IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WILL BRADSHAW,	§	
	§	
Plaintiff,	§	SA-20-CV-01168-FB
	§	
vs.	§	
	§	
JOSEPH SALVAGGIO, KELLY KUENSTLER, CATHERINE RODRIGUEZ, DONNA CHARLES, MONICA ALCOCER,	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

To the Honorable United States District Judge Fred Biery:

This Report and Recommendation concerns Plaintiff's Motion for Preliminary Injunction [#4]. All dispositive pretrial matters in this case have been referred to the undersigned for disposition pursuant to Western District of Texas Local Rule CV-72 and Appendix C [#10]. The undersigned therefore has authority to enter this recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that Plaintiff's motion be **granted** and that the District Court issue a limited injunction prohibiting Defendants from removing Plaintiff from his duly elected seat on City Council before a trial on the merits of this case.

I. Background

This case concerns a dispute between Plaintiff Will Bradshaw, a member of the City Council of the City of Leon Valley, Texas, and his fellow Councilmembers, the City Manager, and the Chief of Police. Bradshaw brought this action on October 1, 2020, against Police Chief Joseph Salvaggio, City Manager Kelly Kuenstler, and Councilors Catherine Rodriguez, Donna

Charles, and Monica Alcocer, in both their individual and official capacities, for damages and to enjoin Defendants from removing him from City Council. Bradshaw alleges that Defendants have unlawfully conspired to remove him from his elected seat on City Council in retaliation for his exercise of his right to constitutionally protected political speech. In addition to violating his First Amendment rights, Bradshaw contends that the process by which Defendants intend to remove him violates his rights to procedural and substantive due process because the pre-removal hearing lacks certain procedural protections to ensure he has the ability to adequately challenge the cited bases for his removal. Bradshaw's Complaint contains eight counts alleging violations of his constitutional and civil rights pursuant to 42 U.S.C. § 1983 and one count alleging a violation of the due process clause of the Texas Constitution. Bradshaw contends that Defendants have a pattern and practice of suppressing political opposition by removing elected officials through biased investigations and sham proceedings.

At the time Bradshaw filed his Complaint, he also filed a motion for an *ex parte* temporary restraining order ("TRO") and preliminary injunction, alleging that Defendants set a hearing for October 5, 2020, to determine whether to remove Bradshaw from elected office for conduct protected by the First Amendment. The District Court granted the *ex parte* motion for a TRO on October 2, 2020, and issued a temporary injunction restraining Defendants from taking any action to remove Bradshaw from office [#8]. The District Court also ordered that Bradshaw promptly obtain service of process of his lawsuit on Defendants and that Defendants file a response to Bradshaw's request for a preliminary injunction on or before October 13, 2020.

In lieu of a response, Defendants filed a motion to dissolve the TRO or for an expedited hearing on the preliminary injunction. Defendants' motion was limited to a cursory recitation of the elements Bradshaw must prove to prevail on his motion for preliminary injunction and a

general assertion that Bradshaw has obtained and will be provided the process he is due under the law. The motion did not substantively discuss, let alone mention, Bradshaw's cause of action alleging Defendants' conduct unlawfully abridged his First Amendment right to free speech.

The District Court denied the motion to dissolve, referred this case to the undersigned to conduct a preliminary injunction hearing, and extended the TRO (which was originally set to expire on October 16, 2020) an additional 14 days to allow the Court to conduct the preliminary injunction hearing and issue a ruling before the TRO expired.

The undersigned held a live evidentiary injunction hearing on October 27, 2020, at which counsel for all parties and their witnesses appeared via videoconference. At the undersigned's direction, the parties focused their argument and presentation of evidence on Bradshaw's First Amendment claim. Bradshaw and Keith B. Sieczkowski, the attorney hired by the City of Leon Valley to investigate the allegations underlying Bradshaw's possible removal, provided testimony at the hearing. At the close of the hearing, the undersigned informed the parties that the Court would be issuing a recommendation to grant Bradshaw's motion and to issue a limited injunction prohibiting his removal from City Council prior to a trial on the merits of this case.

At the hearing, the parties agreed to an expedited period in which to file any objections to this report and recommendation to facilitate the District Court's ultimate resolution of the motion for preliminary injunction prior to the expiration of the TRO on October 30, 2020. The parties agreed to file any objections on or before 11:59 p.m. on Thursday, October 29, 2020, so that the District Court can enter a final order as soon as October 30, 2020. The undersigned now issues the following findings of fact and proposed conclusions of law for the District Court's review.

II. Findings of Fact

The evidence and testimony presented at the Court's preliminary injunction hearing established the following facts. Bradshaw is a duly elected member of the City Council of Leon Valley, Texas. Bradshaw has a history of voicing the concerns of citizens regarding the conduct of the Leon Valley Police Department and has directly criticized Defendant Salvaggio, the Chief of Police, on numerous occasions both during and after his election to the City Council. These criticisms have concerned, among other things, conduct of the Leon Valley Police Department that Bradshaw believes is aimed to limit the expression of free speech in the City of Leon Valley. Bradshaw testified that his relationship with Salvaggio is an acrimonious one, made more so by events in the last several months involving Salvaggio's response to protests in the community following the death of George Floyd, an unarmed Black man, at the hands of police in Minneapolis, Minnesota on May 25, 2020. According to Bradshaw, in the wake of Floyd's death and at Salvaggio's direction, the Leon Valley Police Department engaged in numerous unlawful arrests of peaceful protesters and the confiscation of their signs and personal property. As a result of these and other events, concerned citizens of Leon Valley created a community organization, "The Change Leon Valley Project," which has the purported purpose of bringing alleged corruption and unlawful activity in Leon Valley's city government to light.

On June 4, 2020, the City Council of Leon Valley held a meeting, at which Bradshaw and Defendants were present. A 70-year-old citizen of Leon Valley, Olen Yarnell, also an outspoken critic of Salvaggio, spoke at the meeting, criticizing the Police Department and Salvaggio specifically. The hearing lasted approximately six hours and adjourned at 1:30 a.m. on June 5, 2020. Immediately following the hearing, Leon Valley police officers arrested Yarnell in the foyer outside City Council Chambers. Bradshaw witnessed the arrest and was informed by the

arresting officers that there was an outstanding warrant for an assault Yarnell allegedly committed against Defendant Councilor Alcocer in 2019. (Bradshaw testified that he witnessed this alleged assault in 2019, and that he believed the allegations giving rise to the warrant to be completely baseless.)

Bradshaw testified that despite the fact that the alleged assault occurred almost one year ago, and the warrant had been outstanding for some time, no attempt was made to arrest Yarnell when he arrived at the City Council Chambers that night for the meeting. It was not until Yarnell had given oppositional testimony at the City Council meeting that the arrest warrant was executed. Outraged by the police decision to wait to execute the arrest warrant until almost one year after the alleged assault and in apparent response to oppositional testimony, Bradshaw spoke directly to Assistant Police Chief David Gonzalez as he was leaving the building. Police body cams recorded Bradshaw making the following statements while pointing a finger at the Assistant Chief:

> You guys are disgusting. You disgust me. You're the problems with this country. You're the problems. You're the guys that are kneeling on people's necks. I'm sorry but this is disgusting. This is disgusting. You arrested a 70-year-old for assault. That's disgraceful.[1]

Although Bradshaw was visibly agitated as he spoke these words, it is undisputed that he did not interfere with the arrest of Yarnell or make any threats to Assistant Chief Gonzalez or any other City official. He vigorously expressed his opinion regarding the arrest and left the building. Bradshaw was credible in his testimony, and the undersigned interprets as genuine Bradshaw's stated concern underlying his outrage that the arrest of Yarnell may have been motivated by Yarnell expressing opinions critical of the police and elected leaders.

[1] The recordings are available to the public on the City of Leon Valley's website at http://leonvalleytx.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1293&Format=Agenda (last visited October 28, 2020) at the approximate 54:00 minute mark.

Several weeks later, Assistant Chief Gonzalez wrote a memorandum to Salvaggio regarding the incident. (Memo [#24-2] at 9–10.) The memo complains that Bradshaw's statements caused Gonzalez to be concerned about his ability to do his job and created a hostile work environment. The record contains a similar letter from Officer Flores, an officer who was at the scene following the arrest, to Assistant Chief Gonzalez, expressing concern that Bradshaw's statements created a hostile workplace and that he felt unsupported by Bradshaw, one of Leon Valley's leaders. (Flores Email [#24-2] at 11–12.) There is third correspondence in the record from Officer Trevino to Assistant Chief Gonzalez, similarly expressing disapproval of Bradshaw's conduct following the Council meeting and describing it as unprofessional, belittling, and demeaning. (Trevino Email [#24-2] at 13.)

These memos resulted in a July 10, 2020 formal complaint by Salvaggio to Defendant Kuenstler, City Manager, alleging harassment, negative stereotyping, and the creation of a hostile work environment by Mayor Chris Riley and Bradshaw. (Complaint [#24-2] at 1–8.) Salvaggio's letter describes Bradshaw's behavior as "extremely abusive," "overly aggressive," and "extremely demeaning," and complains that Bradshaw has a history of "viciously attacking the police department" for simply doing its job. The letter also discusses certain "First Amendment agitators," who allegedly have made threats and tried to instigate attacks on Salvaggio and other officers. Salvaggio identifies these individuals in his complaint as being associated with the Change Leon Valley Project, an organization of which Bradshaw, Mayor Riley, and current City Council candidate, Josh Stevens, are members. Salvaggio states that he fears losing his job and his life based on the "harassment" of these "agitators," whose actions have been condoned by Mayor Riley and are being espoused by Bradshaw. The letter accuses Bradshaw—in making "hostile statements" on June 5, 2020 to Assistant Chief Gonzalez—of

violating several provisions of the City of Leon Valley Home Rule Charter and City Ordinance and calls for a formal investigation.

In response to Salvaggio's complaint, Defendant Councilors hired an attorney, Keith B. Sieczkowski, to investigate Bradshaw's actions pursuant to Leon Valley Home Rule Charter § 3.12, which provides the City Council with authority "to inquire into the official conduct of any department, agency, appointed boards, office, officers, employees or appointed board members of the City."[2] (Charter [#12-2] at 3.) Sieczkowski issued an investigative memorandum on September 15, 2020, summarizing his findings. (Memo [#24-1] at 1–8.) The memo focuses primarily on Bradshaw's comments directed at Assistant Chief Gonzalez following the June 4–5, 2020 City Council meeting and Yarnell's arrest and concludes that Bradshaw violated Home Rule Charter §§ 3.09(C), and (D), as well as City Ordinance § 1.12.001 in addressing the Assistant Chief.[3] Sieczkowski found there was insufficient evidence to indicate that Bradshaw violated § 3.09(A), another provision referenced in Salvaggio's complaint, which prohibits the admission of the City's liability by a member of City Council.

Section 3.09(C) and (D) both address how and when City Council members may "deal with" City officers and employees. HRC § 3.09(C) provides:

> Except for the purpose of inquiries and investigations, unless otherwise provided in this Charter, the City Council as a whole and its individual

[2] The full text of the HRC and the governing City Ordinances are available to the public on the City of Leon Valley's website under "Code of Ordinances" at http://www.leonvalleytexas.gov/government/city_council/government/code_of_ordiances.php (last visited October 28, 2020).

[3] The memo also addresses statements made by Bradshaw at an August 4, 2020 City Council Meeting in which he urged citizens to vote "no" on various charter amendments proposed on the upcoming November ballot. Sieczkowski concluded that these comments violated various City Ordinances prohibiting the use of an official position in the city to advance private interests. Additionally, Sieczkowski discusses statements Bradshaw made to the media regarding the arrest of Yarnell and allegations that these statements also violated Home Rule Charter § 3.09(A).

> members shall deal with City officers and employees who are subject to the direction and supervision of the City manager solely through the City Manager, and neither the City Council nor its individual members shall give orders to any such officer or employee, either publicly or privately.

HRC § 3.09(D) similarly provides, in pertinent part:

> Except for the purpose of inquiries and investigations, unless otherwise provided in this Charter, the City Council as a whole and its individual members shall deal with the City Staff solely through the City Manager, and neither the City Council, as a body or any individual member . . . shall give orders to any of the subordinates of the City Manager, either publicly or privately.

Sieczkowski found that Bradshaw violated §§ 3.09 (C) and (D) by directing his statements and criticism to Assistant Chief Gonzalez personally and therefore "dealing" with a city employee directly, rather than through the City Manager according to the City's Organizational Chart.

Finally, City Ordinance § 1.12.011 is an ethics regulation that addresses harassment that provides in part:

> All city officials and employees are entitled to a workplace free of unlawful harassment by city officials, employees, board appointees, citizens, and vendors. This means that all city officials and employees must be respectful of others and act professionally. City officials and employees are also prohibited from engaging in unlawful harassment of other city officials, employees, citizens, vendors, and all other third parties.
>
> (1) . . . Harassment becomes unlawful when:
>
> (A) The offensive conduct causes intimidation, an antagonistic environment and/or is offensive to a reasonable person. The conduct can include but is not limited to epithets, slurs and negative stereotyping; threatening, intimidating, or hostile conduct; denigrating jokes and comments; and writings or pictures, that single out, denigrate, or show hostility or aversion toward a city official or employee, and that interferes with work performance. Conduct, comments, or innuendoes that may be perceived by others as offensive are wholly prohibited.

Sieczkowski found that Bradshaw violated § 1.12.011 by engaging in conduct that was "objectively loud and aggressive," disrespectful, and unprofessional when he made "accusatory

statements to the officers," and "gesticulated aggressively and forcefully" toward Assistant Chief Gonzalez. Sieczkowski concluded that the body cam video established that Bradshaw created an antagonistic environment, stereotyped and degraded officers, and that this conduct would be perceived as offensive by others. The legal memorandum did not address how the First Amendment intersects with these Leon Valley ordinances and Home Charter Rule provisions facially or as applied. At the hearing, Sieczkowski offered his opinion, although he could not cite specific legal support for it, that Bradshaw's statements to Assistant Chief Gonzalez were not protected by the First Amendment; Sieczkowski's interpretation of First Amendment law, however, is, of course, not binding on this Court.

After Sieczkowski issued his memorandum, a hearing was scheduled under HRC § 3.12 to address allegations of a violation of the Home Rule Charter and City Ordinance. According to HRC § 3.12, an individual subject to such a hearing shall be provided the results of any investigation and shall be provided an opportunity to respond and present relevant evidence, including testimony from individuals. HRC § 3.12(B). But the individual is not permitted to retain counsel or to ask any questions; only the City Council may ask questions of the individual. *Id.* A council member must "forfeit" his or her office if he is determined to have violated any provision of the Home Rule Charter. *Id.* at § 3.08(B).

Defendants conceded at the hearing that, although Sieczkowski's memorandum addresses several other incidents aside from Bradshaw's statements to Assistant Chief Gonzalez on June 5, 2020, it is Bradshaw's June 5 statements that gave rise to the scheduled § 3.12 hearing and that could result in Bradshaw's removal through forfeiture of his City Council seat if he is found to have violated City Ordinances and the Home Rule Charter.

III. Proposed Conclusions of Law

Bradshaw asks the Court for a preliminary injunction enjoining his removal from the Leon Valley City Council prior to a trial on the merits of his lawsuit. Rule 65 of the Federal Rule of Civil Procedure governs injunctions and restraining orders and provides that a district court may only issue a preliminary injunction upon notice to the adverse party. Fed. R. Civ. P. 65(a). A plaintiff requesting a preliminary injunction must establish the following four factors to be entitled to the injunction: (1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury; (3) the threatened injury outweighs any damage that the injunction may cause the opposing party; and (4) the injunction will not disserve the public interest. *De Leon v. Perry*, 975 F. Supp. 2d 632, 649 (W.D. Tex. 2014), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997)).

A preliminary injunction is an "extraordinary remedy" that should only be granted if the moving party has clearly carried the burden of persuasion on all factors. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Ultimately, "[t]he decision to grant or deny a preliminary injunction lies within the discretion of the district court and will be reversed on appeal only upon a showing of abuse of discretion." *DSC Commc'ns Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996).

Bradshaw contends that he is likely to prevail on at least one of his causes of action and will suffer irreparable harm if an injunction is not issued and he is removed from City Council. The undersigned agrees and will address each of the required factors for the issuance of a preliminary injunction in turn.

A. Likelihood of Success on the Merits

Bradshaw's motion for a preliminary injunction addresses two claims—his claim that his removal would be unlawful because it constitutes retaliation in violation of the First Amendment, and his claim that the process to be employed by the City to effectuate his removal fails to satisfy his right to procedural due process. As previously mentioned, the undersigned directed the parties to address only the First Amendment claim at the hearing, as Bradshaw need only demonstrate a likelihood of success on one claim to obtain a preliminary injunction. Additionally, the remedy for a procedural due process violation is, in most circumstances, more process, not necessarily an injunction preventing discipline or removal.

Bradshaw's First Amendment claim is premised on the argument that his speech addressing Assistant Chief Gonzalez is speech protected by the First Amendment, and therefore his censure or removal from elected office based on that speech constitutes First Amendment retaliation. (Compl. [#1] at ¶¶ 121–26.) To prevail on his claim of First Amendment retaliation pursuant to Section 1983, Bradshaw must establish the following: (1) he was engaged in constitutionally protected activity; (2) Defendants' actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) Defendants' adverse actions were substantially motivated against his exercise of constitutionally protected conduct. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Based on the evidence presented at the hearing, Bradshaw is likely to be able to establish each of these elements.

Defendants conceded at the hearing that the scheduled § 3.12 hearing that could result in Bradshaw's removal from elected office was not just substantially but almost entirely motivated by his statements directed at Assistant Chief Gonzalez after Yarnell's arrest and the June 4, 2020 City Council meeting. Therefore, the requisite causal link is not in dispute. The undersigned

also finds that Defendants' decision to pursue an investigation and § 3.12 hearing regarding allegations that he violated City ordinances and the Home Rule Charter, which could result in his censure or removal from office by forfeiture, would chill a person of ordinary firmness from continuing to engage in the speech at issue. Notably, Plaintiff is only seeking to enjoin Defendants from removing him from office, and not from going forward with the hearing. At the hearing, Defendants would not agree to refrain from removing Bradshaw pending the outcome of this lawsuit. There could be no question that the threat of removal from office would chill any elected official from engaging in protected speech.

The disputed issue before the Court is therefore whether Bradshaw was engaging in constitutionally protected speech when he addressed Assistant Chief Gonzalez after the meeting. As previously mentioned, Defendants failed to brief this issue in their written filings prior to the hearing. When pressed on the intersection between the First Amendment and Bradshaw's speech at the hearing, Defendants simply argued repeatedly that Bradshaw's conduct constituted harassment as defined by the City Ordinance and violated the Home Rule Charter's prohibition on "dealing with" city employees except through the City Manager, and that the First Amendment was not implicated where these provisions had been violated. Defendants seem to be arguing that there can never be a First Amendment violation where a municipal ordinance proscribes certain speech or conduct, an argument that should be summarily dismissed as meritless.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, ..." U.S. Const. amend. I. The Constitution's Supremacy Clause, of course,

invalidates state and local laws that interfere with or are contrary to federal law. *See* U.S. Const., Art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. 1 (1824). The core value underlying the Free Speech Clause of the First Amendment is the "public interest in having free and unhindered debate on matters of public importance." *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 573 (1968). Thus, to the extent that the Home Rule Charter encompasses—in its definition of "harassment"—speech and conduct protected by the First Amendment, it cannot be enforced with respect to that speech and conduct. Pursuant to the Supremacy Clause, all state and local laws must comply with the First Amendment and, as applied to certain conduct, may not unconstitutionally chill protected speech. It is therefore not a viable defense to Bradshaw's claim of First Amendment retaliation that the allegedly retaliatory conduct does not run afoul of the Constitution simply because it is predicated on Leon Valley's enacted charter and ordinances. This circular argument advances nothing of substance for the Court's consideration.

The real issue is whether Bradshaw's First Amendment rights are limited by the fact that he is an elected member of City Council, not a private citizen, and may have been acting in that capacity when he criticized the Police Department. Defendants argue that the City may limit freedom of expression of City Council members to preserve a workplace free from discord for its employees. The Court should reject this argument as well.

The Supreme Court has held that the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). However, the First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee's official duties because in such circumstances the employee does not speak as a citizen for First

Amendment purposes but as an employee. *Id.* at 421. This distinction flows from the fact that in the former circumstance, the government is acting as a sovereign; in the latter, it acts as an employer. *Pickering*, 391 U.S. at 568. Yet, Bradshaw is an elected public official, not a city employee. He does not work for the City Manager or the Police Chief; he represents the people of Leon Valley. Defendants would have the Court find that there is no meaningful distinction between these two roles. The undersigned is not persuaded by Defendants' arguments.

The Supreme Court has not yet addressed whether *Garcetti*'s limitations on the free speech of public employees should extend to elected officials. Yet, the Fifth Circuit considered this very issue in an opinion that was subsequently vacated on rehearing *en banc* based on mootness grounds. *Rangra v. Brown*, 566 F.3d 515, 522 (5th Cir.), *on reh'g en banc*, 584 F.3d 206 (5th Cir. 2009). The question in *Rangra* was whether the speech of elected state and local government officials made pursuant to their official duties, like speech of non-elected public employees, is less protected by the First Amendment than other speech. *Id.* at 517. The *Rangra* panel held that it was not. That decision, although not binding on this Court because it was vacated, nevertheless provides persuasive reasoning, and notably, was cited with some approval by the Fifth Circuit recently in *Wilson v. Houston Community College System*, 955 F.3d 490, 493 (5th Cir. 2020).

In *Rangra*, the plaintiffs, elected city council members, were indicted in state court for violations of the criminal provisions of the Texas Open Meetings Act based on allegations that they improperly acted as a quorum when they exchanged private emails with respect to a discussion of whether to call a council meeting to consider a matter related to a public contract. *Id.* at 518. Although the charges were dropped, the plaintiffs feared future prosecution and therefore brought an action under Section 1983 for declaratory and injunctive relief against the

state attorney general and the district attorney, challenging the criminal provisions of the Texas Open Meetings Act as content-based speech restrictions. *Id.* The district court dismissed the plaintiffs' claims, holding that under *Garcetti*, elected officials, like public employees, enjoy no First Amendment protection of speech made pursuant to their official duties. *Id.* The Fifth Circuit reversed, holding that the district court had erred in incorrectly assuming that *Garcetti* governed the case and that the First Amendment provided no protection to speech by elected officials. *Id.*

In surveying Supreme Court precedent and analyzing *Garcetti*, the panel in *Rangra* concluded that "[n]one of the Supreme Court's public employee speech decisions qualifies or limits the First Amendment's protection of elected government officials' speech." *Id.* at 523. The Court also cited multiple cases in which the Supreme Court upheld First Amendment protections of the speech of elected officials, affording that speech as robust protection as the speech of public citizens. *Id.* at 525 (citing, e.g., *Bond v. Floyd*, 385 U.S. 116, 133–35 (1966) (excluding state representative from membership in legislature because of criticism of federal policies in Vietnam violated right to free expression under First Amendment)). Indeed, affording First Amendment protection to elected officials, who are elected for the very reason of expressing their constituents' opinions on matters of public concern, is imperative. *See Bond*, 385 U.S. at 135–36 ("The manifest function of the First Amendment in representative government requires that legislators be given the widest latitude to express their views on issues of policy."). Indeed, the Supreme Court has generally indicated that "statements by public officials on matters of public concern must be accorded First Amendment protection" even where their statements are directed at their "nominal superiors." *Pickering*, 391 U.S. at 574 (citing *Garrison v. State of La.*, 379 U.S. 64 (1964)).

As noted above, although *Rangra* was vacated as moot after an *en banc* rehearing was granted, just as few months ago, the Fifth Circuit also expressed some approval of the decision in a case concerning public speech by trustees elected to a public community college district. *See Wilson*, 955 F.3d at 493. In *Wilson*, a trustee publicly criticized his fellow board members by arranging robocalls regarding the board's challenged actions and providing an interview with a local radio station. *Id.* In response, the board excluded the trustee from an executive session, in which they adopted a resolution publicly censuring the trustee for his actions. *Id.* at 493–94. The district court dismissed the case for lack of standing, concluding that there was no constitutional injury because the censure did not infringe on the plaintiff's free speech rights. *Id.* at 496–97. In reversing, in addition to finding the plaintiff had standing, the Fifth Circuit emphasized the critical "role that elected officials play in our society," which "makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Id.* at 497 (citing *Rangra*, 566 F.3d at 524). The Court went on to hold that a censure of publicly elected officials can be a cognizable injury under the First Amendment. *Id.* Notably, the Fifth Circuit did not discuss or apply *Garcetti*, which makes sense given that the case involved an elected official, not an unelected government employee.

Under these precedents, the undersigned concludes that *Garcetti* does not apply to limit the First Amendment rights of elected officials and that Bradshaw enjoys the same First Amendment protections as a City Councilor as he would as a public citizen. Furthermore, the undersigned finds that the evidence presented at the hearing establishes that Bradshaw was engaged in political speech when he criticized Assistant Deputy Gonzalez and the police department's practices, the type of speech that is afforded the highest level of First Amendment protection. *See id.* at 498 (explaining that strict scrutiny is used to assess the government's

regulation of an elected official's speech). Accordingly, to defend their actions, Defendants must show that the municipal ordinance and charter provisions at issue, as applied to Bradshaw, an elected official, further a compelling interest and are narrowly tailored to achieve that interest. *Dep't of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 438 (5th Cir. 2014). Defendants are unlikely to be able to do so at a trial on the merits.

Defendants' interpretation of HRC § 3.06 advanced at the Court's hearing would limit all speech by City Councilors like Bradshaw regarding complaints and criticisms of any city official directed to anyone other than the City Manager. In fact, Defendants conceded that under their interpretation, no matter what conduct Bradshaw had witnessed by police officer, he would never be allowed to address the police officer directly. Taken to its logical extension, this position would prohibit Bradshaw from speaking up and directly addressing an officer even if he were to witness or be subjected to excessive force. Even if Defendants could identify a compelling government interest in limiting the speech of elected officials in Leon Valley, they are unlikely to be able to demonstrate that HRC § 3.06 is narrowly tailored to advance that interest. As for the city harassment ordinance, its application to elected officials, as opposed to city employees, could be used to selectively prohibit political speech, which often arises in the context of an antagonistic debate over matters of public concern, based solely on its content. Defendants refused to acknowledge at the injunction hearing that any of these issues should be taken into consideration in evaluating the constitutionality of their actions, including the removal of members of City Council, and at a trial on the merits are unlikely to be able to demonstrate that the HRC ordinances withstand strict scrutiny as applied to Bradshaw's speech at issue. Bradshaw is therefore likely to prevail on the merits of his First Amendment retaliation claim.

B. Irreparable Harm

Bradshaw has also established that he will suffer irreparable harm if an injunction is not issued to prevent his removal from the City Council pending resolution of this dispute. In Texas, once an office holder is removed, the only recourse is the extraordinary remedy of a writ of quo warranto, the purpose of which is to determine disputed questions concerning the proper person entitled to hold public office. *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 490 (Tex. 1996); *see also* Tex. Civ. Prac. & Rem. Code § 66.001. This exclusive remedy may only be initiated by the attorney general or district attorney of the county at issue, not a private citizen. *See* Tex. Civ. Prac. & Rem. Code § 66.002. Plaintiff has a recognized interest in his elected position. *See Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979) (holding that an elected official has a protected interest in his elected position for purposes of the due process clause).

Bradshaw brings to the Court's attention a lawsuit brought against the City of Leon Valley by a former City Councilor, Benny Martinez, who was removed from his elected seat based on allegations of sexual harassment. *City of Leon Valley v. Martinez*, No. 04-19-00879-CV, 2020 WL 4808711, at *1 (Tex. App.—San Antonio Aug. 19, 2020, no pet.). After his replacement was sworn in, Martinez sought his reinstatement through a declaratory judgment action. *Id.* The Texas Court of Appeals dismissed Martinez's case for lack of standing based on the only recourse being a quo warranto proceeding filed by the district attorney, not Martinez. *Id.* at *2. Were the Court to decline to issue an injunction preventing the City from removing Bradshaw from office (or requiring forfeiture of his seat through findings of wrongdoing), Bradshaw could face dismissal of his case and the loss of his elected seat without recourse. This is the essence of irreparable harm.

C. Balance of Harms

The Court should also conclude that the threatened injury to Bradshaw—the loss of his elected position without recourse—outweighs any damage that would be caused by an injunction prohibiting his removal until a trial on the merits. If the Court issues the limited injunction recommended herein, the only action prohibited is Bradshaw's removal. Defendants may proceed with their § 3.12 hearing and make their findings with respect to the alleged misconduct of Bradshaw. They would simply be enjoined from effectuating Bradshaw's removal or forfeiture of his position during the pendency of this litigation. At the hearing, Defendants were unable to articulate any harm, let alone harm comparable to that suffered by Bradshaw if he is removed and then unable to obtain his reinstatement through a private action.

D. Public Interest

Finally, the recommended injunction will not disserve the public interest. Bradshaw was elected by members of the public to represent their interests on the City Council of Leon Valley. The public has an interest in the protection of elected officials from unlawful retaliation for their speech on matters of public concern. By allowing Bradshaw to continue to serve in his duly elected capacity, the Court advances this public interest. By ensuring that public officials have recourse for raising concerns regarding possible retaliation for the exercise of their First Amendment rights, the Court also advances the public interest. Defendants have not articulated how the recommended injunction, which merely prevents Bradshaw's removal, not the investigation or adjudication of the pending allegations, would disserve the public interest.

IV. Conclusion and Recommendation

Having considered Bradshaw's request for a preliminary injunction, the related written filings, the argument of counsel at the live hearing, as well as the testimony and evidence

presented, the undersigned recommends that Plaintiff's Motion for Preliminary Injunction [#4] be **GRANTED** and the District Court enter a limited injunction enjoining Defendants from removing Plaintiff Will Bradshaw from his seat on the Leon Valley City Council prior to a trial on the merits of this case.

V. Instructions for Service and Notice of Right to Object/Appeal

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this report and recommendation must be filed **on or before 11:59 p.m. on October 29, 2020**, after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The party shall file the objections with the Clerk of Court and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the un-objected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto.*

Ass'n, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED this 28th day of October, 2020.

ELIZABETH S. ("BETSY") CHESTNEY
UNITED STATES MAGISTRATE JUDGE