RECORD NO. 17-7073

ORAL ARGUMENT SCHEDULED: MARCH 26, 2018 AT 9:30 A.M.

In The

United States Court of Appeals

For The District of Columbia Circuit

RAYMOND MCGOVERN,

Plaintiff – Appellant,

v.

CHRISTOPHER BROWN, Badge No. 018, in his individual and official capacities; MICHAEL GLAUBACH, in his individual and official capacities; JAMIE BARTON, in her individual and official capacities; GEORGE WASHINGTON UNIVERSITY,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Defendants lacked probable cause to arrest McGovern for the crime of unlawful entry – refusal to quit. Defendants do not purport to have issued an express directive to leave pursuant to the applicable statute.

GW's policy, admittedly, is to use force and remove civilians whom they deem to have violated internal policy without first issuing an express directive to leave the premises.

In order to salvage this arrest, rather than ensure their campus police act in accordance with the law, they ask the Court to change the interpretation of the law.

No prior court in the District of Columbia, including the D.C. Court of Appeals, has previously held that a directive to leave may be implied rather than expressly issued. GW does not dispute that it would have been no burden to issue an express directive to quit. Authorizing Defendant's proposed revisions to the law would have significant adverse repercussions, and there is no justification to change the law for these campus police who are obligated to know and operate within municipal law as it exists.

Regarding the excessive force claim, facts are in material dispute precluding summary judgment. A jury could reasonably find that defendants' force was

excessive. McGovern's documented injuries were significant, and Defendants themselves testified to force that occurred outside of the auditorium and not visible on video. Force used inside the auditorium remains a matter of disputed fact, both as to motive and justification for the force and as to the force itself, which is not all captured on video or at all necessary angles. Even Defendants and the court below have different interpretations as to what occurred on the video.

ARGUMENT

I. GW's Campus Special Police Officers Lacked Probable Cause to Arrest McGovern for the Offense of Unlawful Entry – Failure to Quit When They Seized Him

Defendants do not dispute in their brief that McGovern was seized based on GWU's training and policy directing officers to seize and use force against persons in the absence of probable cause to arrest for any offense.

GW's Campus SPOs seized McGovern without directing him to leave the premises. Consequently, at the moment of seizure they had no grounds to believe he had broken the law. Officer Brown admits that he did not have probable cause to arrest McGovern for any offense under District of Columbia law at the time that he seized him. Brown admits he was merely enforcing GWU policy when he used force and seized McGovern, not acting in furtherance of District of Columbia law. JA 353, 355-356, 358-360.

This is not a matter of subjective intent. Brown believes he lacked probable cause at that moment because he knows he did not issue a directive to leave. Any reasonable officer knowing the fact that he had not issued an express directive to leave, had not even attempted to, would understand from the facts available to him that he did not have probable cause to arrest at that moment of seizure. *See Devenpeck v. Alford*, 543 U.S. 146, 154-55 (2004).

Chief of GW's campus police, Kevin Hay, testified that GW's policy and training of campus police to handle the incident at issue was to "first use verbal encouraging, sir, would you, please, come with me. And if that didn't work, then they would try and escort him out, first using hand directions, and if that didn't work, taking physical hold of the person and attempting to walk them out, and if that didn't work, then physically removing them." JA 286-287. Chief Hay further confirmed that under this policy and training, campus police were directed they could physically seize persons and remove them, even without the person having committed a criminal offense. JA 287-288.

GW trained its campus police that they were authorized to seize and physically remove an invitee without resort to the unlawful entry statute, i.e., without issuing the requisite directive to quit the premises.

Brown testified that at the time he initially seized, put hands on, and used force against McGovern, and removed and pulled him up the aisle he was

following University policy and not "following D.C. Code." JA 355-359. Brown distinguished his seizure of and use of force against McGovern carried out pursuant to university policy from a different, later point where he testified he then was "following D.C. Code." The point at which he testified he was acting pursuant to District of Columbia law did not occur until McGovern was "stating out loud 'This is America'" after Brown had his hands on McGovern and was taking him up the aisle. This is the point at which Brown testified that he first had probable cause, *ibid,* well after the actual moment of arrest.

As evidenced in the record and conceded in opposition, GW's operating policies authorized SPOs to use force to "expel McGovern" without an express demand to leave "at any time for any reason." Appellees' Br. 27 - 28. Brown's intent was to forcibly remove McGovern, without resort to an express demand to leave the premises, ostensibly because McGovern had engaged in what Chief Hay called a "silent insult" (JA 289) to an invited speaker in violation of internal GW policies that had never been published to event attendees, JA 631 n.6. *See also* JA 406-07 (standards of what GW deemed "disruptive" conduct varied from event to event depending on the invited speaker's perceived sensitivity or preferences and were effectively unknowable to invitees in advance).

A. No Case Supports Defendants' Assertion that a Directive to Leave May Be Implied

The District of Columbia crime of unlawful entry, D.C. Code § 22-3302(a)(1) identifies two distinct crimes: 1) unlawful entry based on the entry *ab initio* and 2) refusal to quit the premises after lawful initial entry, upon directive to leave by a person lawfully in charge.

Each of these offenses has different elements and each has its own body of interpretive case law. Defendants repeatedly conflate these offenses and cite case law only applicable to the crime of unlawful entry *ab initio* without identifying that distinction.

Because Defendant Brown did not issue an express directive to leave the premises, the court below found there was probable cause to arrest for the uncharged offense of unlawful entry – refusal to quit by holding that a directive to leave need not be expressly issued, that it may be implied.

In error, it eliminated the requirement of an express directive to leave the premises (followed by a refusal) to establish the offense of unlawful entry – refusal to quit. The statute plainly requires a "refus[al] to quit the [property] on the demand of the lawful occupant, or of the person lawfully in charge thereof." D.C. Code § 22-3301(a)(1). The D.C. Court of Appeals interprets this statutory requirement to be satisfied only where "a person lawfully in charge of the premises

expressly order[s] the party to leave." *O'Brien v. United States*, 444 A.2d 946, 948 (D.C. 1982)(emphasis added).

Defendants urge adoption of the lower court's novel interpretation of local law, that language not constituting an express demand to leave could satisfy the elements of the offense so long as the "will" of a lawful occupant is "objectively manifest through either express or implies means." JA 631 (citing *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013)). Appellant's Br. 27 – 35. Using this expansive standard, Brown's words were deemed to satisfy the elements of unlawful entry – refusal to quit, an offense with which McGovern was not charged.

Although defendants reference *Ortberg* repeatedly for the same errant proposition, they fail to even cursorily respond to McGovern's treatment of that case on opening brief. As McGovern observed, *Ortberg* permits express or implied communication to convey that entry into prohibited space is against the will *ab initio*. *See* Appellant's Br. 4 - 5, 25, 32 - 33.[1]

Defendants do not even acknowledge, much less address, this essential distinction, that *Ortberg* is about the unlawful entry – against the will *ab initio* offense.

[1] Defendants concede that McGovern entered the premises with permission, specifically obtaining from a professor a ticket that GW "made available for guests to attend." Appellees' Br. 3, 7.

In fact, *Ortberg* explicitly distinguished the general intent requirements for unlawful entry *ab initio* from the offense at issue here, that of refusal to quit. "For the crime of unlawful entry based on the entry (**as distinct from the refusal to leave**), we have repeatedly said that only general intent is required." *Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013) (parenthetical in original, emphasis added).

The *Ortberg* court then endorsed the jury instruction applicable only to the crime of unlawful entry based on entry, finding, "with respect to the element that the entry be against the will of the lawful occupant, the government need only prove that the defendant "knew or should have known" that his entry was unwanted." *Ibid*. The *Ortberg* court went on to "appl[y] its framework" to reach its conclusion that Ortberg "knew or should have known" that his entry into an invitation-only private fundraising event on the private event space of a hotel, to which he did not have an invitation and for which he was not registered, was unwanted. *Ibid.*

In response to McGovern's detailed treatment showing that an express directive to leave did not issue (Appellant's Br. 36-40), GW and the campus police defendants concede as much and summarily state, "McGovern's argument that the directive must be explicit – 'You are ordered to leave the premises,' for example – is clearly wrong. D.C. law permits such orders to be 'implicit.' *Ortberg*, 81 A.3d at

308." Appellees' Br. 25 n.5. There is no case in existence in the District of Columbia that so holds, and Defendants cite none.

Defendants' case thus turns entirely on asking this Court to endorse a radical alteration of the unlawful entry-refusal to quit offense.

Any such expansion of local law is appropriately certified to the D.C. Court of Appeals as it would manifestly change the scope and application of a statutorily well-defined offense. *See* Appellant's Motion to Certify Question of Law filed July 17, 2017.

In the absence of Brown having issued an express directive to leave, Defendants argue that inferences and implications from surrounding circumstances are sufficient to meet the required express directive element of the crime of unlawful entry – refusal to quit.[2] They cite no case for this radical proposition, as there is none. Instead, they point to cases involving the different offense of unlawful entry *ab initio*.

The courts have long recognized the myriad circumstances that can convey a property is off-limits *ab initio*, whether through express verbal directive or a sign

[2] Defendants state that "unlawful entry is also established when a person who lawfully enters property fails to comply with a condition imposed by the owner on all those who enter." Appellees' Br. 22. To the extent that Defendants might be perceived as offering this argument to the facts here, it was fully rejected by the court below, including as without any factual basis. *See* Appellant's Br. 30, n.3. Defendants did not appeal that ruling which is conceded and it is not before the Court on appeal.

or boarding that prohibits entry or through the locking of a gate with perimeter fence, etc. It does not follow that the distinct offense of unlawful entry – refusal to quit is subject to the same breadth of interpretation. The law requires an express directive. Anything less falls short. The statute, due process, and governing case law all compel the conclusion that it is error to misapply *Ortberg* to the offense at bar.

Defendants do not counter McGovern's observation that the statutory language of the refusal to quit offense expressly requires a "refus[al] to quit . . . on the demand of the lawful occupant. . ." This is in distinction to the statutory language regarding unlawful entry – against the will which allows boarding up or the securing of premises in "a manner that conveys that it is vacant and not to be entered." D.C. Code § 22-3302(a)(1); Appellant's Br. 2.

Defendants do not dispute that the criminal jury instructions require proof that "defendant was directed to leave the property." *District of Columbia v. Murphy*, 631 A.2d 34, 37 n.6 (D.C. 1996); Appellant's Br. 30.

Defendants do not counter that the local D.C. Court of Appeals has interpreted the statutory language to be satisfied only where an officer or person in charge "expressly order[s] the party to leave." *O'Brien*, 444 A.2d at 948; Appellant's Br. 28, 32 - 33, 38 - 39. This is in distinction to *Ortberg*, which allows

express or implicit communication or notice of circumstances that a property is off-limits *ab initio.*

Instead, and in a concession that he did not issue the required express directive to leave, Brown and his co-defendants assert that his statement, "Sir, can you please come with me," was an implied directive to leave and that as such criminal penalty for unlawful entry could attach in the absence of actually issuing a clear, and express directive to McGovern to leave the premises. Appellees' Br. 21.

GW and the campus police officers cite to *Artisst v. United States*, 554 A.2d 327 (D.C. 1989) for the *mens rea* requirement of the unlawful entry – entry against the will offense, again not distinguishing that the offense at bar is the refusal to quit offense.

For the refusal to quit offense, it is the refusal to respect an express directive to quit the premises that manifests *mens rea*. The express directive is indispensable.

Citing *Artisst* and *Ortberg*, Defendants incorrectly state that for the offense of unlawful entry at issue here, "there must be a 'general intent to be on the premises contrary to the will of the lawful owner.'" Appellant's Br. 21. *Artisst*, like *Ortberg*, involved conviction for unlawful entry *ab initio*, not unlawful entry refusal to leave. *Artisst*, 554 A.2d at 330 (entry was made in "contravention of a prominently posted warning.").

Omitting, again, that *Ortberg* addresses elements of a "distinct" offense other than the one at issue here, Defendants describe *Ortberg* as standing for the proposition that "no proof [is] needed that the defendant purposefully sought to defy the will of the lawful occupant or to violate the law." Appellant's Br. 21. The *Ortberg* court's discussion of the government's burden of proof was as to general intent, a knew or should have known standard for entering against the will of the lawful owner.

Defendants then misapply the "knew or should have known" analysis in *Ortberg* requiring that the will of the owner can be "objectively manifest through either express or implied means" to the different crime of unlawful entry - refusal to leave. Appellees' Br. 21.

Brown and his co-defendants thus defend his failure to issue an express directive to leave the premises by asserting, "Instead, any words implying that a person may no longer remain are sufficient." Appellees' Br. 21.

Pursuing this same mistaken argument, Defendants have filed a letter pursuant to Fed. R. App. P. 28(j) citing the Supreme Court's recent ruling in *Wesby* as supplemental authority. Appellees' Letter filed January 31, 2018[3]; *D.C. v. Wesby*, No. 15-1485, 2018 WL 491521, (U.S. Jan. 22, 2018).

[3] McGovern addresses Defendants' letter arguments herein, rather than by response letter.

By letter, Defendants describe *Wesby* as follows: "The Court considered whether the officers had probable cause to arrest the plaintiffs pursuant to D.C.'s unlawful entry statute, D.C. Code § 22-3302, *the same issue raised here*." Appellees' Letter, p.1 (emphasis added).

Wesby does not address the issue raised here, the crime of unlawful entry refusal to leave. *Wesby*, like *Ortberg*, addresses unlawful entry *ab initio*, entry against the will of the lawful owner. *Wesby* evaluated whether officers had reason to believe that partygoers at a vacant house "'knew or should have known' their 'entry was unwanted'" and as such whether officers had probable cause for arrest. *D.C. v. Wesby*, 2018 WL 491521, at *7 (quoting *Ortberg*).

In assessing whether there was probable cause for unlawful entry *ab initio*, the Court's analysis was on *mens rea*, which, as the *Ortberg* court identified, involves general intent – the knew or should have known requirement for the crime of unlawful entry upon entry, as distinct from unlawful entry refusal to leave.

In their letter, defendants state, "McGovern argues that probable cause required 'an express issuance of an order to quit followed by the refusal to do so,' and that the directive he received from SPO Brown, 'Sir, can you please come with me,' did not meet that rigid test…But *Wesby* expressly rejects that kind of analysis." Appellees' Letter, p 2-3.

Nothing in *Wesby*, or any ruling to date, suggests that the statutory requirements of a directive to leave and subsequent refusal to do so for the crime of unlawful entry –refusal to quit have been dispensed with, modified, or are subject to implication. Defendants seem to be saying if one may infer that a property owner might not want an invited or ticketed person to remain on the property, that inference can somehow substitute for an actual directive or gives directive substance to a communication that is not a directive. While Defendants suggest it is a foregone conclusion that a ticket-holder who stands in silent dissent is engaged in "disruptive" conduct, the standards for what is deemed permissible or "disruptive" varies from event to event and speaker to speaker. If the speaker is Cornell West or someone with similar perceived sensibilities regarding free speech, dissent is welcomed by GW. JA 406-07. No ticket-holder knows what is deemed "disruptive" or the "will" of GW, except upon express directive.

Wesby's totality of the circumstances analysis does nothing to displace the requirement of an express directive to leave. Either the directive to leave was issued, or it was not. The totality of circumstances analysis in *Wesby* relates to the *mens rea* of the partygoers – whether an officer had evidence that the partygoers "know or should have known they were entering against the will of the lawful owner." There are many ways to communicate that a property is generally off-limits. To communicate to an invitee lawfully present that authorization is revoked

and you must leave requires an express directive to leave. Brown's failure to issue an express directive to leave the premises cannot be saved by other circumstances or inferences.

B. An Express Directive to Leave was Not Issued

As Brown's statement was not an express directive to leave, defendants are left to argue that "any reasonable person would interpret Brown's request to 'please come with me' as an 'objectively manifest' directive to leave the auditorium under *Ortberg* [note omitted]." Appellees' Br. 24.

Brown and his co-defendants thus concede that a reasonable jury would need to "*interpret* Brown's request to 'please come with me'" as a directive to leave the auditorium. Appellees' Br. 24 (emphasis added); *id.* 14 (same).

Defendants' statement that even if there was not a directive to leave, Brown's statement "could not have been interpreted as permitting McGovern to stay where he was," is further admission that defendants lacked probable cause for the arrest and seizure of McGovern. Appellees' Br. 24-25. This statement admits that Brown's communication could be "interpreted" as a request to move elsewhere on the premises, rather than to leave the premises.

An order or a directive or a request to generally move from a particular position to another unspecified position or to the rear or side of the room does not

satisfy the requisite element of a directive to quit the premises. Failure to generally move is not an offense under the unlawful entry statute.

Defendants further argue that, rather than an express directive to leave, "any words implying that a person may no longer remain are sufficient." *Id.* 21.

In support, Brown points to *Ronkin v. Vihn*, 71 F.Supp.3d 124 (D.D.C. 2014), *O'Brien v. United States*, 444 A.2d 946, 947 (D.C. 1982), and *Ortberg*, 81 A.3d 303. Appellees' Br. 21 - 22. None of these cases support Brown's position.

In *Ronkin*, a WMATA officer had two encounters with an intoxicated individual.

In the first encounter, the officer advised that the plaintiff's "horse-playing needed to be taken outside," *id.*, 71 F.Supp.3d at 128, and ordered that plaintiff "catch a cab and leave the station and not utilize the station," *id.* Unbeknownst to the officer, plaintiff fully exited the station but after some time also returned to the station. *Id.*, 71 F.Supp.3d at 129-29.

In the second encounter, when the officer encountered plaintiff again after her exit and later return, the officer told the plaintiff "I told you to leave, go ahead and leave; don't come through the station." *Id.*, 71 F.Supp.3d at 129. The plaintiff reportedly refused, stating "I'm [twenty-one] fucking years old[.] I can do whatever I want[,] I want to ride the Metro system." *Id.* She was subsequently arrested and charged with unlawful entry – refusal to quit.

Brown's citation to *Ronkin* is misplaced. The officer expressly directed plaintiff to leave the premises and she expressly refused. In no way does *Ronkin* suggest that a suggestion or a request or words of encouragement by an officer can be treated as a directive. In no way does *Ronkin* suggest that words that fall short of a directive to leave can satisfy the statutory requirement and the requirements of due process that there be an express directive to leave the premises.

Brown mischaracterizes the case, arguing that the "court rejected plaintiff's argument that instruction was 'ambiguous as to the duration of her exile.'" Appellees' Br. 22. The plaintiff in *Ronkin* had argued that the initial directive was insufficiently clear, was ambiguous, because it did not specify for how long she was required to leave the station.

The court considered that the first directive might lack sufficient clarity or might manifest ambiguity such that it was insufficient as a directive on which to base the arrest – a position which undermines Brown's argument that there is anything less than strict requirement of a prerequisite and clear directive to leave.

The court reasoned that whatever ambiguity might have existed in the first encounter about how long she was required to leave was cured or clarified by the issuance of the express directive to leave in the second encounter, which was also refused. *Ronkin*, 71 F.Supp.3d at 134 ("after receiving this clarification, assuming

clarification was needed, she once again verbally stated her refusal to leave despite being 'personally ask[ed] ... to leave' a second time").

The *Ronkin* opinion suggests that the law does not countenance anything short of a strict requirement of an express and unambiguous directive to leave.

Brown's citation to *O'Brien* is unhelpful to his argument. As submitted by McGovern, *O'Brien* holds that for the statutory requirement of an order to quit to be satisfied, "a person lawfully in charge of the premises [must] **expressly order the party to leave**." *O'Brien*, 444 A.2d at 948 (emphasis added). There was no ambiguity in the express directive issued by the officers in *O'Brien* that he leave the clearly delineated prohibited premises (i.e., 15 feet within any Metro escalator or stair, etc.) and move to a nearby public sidewalk where leafletting was permitted. *O'Brien*, 444 A.2d at 947.

Defendants also inaccurately argue that the "crux" of McGovern's argument is that he was subjectively unaware of Brown's words and, therefore, there is no probable cause to arrest for unlawful entry. Appellees' Br. 3 - 4, 25, 29 - 30. The proper analysis is not whether or what McGovern heard or perceived but on what Brown knew and did – the facts known to Brown.

71-year-old McGovern did not hear Brown's words issue nor perceive that an officer was talking to him from behind, out of sight. Brown knew that he had taken up position behind McGovern and chose not to move into his field of vision

to communicate with him, present himself as a uniformed officer, get McGovern's attention, talk to him directly.

Accepting, *arguendo,* that Brown reasonably assumed McGovern heard his words, the words do not constitute an express order to leave the premises.

Defendants argue that a reasonable officer's "belie[f] that McGovern was violating D.C.'s unlawful entry statute" would be informed by the claim that McGovern was the sole person standing in the audience, Appellees' Br. 23, which even if true does not create or relate to a directive to leave.

Brown argues, with no citation to the record, that he presumes McGovern saw him in uniform. Appellees' Br. 23. This is disputed and baseless. There is no record citation to testimony by anyone that McGovern saw Brown in uniform prior to use of force. To the contrary, regarding the individual in plain clothes who turned out to be an officer, McGovern testified to seeing a burly man in civilian clothes who seemed menacing "But there was no indication that he had anything to do with law enforcement that I saw." JA 269-270 *See* Appellant's Br. 40-44 (no display of police authority prior to use of force). The video does not reflect McGovern observing Brown in uniform and in fact does show that Glaubach's badge was not clearly visible when he was standing in the aisle.

The record reflects Brown entered the row from the side and rear and stood behind McGovern. JA 175, 324, 384. If Brown felt that it was "foolish, dangerous,

and a heightened risk to audience members" (Appellees' Br. 26) for Brown to have made himself visible in uniform to the 71-year-old McGovern when communicating to him, this does not justify failing to utter words identifying himself as a police officer, or explain his failure to issue a directive to leave to him.

Brown argues that he touched McGovern's shoulder from behind, Appellees' Br. 24, which again does not create or relate to a directive to leave.

Brown argues that twice, from behind, he said "Sir, can you please come with me." Appellees' Br. 24. For reasons set forth herein and in McGovern's opening brief, this does not constitute an express directive. *See* Appellant's Br. 36-39. In a footnote, Brown contends this constitutes an "implicit" order. Appellees' Br. 25 n.5. While using various formulations, Brown never contends these words constitute an express directive to leave the premises.

Brown knew he had not issued an express directive to leave the premises and, in fact, he had not done so or intended to do so. As such, there is no probable cause for the uncharged offense of unlawful entry – refusal to quit.

Allowing vague other words of suggestion to substitute for the predicate of a directive to leave undermines the statutory and due process function of the requirement.

A finding that the statement, "Sir, can you please come with me" constitutes a directive has significant legal ramifications. As McGovern observed, far-reaching

constitutional consequences arise in the context of police-citizen interactions depending on whether an officer's words are a directive or are merely words of encouragement or request. Appellant's Br. 39, *See e.g. United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990)(body search by detective who identified himself as officer and requested the search in low conversational tone deemed consensual).

The Court should be very cautious before accepting a new doctrine that treats officers' words of suggestion or encouragement as directives. There are many existing circumstances where police rely on suggestions, without exercise of authority or directive, to encourage or request civilians to do something. Defendants do not dispute that blurring the distinction between a request and a directive is ill-advised from a jurisprudential perspective, but they urge it upon this Court.

C. Even Assuming an Express Directive to Leave Was Issued, Campus Police Afforded No Opportunity to Comply

Defendants do not squarely address or respond to the issue raised by McGovern that the unlawful entry statute requires not only the express directive to quit, but actual opportunity to comply any such directive. Appellant's Br. 44-45.

Even if an officer were to assume that a directive to leave had been issued and heard, only approximately *one second elapsed between the completion of the issuance of that communication and the seizure by force*. In other words, there was no opportunity given to respond. Brown seized McGovern immediately.

In their only passing reference to this issue, Defendants state that McGovern "had a least five seconds to make some kind of response to Brown after being approached and touched," which defendants call "ample time," and cite the Hatchett video. Appellees' Br. 30. In addition to the fact that five seconds from the *initiation* of communication cannot be considered meaningful opportunity to comply prior to being subject to use of force, the Hatchett video confirms that Brown seized McGovern immediately as he ended his communication, without waiting for any response. As Brown and Glaubach admit, "the entire object of the intervention" was to end McGovern's silent standing "swiftly." Appellees' Br. 26.

D. Defendants Are Asking the Court to Conform the Law to their Illegal Policy

It would have been no burden, and no additional effort for defendants to have uttered words constituting a directive to leave.

Defendants do not dispute that Brown was not seeking to issue a directive to leave pursuant to the unlawful entry –refusal to quit statute but that rather he was seeking to enforce GW's policy by which he had been trained to seize persons without probable cause. Appellees' Br. 27-28.

Both Brown and Glaubach were aware of the fact that they were not attempting and were not seeking to divest McGovern of his license to be present on the property – because they believed they were privileged to use force without any such predicate. That is why there is no directive and no opportunity to comply.

As discussed in Appellant's opening brief, the University trains and authorizes campus police to seize a person without probable cause to believe the person has committed a criminal offense. Brown and Glaubach followed GW's policy and training to swiftly remove and seize anyone deemed to be "disruptive" of an event, with what constituted "disruption" being determined event-to-event without notice, and regardless of the fact that what GW categorizes as "disruptive" conduct does not actually rise to a criminal offense under District of Columbia law.

GW trained its campus police that they were privileged to arrest for disorderly conduct based on violations of the University's disruption policies even where that same conduct is not considered unlawful under the District of Columbia's disorderly conduct law. *See* Appellant's Br. 18-20, 27-28, 45, 47. Brown testified that he was following such training on disorderly conduct when he conducted the arrest and seizure of McGovern. JA 362-364.

GW and its co-defendants do not dispute that their policy is to seize and use force against persons regardless of whether they have violated municipal law, instead asserting that they do not see how such unprivileged seizures violate the law. Appellees' Br. 27 n.6.

This goes to the heart of the problem in this case: that GW believes, and has trained its officers, that the District's commission of arrest powers to SPOs on private campuses allows use of force for violations of university policy, and that

such use of force is not conscribed by the bounds of what is authorized solely under municipal law. Instead of correcting their policy, GW is asking the court to change the legal standards of due process for their convenience.

The authority commission by the District of Columbia to SPOs is cabined by the laws of the District and SPOs' conduct is subject to the rules promulgated for the D.C. MPD. It is of critical importance that the power to arrest, to deprive another person of their liberty, is not abused and that the authority to arrest is not expandable to conduct that is not considered a crime under the laws of the D.C., regardless if doing so serves the private interests of the employer.

It poses a danger to the residents of the District of Columbia for any private employers of Special Police Officers in D.C. to believe they can abuse commissioned arrest authority in service of private policy. We rely on the careful authorization of state police power and use of force through law enacted by the D.C. Council and pursuant to lawful directives issued by the Chief of the D.C. MPD. The private administrators and lawyers of GWU, or any other private employer, cannot stand in the stead of democratically elected and appointed officials and expand authorized use of force and seizure to serve private policy and interest, *ultra vires*.

II. A Jury Could Find that Defendants Used Unreasonable Force

Contending that it would have been "foolish, dangerous, and a heightened risk to audience members" for Brown to have presented himself physically in a manner to be visible to McGovern as a police officer when communicating, Defendants state, "McGovern was deliberately ignoring Brown and thus expressly put himself at Level II – Passive Resistance ("Ignoring an officer") on the Use of Force Matrix." Appellees' Br. 26.

An officer cannot reasonably believe that a person is "ignoring an officer" when the officer makes the choice to *not present himself visually or verbally as an officer* to the person who will be subject to his force. A person cannot be "ignoring an officer" when there is no indicia that the person speaking to him is an officer.

While continuing to state that McGovern resisted Brown while in the row, Defendants do not respond to McGovern's argument that it would have been readily observable to any reasonable officer, that yanking someone down and into a narrow row of persons sitting in fixed seats would cause a person to stumble or fall and reflexively need to steady themselves. Appellant's Br. 53. Given that Brown, according to Chief Hay, had to "shimm[y]" past these same audience members to walk single file into the row at his own pace, Brown and Glaubach could not have reasonably believed that McGovern's falling over audience members when yanked down by a Brown on the way out was resistance. JA 543.

Defendants incorrectly state that McGovern did not dispute Defendant's application of their use of force matrix and without citation state, again incorrectly, that he conceded they were privileged to use some force against him. Appellees' Br. 36-37. In fact, it is Defendants who fail to respond to McGovern's discussion of their violation of their own use of force matrix. Appellant's Br. 53-54.

McGovern has certainly alleged excessive force. He presents evidence of injury from excessive force including bruising to his wrist from excessively tight handcuffing (JA 575), lacerations and abrasions to his left hand (JA 577, 579), bruising to his upper right arm (JA 582), large welts to his right calf (JA 583), leg (JA 587), torso (JA 584, 588), and feet (JA 578, 580, 581).

Applying the *Graham* factors to the facts in this case, McGovern has alleged facts that, viewed in the light most favorable to him, would allow a reasonable juror to find that Brown and Glaubach violated his constitutional rights. McGovern was not arrested for any violent crime, the extent of the bruising and lacerations indicate excessiveness of force was used (JA 575-589). McGovern alleges excessively tight handcuffing, which resulted in bleeding requiring medical attention and bruising (as reflected in the image at JA 575).

McGovern draws attention in particular to the gratuitous and deliberate slamming of him into the auditorium door. McGovern submits that this act of violence advanced no legitimate law enforcement purpose. *See Johnson v. District*

of Columbia, 528 F.3d 969, 978 (D.C. Cir. 2008). No legitimate interest could have been served by this gratuitous act of violence. *See DeGraff v. District of Columbia*, 120 F.3d 298, 302 (D.C. Cir. 1997) (no legitimate interest where officers carried suspect horizontally and handcuffed to a mailbox).

The critical motives and context behind the slamming of McGovern into the door are in genuine dispute, including whether such force was intentional or accidental or occurred at all, since defendants now claim that that the video shows that McGovern did not strike the door at all (Appellees' Br. 13, 38), while the lower court observed that video showed McGovern did in fact hit the door, but that it was not a consequence of unreasonable force, JA 637-638. As such, these present issues of genuine disputed fact not appropriate for resolution on summary judgment and further evidence that the video does not resolve disputed facts as to excessive force.

The Court is bound to accept all justifiable inference in McGovern's favor at this stage. *See Tolan v. Cotton*, 134 S.Ct. 1861, 1863 (2014) (per curiam) (reversing summary judgment for police officers in excessive force case for failure of lower courts "to adhere to the axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *Harris v. U.S. Dept. of Veterans Affairs*, 776 F.3d 907 (D.C. Cir. 2015) (reversing summary judgment for police officers on

plaintiff's assault and battery claim where parties offered materially different sworn statements regarding the nature of the underlying contact); *Johnson*, 528 F.3d 969 (factual issues preclude summary judgment on excessive force claim).

While Defendants assert that all force occurred within the auditorium and additionally that all use of force was fully visible on the Hatchett video, neither is true.[4]

Contact and use of force including the excessively rough and tight handcuffing that caused bleeding and bruising occurred outside the auditorium doors (JA 336, 339). According to Defendant Glaubach's own testimony, once in the lobby area outside of the auditorium even more officers joined to use force against the 71-year-old McGovern in handcuffing him, and Glaubach himself used further pain techniques on McGovern. JA 394-395. Campus SPO Elliot Horne also testified that Brown and Glaubach with the addition of himself and another officer all used force against McGovern in the hallway outside the auditorium, all participating in handcuffing him. JA 94.

McGovern testified to being in a state of shock outside the auditorium, that the handcuffing caused him injury, that he required EMT treatment, that he was not

[4] Defendants incorrectly state in a footnote that "McGovern testified that no further force was used on him outside the auditorium beyond what is on the Hatchett video." Their citation, JA 83, contains no such statement, and in fact, McGovern there and elsewhere testified to force used outside the auditorium.

resisting, that he tried to communicate that he had a ticket, and that he was "accosted" through a humiliating body search by a female officer as the officers laughed at him when he requested one of the many male officers present search him instead. JA 82.

CONCLUSION

For the reasons stated herein and on opening brief for Appellant[5], this Court should reverse the decision of the District Court and remand for further proceedings.

Respectfully Submitted,

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[5] With regard to First Amendment claims, McGovern advanced those claims against the federal defendant and did not pursue those claims further after resolution and stipulation of dismissal with the federal defendant.

CERTIFICATE OF COMPLIANCE

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Dated: February 5, 2018

/s/ Mara E. Verheyden-Hilliard
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 5th day of February, 2018, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that, I caused the required copies of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

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