehicle without a warrant or judicial process is reasonable only if (1) a community-caretaking function objectively justifies the impoundment and (2) the decision to impound is made in accordance with standard criteria not based on a suspicion of evidence of criminal activity. *United States v. Snoddy*, 976 F.3d 630, 634 (6th Cir. 2020); *United States v. Kimes*, 246 F.3d 800, 805 (6th Cir. 2001). Fambrough asserts that neither requirement was met when the police impounded his truck. We disagree.

1.

We'll start with whether the impoundment served a community-caretaking function. The police's community-caretaking functions include the authority "to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience." *Opperman*, 428 U.S. at 369. In practice, community-caretaking functions can justify a warrantless impoundment in a variety of scenarios, including non-hazardous parking violations. *See, e.g.*, *id.* at 365–66 (non-hazardous parking violation); *Snoddy*, 976 F.3d at 634 (impounding after arresting driver); *United States v. Kelly*, 827 F. App'x 538, 541–42 (6th Cir. 2020) (vehicle interfering with use of private property); *United States v. Kimhong Thi Le*, 474 F.3d 511, 513–15 (8th Cir. 2007) (abandoned and overturned vehicle off the side of a highway).

And when evaluating whether the police's community-caretaking functions justify an impoundment, we ask whether it's "objectively justifiable" and ignore the "officer's subjective intent." *Kimes*, 246 F.3d at 805 (citing *Whren v. United States*, 517 U.S. 806, 812 (1996)).

So though subjective motivations are relevant to Fambrough's retaliation claims, they aren't relevant to his Fourth Amendment claim.

Turning to what happened here: When Officers Majercik and Wood arrived at Fambrough's home in August, they observed Fambrough's truck parked on the street outside of his home. The Parking Ordinance prohibits parking "a truck, commercial tractor, trailer, [or] semi-trailer . . . on a roadway or driveway at any time in front of or alongside property used for residential purposes." E.C.C.O. § 351.11. And though the ordinance carves out an exception for when the vehicle is parked "for loading and unloading purposes," *id.*, the officers didn't see anybody in or near the truck or anything else that would've given them an indication it was being loaded or unloaded. When Fambrough eventually arrived on the scene (after the tow truck was present), he never told the officers that he was loading or unloading the truck. So because it was parked illegally, the police had an objective justification for impounding the truck. And though viewing the truck as a danger to passing vehicles might be an exaggeration, the community-caretaking function isn't limited to removing hazards. It's broad enough to include the public convenience, which is often what parking ordinances are aimed at protecting. *See Opperman*, 428 U.S. at 365, 369. For instance, we've held that removing an illegally parked car, the purpose of which was simply to free up parking spots for others, can serve a community-caretaking function. *See Kimes*, 246 F.3d at 802–04 (approving an impoundment of a truck that was sitting in a medical center's parking lot because "leaving the truck . . . would have meant denial of access to the parking space by other visitors").

But that's not to say that enforcing a parking ordinance is automatically reasonable. The Parking Ordinance could be enforced in ways that might alter our analysis. For instance, the ordinance applies to certain vehicles parked in a "driveway at any time." E.C.C.O. § 351.11. If the police had impounded Fambrough's truck while parked in his driveway without judicial process, reasonableness might require more than what the police did here. *See United States v. Sanders*, 796 F.3d 1241, 1250 (10th Cir. 2015) (noting that courts have considered whether the property owner was consulted before removing a car from private property). We needn't resolve that possibility, however, because it isn't the situation presented by this case. Fambrough's truck

wasn't parked in his driveway. And a parking ordinance that aims to prevent large vehicles from clogging residential streets falls within the community-caretaking function.

Fambrough makes several counterarguments, but none of them persuade. First, he says that a community-caretaking function didn't justify the impoundment because Fambrough and others were present at the scene and were willing and legally capable of driving the van away. In response, the City points to language from *United States v. Hockenberry*, where we said that "an impoundment decision will not be impermissible simply because alternatives to impoundment might exist." 730 F.3d 645, 658 (6th Cir. 2013); *see also Snoddy*, 976 F.3d at 635 n.1. But Fambrough's argument goes beyond merely identifying an alternative. By pointing out his and others' presence, he's saying that the impoundment was never justified by a community-caretaking function. *See generally United States v. Duguay*, 93 F.3d 346, 353 (7th Cir. 1996) ("[I]f the purpose of impoundment is not investigative, . . . we do not see what purpose denying possession of the car to a passenger, a girlfriend, or a family member could possibly serve."); Wayne R. LaFave, 3 *Searches and Seizure* § 7.3(d) (6th ed. 2025) ("When the police find a vehicle to be illegally parked under circumstances where the continued presence of the vehicle at that place will impede traffic or constitute some other hazard, then impoundment of that vehicle is lawful, assuming of course the operator of the vehicle is not present to take charge of the vehicle." (footnote omitted)).

And on that point, we've considered the presence of the owner or others when assessing an impoundment. In *Hockenberry*, we looked at who was in the vehicle to assess whether the impoundment was reasonable. But among the three occupants, both the driver and the owner had suspended licenses and the third occupant had active warrants for her arrest. *Hockenberry*, 730 F.3d at 660. Only after considering those facts did we conclude that the impoundment was justified. *Id.*; *see also Shandor v. City of Eastpointe*, 2021 WL 4775190, at *2 (6th Cir. Oct. 13, 2021) ("When there is no one else readily available to accept possession, the police have the discretionary authority to impound the vehicle in the absence of any licensed driver to attend to it." (citation modified)).

But when the owner or others arrive matters. In *Hockenberry*, we didn't widen our view beyond who was presently on the scene when the police made the decision to impound.

See Hockenberry, 730 F.3d at 660; *see also United States v. Jackson*, 2025 WL 80372, at *1 (6th Cir. Jan. 13, 2025) (upholding impoundment where the driver's girlfriend arrived thirty minutes after the driver's arrest). Fambrough arrived after the tow truck was already on scene. And the others arrived after Fambrough. So they arrived too late. We decline to adopt a rule that would invalidate an impoundment when the owner or others arrive after the tow truck.

Second, Fambrough argues that the impoundment wasn't justified because his truck wasn't a hazard or obstructing traffic. And he points to the testimony of Officer Lundy, who acknowledged that Fambrough's truck was neither of those things. But as we've noted, the truck didn't need to be a hazard or present a serious obstruction to traffic for its impoundment to be justified.[12] *See Kimes*, 246 F.3d at 804.

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Next, officers "exercising their discretion to impound a vehicle must do so according to standard criteria." *Snoddy*, 976 F.3d at 634. In addition to a police department's written policy, testimony can shape the contours of the police's criteria for impoundment. *United States v. Tackett*, 486 F.3d 230, 233 (6th Cir. 2007). This requirement ensures that officers don't impound vehicles as a pretext for rummaging through someone's car for incriminating evidence. *See Hockenberry*, 730 F.3d at 659. And it applies both to the police's decision to impound and to how they conduct a post-impoundment inventory search.[13] *Kimes*, 682 F.3d at 454–55.

Just like the standard-criteria requirement for post-impoundment inventory searches, we don't require impoundment policies that are inflexible and eliminate all discretion. *See, e.g.*, *Colorado v. Bertine*, 479 U.S. 367, 375 (1987) (rejecting the argument that a post-impoundment

[12]Fambrough also attacks the district court's view that the impoundment was justified because it motivated compliance with the law. *Cf. Miranda v. City of Cornelius*, 429 F.3d 858, 866 (9th Cir. 2005) (rejecting deterrence as an aspect of the community-caretaking function). But we aren't resting our conclusion on a deterrence rationale, so we needn't weigh in on this argument.

[13]Some circuits haven't extended the standard-criteria requirement from inventory searches to impoundment decisions—instead viewing reasonableness, not standardization, as the sole lodestar. *See, e.g.*, *United States v. McKinnon*, 681 F.3d 203, 208 (5th Cir. 2012); *United States v. Smith*, 522 F.3d 305, 312–15 (3d Cir. 2008); *United States v. Coccia*, 446 F.3d, 233, 238 (1st Cir. 2006) ("[I]t is inappropriate for the existence of (and adherence to) standard procedures to be the sine qua non of a reasonable impound decision."). And though there's considerable force to the position of these circuits, we're bound by circuit precedent.

inventory search was unconstitutional if the police's impoundment policy gave officers "discretion to choose between impounding [the arrestee's] van and parking and locking it in a public parking place"); *United States v. Jackson*, 682 F.3d 448, 454–55 (6th Cir. 2012). Rather, the impoundment policy must be sufficiently tailored to community-caretaking functions. *See Jackson*, 682 F.3d at 455 (noting that, for inventory searches, an officer's exercise of discretion within a policy is permissible so long as the policy doesn't "grant officers carte blanche" and is "sufficiently tailored to only produce an inventory"); *cf. Florida v. Wells*, 495 U.S. 1, 4 (1990) ("[I]n forbidding uncanalized discretion to police officers conducting inventory searches, there is no reason to insist that they be conducted in a totally mechanical 'all or nothing' fashion.").

So we must assess whether the ECPD's criteria for impoundment were sufficiently tailored to community-caretaking functions. The ECPD's towing policy authorizes impoundment in several enumerated circumstances. These circumstances include when the driver is arrested or when an abandoned vehicle is obstructing the use of private property. And they include when the vehicle creates a parking or traffic concern. The policy tells officers that "the following are some, but not limited to, occasions when sworn personnel *may* tow vehicles" and then lists the occasions, like when a vehicle "obstruct[s] the normal flow of traffic," "create[s] a hazard," or is "illegally parked." R.104-29, ECPD Towing Policy, PageID 3946 (emphasis added). ECPD policy dictates that all impounded vehicles "shall be subject to inventory." R.104-30, ECPD Inventory Policy, PageID 3951. Among other requirements, officers must ask the vehicle's owner to "remove, if possible, all valuables from the vehicle prior to impoundment." *Id.* Finally, all impoundments and inventories must be recorded and those records maintained.

We find that the City's impoundment policy is sufficiently standardized. The ECPD's description of circumstances in which police can impound vehicles aligns with community-caretaking functions, like preventing hazards and obstructions. Officers retain discretion under the policy because the list of reasons for impoundment for traffic violations is non-exhaustive. And the policy doesn't tell officers that they must tow a vehicle whenever authorized to do so. But "the law allows for some flexibility and practical judgment" when officers decide whether to impound. *Hockenberry*, 730 F.3d at 661. So we decline to condemn an impoundment policy for

giving officers a non-exhaustive list when that list is lockstep with community-caretaking functions.

Resisting this conclusion, Fambrough points to testimony from several City police officers to argue that the ECPD's policy wasn't sufficiently standardized. City police officers made statements like "[w]hat I may do as an officer, another officer may not do," and "[e]very officer is different." R.104-13, Lundy Dep., PageID 3702–03; R.104-14, Majercik Dep., PageID 3727–28. This testimony doesn't move the needle. It's true that under the policy, different police officers may make different decisions when faced with similar circumstances. But as explained above, an impoundment policy that eliminates all discretion isn't required.[14]

Finally, Fambrough argues that the police violated their policy by not allowing him to remove his expensive sound equipment, not conducting an inventory search, and not recording the impoundment. But none of those failures are connected to the decision to impound or independently unreasonable under the Fourth Amendment. *See Hockenberry*, 730 F.3d at 661 ("The post-discovery listing of items discovered in a search has no pertinent connection to the discovery itself." (quoting *Kimes*, 246 F.3d at 805) (citation modified)). And Fambrough doesn't argue that the seizure of his sound equipment, separate from the seizure of his van, was unreasonable. So even accepting that the police violated their towing and inventory policy in the way Fambrough describes, those violations didn't translate into a constitutional violation.

We affirm the district court's grant of summary judgment for the City on Fambrough's Fourth Amendment claim.

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[14]Fambrough also attacks the standardization of the policy by saying that the police "outsourced impoundment decisions to financially interested private towing companies." Appellant Br. at 68. It's true that one officer testified that officers wouldn't prevent a tow-truck driver from returning the car to its owner at the scene if the owner paid the towing company a "drop fee," as apparently some companies allow. But we've approved an impoundment policy that allowed car owners to avoid impoundment if the owner of the property where the car was parked gave permission for the car to remain there. *See Jackson*, 682 F.3d at 455. So third-party involvement in whether a car is towed doesn't automatically doom the policy. And Fambrough doesn't develop an argument on his outsourcing point in his briefing beyond two sentences that address it. Though there may be a need for doctrinal clarity on the manner in which a towing company acts as an agent of the government for Fourth Amendment purposes in this context, *see Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 614 (1989), Fambrough doesn't present an argument that requires us to confront this head-on.

IV.

For Fambrough's retaliation claims against the Individual Defendants, we reverse the dismissal of the claims against King and Smedley and affirm the grant of summary judgment to Gardner. With respect to the City, we vacate the grant of summary judgment for the retaliation claim and remand for further proceedings consistent with this opinion. For the rest of Fambrough's claims, we affirm.