UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISON

WILL BRADSHAW,

Plaintiff.

Case No. 5:20-cv-01168

Hon.

v.

JOSEPH SALVAGGIO;
KELLY KUENSTLER;
CATHERINE RODRIGUEZ;
DONNA CHARLES;
MONICA ALCOCER.

Defendants.

PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NOW COMES Plaintiff, Councilor Will Bradshaw, by and through counsel, Solomon M. Radner, and files this Emergency Motion for a Temporary Restraining Order and Preliminary Injunction to prohibit Defendants from unconstitutionally removing Plaintiff from his duly elected position as Councilor on the Leon Valley City Council. Plaintiff respectfully requests this Court issue the sought relief without notice pursuant to Fed. R. Civ. P. 65(b)(1). (See Exhibit 1, Statement of Counsel: Notice to Defendants and attached exhibit). For the reasons stated herein, Plaintiff respectfully requests this Court Grant Plaintiff's motion.

INTRODUCTION

Plaintiff, Councilor Will Bradshaw, is an elected city councilmember for the City of Leon Valley. While Plaintiff was duly elected by the citizens of Leon Valley, as of the filing of Plaintiff's Complaint and this accompanying Request for Preliminary Relief and a Temporary Restraining order, Defendants have, for the second time in Leon Valley's recent past, fabricated violations of

the City Charter in order to remove an elected official from his position. Plaintiff has not committed any violations to support the disciplinary proceedings and the investigation into him is nonexistent and the outcome predetermined. Plaintiff is being removed specifically for conduct that is protected by the First Amendment. As discussed in Plaintiff's Complaint and herein, Plaintiff is the current target of an unlawful and oppressive tyranny of the majority by Defendants, other state officials using their positions to quash political opposition and remove any councilmember who disagrees or speaks out. Without intervention from this Court within the next 72 hours, Plaintiff and the public will be irreparably harmed by Defendants unlawful conduct removing him from his elected position.

It is vital to maintain the integrity of our elections for this Court to prevent the defendants from unconstitutionally ousting a duly elected member of Leon Valley City Council.

STATEMENT OF FACTS

Plaintiff, Councilor Will Bradshaw, is an elected city councilmember for the City of Leon Valley. (ECF # 1, Plaintiff's Verified Complaint, ¶ 6). Defendant Salvaggio, in his capacity as chief of police and Assistant City Manager, Defendant Kuenstler in her capacity as the City Manager, and City Councilors Defendants Catherine Rodriguez, Donna Charles, and Monica Alcocer, are acting in concert to unlawfully remove Plaintiff from his elected position. (*Id*. at ¶ 7-9, 17-18). Plaintiff is not the first city councilor to be removed by a cohort of these Defendants. (*Id*. at ¶ 17-19, 24-40). The protocol to remove an elected official, as devised by Defendant Councilors, is both unconstitutional on its face and as applied, and being used with malice and without a proper purpose. (*Id*. at ¶ 86-114).

In the past, Plaintiff, and many others in Leon Valley, have expressed concern about Defendant Salvaggio's pattern of unconstitutional conduct as Chief of Police. (*Id*. at ¶ 62).

Salvaggio has publicly engaged in unlawful arrests and unlawful seizures of those engaged in peaceful constitutional protected protest. (*Id*. at ¶ 63-65). Salvaggio has a history of abusing his power as chief of police. (*Id*. at ¶ 72(a)-(i)). Salvaggio recently hired three "bad apples" fired by San Antonio police, one of whom allegedly put their foot on a handcuffed person's neck. (*Id*. at ¶ 66).

Here, Salvaggio wrote a false "harassment letter," an ethics complaint to Defendant Kuenstler, the City Manager, against Plaintiff as the first step in this episode of his abuse of power. (*Id*. at ¶ 12-16). The complaint authored by Defendant Salvaggio is littered with outright lies and false statements. (*Id*. at ¶ 16). Further, Plaintiff's actions as outlined in the complaint are not "abusive" but instead, constitutionally protected conduct that cannot form the basis of Plaintiff's removal from his elected position. (*Id*.). Plaintiff is aware of three alleged violations he is claimed to have committed and will explain each in turn.

First, Plaintiff's verbal response to Defendant Salvaggio's blatant retaliation against a citizen who spoke out against him is not "abuse" or "harassment" or anything but protected speech. (*Id*. at ¶ 42-61). Bradshaw's words were, "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." Bradshaw then walks away while stating that it is "disgraceful." (*Id*. at ¶ 51-52). This conduct is unquestionably protected by the First Amendment and cannot possibly form the basis of a 3.12 hearing without necessarily violating the First Amendment. (*Id*. at ¶ 53).

Second, Plaintiff's statement expressing an understanding for constitutionally protected conduct and protest is not an admission of liability and is itself constitutionally protected speech. (*Id*. at ¶ 70). Plaintiff stated something similar to: "this is why the auditors come here." (*Id*.). The

"auditors" to which Plaintiff refers are individuals who exercise constitutionally protected conduct to confirm that state officials respect the rights secured by the Constitutions of the United States and the State of Texas. (*Id*.). This too is constitutionally protected speech and cannot form the basis of a 3.12 hearing without necessarily violating the first amendment. (*Id*.).

Third, Defendants have claimed Plaintiff's conduct of donating his personal money to an individual's defense fund is also a basis for Plaintiff's removal from his elected position. (*Id*. at ¶ 69). Once again, this conduct is protected by the First Amendment and does not evidence an admission of liability on behalf of the city or a payment of damages as a result of the city's liability. (*Id*.).

Defendants have not undertaken any legitimate investigation into these claims brought by Defendant Salvaggio and the outcome of this hearing is predetermined. (*Id*. at ¶ 18, 91). In repeated fashion, one of the named Defendants makes a complaint against an official who disagrees with them in order to start the removal process and silence political opposition. (*Id*. at 12, 16-22, 26, 43, 74-77). As is customary in Leon Valley, Defendant Salvaggio has demonstrated unconstitutional and retaliatory conduct against Plaintiff because he has dared to speak out against Salvaggio and his tyrannical ways. (*Id*. at ¶ 62-72).

Prior to this attempt to remove Plaintiff from his position, Defendants successfully removed former Councilor Benny Martinez, who has challenged the actions in court, and unsuccessfully sought the removal of Mayor Chris Riley. (*Id*. at 24-40, 73-78). Defendant Salvaggio further unsuccessfully requested the Texas Rangers conduct a criminal investigation into former Councilor Benny Martinez, Mayor Chris Riley, and Plaintiffs alleged violations of the Texas Open Meetings Act. (*Id*. at ¶ 72(e)). The Texas Rangers denied this request. (*Id*.). The District Attorney also rejected Salvaggio's attempt to have Martinez charged with criminal

interference into a police investigation. (*Id*. at (f)). Recently, a candidate for city council, Mr. Josh Stevens, and member of the political group working for change to the city and critic of Salvaggio, was threatened by Salvaggio with arrest in response to his protected speech and is currently being investigated by Salvaggio for an alleged assault. While Salvaggio claims Mr. Stevens assaulted him, it was Salvaggio who shoved Mr. Stevens. After six months, Salvaggio has still refused to release the body-camera footage of Mr. Stevens' alleged assault due to a "pending investigation." (*Id*. at (c)-(d)).

Defendants have engaged in numerous other self-serving and oppressive actions including conspiring to quash a proposal brought to council by Plaintiff, (*Id*. at ¶ 85), attempting to remove Plaintiff from his position as a result of one excused absence, (*Id*. at ¶ 84), permitting councilmembers to be removed without a majority vote of all councilmembers, (*Id*. at ¶ 31, 93, 97), voting in matters in which councilmembers have bias and are not impartial, like the removal of the previous councilman Benny Martinez. (*Id*. at ¶ 29, 32, 34), and attempting to remove Plaintiff from his position because he disagreed with the terms of the City Manager's resignation, which included a large severance Defendant Kuenstler gave to herself with over $100k in benefit pay-outs, a far too generous severance to be reasonable, as well as naming her own successor, Defendant Salvaggio, to take her place. (*Id*. at 79-83).

In addition to this unconstitutional retaliatory conduct, Defendants have devised an unconstitutional investigative and hearing policy that is both procedurally and substantively unconscionable. (*Id*. at ¶ 86-114). As discussed herein, not only is the Charter unconstitutionally vague with regard to the circular and overlapping nature of the requirements and prohibitions of councilors, (*Id*. at ¶ 99-113), the procedures, or lack thereof, violate due process requirements. Plaintiff is not permitted to ask questions of any witness, even his own witnesses, Plaintiff is not

permitted to have a lawyer represent him at the hearing and ask questions of any witnesses, (*Id*. at ¶ 14, 30, 33, 96, 99), and where Plaintiff can be voted out from his elected position by a mere vote of only two councilmembers. (*Id*. at ¶ 93, 97, 31). Further demonstrating the arbitrariness of the proceedings, Defendants have not conducted any legitimate investigation prior to the hearing, and the outcome of said hearing, to find Plaintiff in violation of the Charter and thus required to forfeit his office, has been predetermined. (*Id*. at ¶ 18, 91).

On September 21, 2020, Defendants set a hearing for October 5, 2020 at 6:00pm to determine whether Defendants can remove Plaintiff from elected office for conduct protected by the First Amendment. (*Id*. at ¶ XX).

LEGAL STANDARD

"A plaintiff requesting the extraordinary remedy of a preliminary injunction must establish the following four factors: (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) (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)). "None of these elements, however, is controlling." *Tex. Democratic Party v. Abbott*, 2020 U.S. Dist. LEXIS 94953, at *42 (W.D. Tex. May 19, 2020) (citing *Florida Med. Ass'n v. United States Dep't of Health, Educ. and Welfare*, 601 F.3d 199, 203 n.2 (5th Cir. 1979)). Rather, this Court must consider the elements jointly, and a strong showing of one element may compensate for a weaker showing of another. *Id*.

While required to show a probability of success on the merits of the claim, the "likelihood of success need not be one of absolute certainty, however." *Casarez v. Val Verde County*, 957 F.

Supp. 847, 852 (W.D. Tex. 1997). A movant is "not required to prove [his] case. Nor is it necessary that the movant's right to a final decision, after a trial, be absolutely certain or wholly without a doubt." *Id*. (citations omitted). "A reasonable probability of success, not an overwhelming likelihood, is all that need be shown for preliminary injunctive relief." *Id*. (citing *Gilder v. PGA Tour, Inc.*, 936 F. 3d 417, 422 (9th Cir. 1991)). "A preliminary injunction may issue is plaintiff has raised questions going to the merits so serious and substantial as to make them fair ground for litigation and thus for more deliberate investigation." *Id*. (citations omitted).

"The purpose of a preliminary injunction is to preserve the status quo pending final determination of a lawsuit." *Casarez*, 957 F. Supp. at 852 (citing *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). "The 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 Communs. Corp v. DGI Techs., Inc.,* 81 F.3d 597, 600 (5th Cir. 1996).

ARGUMENT

I. PLAINTIFF IS ENTITLED TO A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

A. Plaintiff Will Likely Succeed on the Merits of His Claims that Defendants Are Violating His Protected Rights

i. Due Process

Both the Texas and United States Constitution's prohibit the deprivation of life, liberty or property without due process of law. *See* Tex. Const. Art. I, § 19; USCS Const. Amend. 14.

Plaintiff's "interest in his elected position, though not 'property' in the conventional sense, is a recognizable interest for purposes of procedural due process analysis." *Tarrant Cty v. Ashmore*, 635 S.W.2d 417, 422 (Tex. 1982) (citing *Ridgway v. City of Fort Worth*, 243 S.W. 740, 745 (Tex. Civ. App.-Fort Worth 1922); *Paris v. Cabiness*, 44 Tex. Civ. App. 587, 98 S.W. 925, 927 (Tex.

Civ. App. 1906); *Howard v. Bell County Board of Education*, 247 Ky. 586, 57 S.W.2d 466, 467 (1933)).

As stated by the Fifth Circuit, "[a]n elected city official who is entitled to hold an office under state law has a property interest in his office which can be taken from him only by procedures meeting the requirements of due process." *Crowe v. Lucas*, 596 F.2d 985, 993 (5th Cir. 1979) (citing *Gordon v. Leatherman*, 450 F.3d 562, 565 (5th Cir. 1971); *Bishop v. Wood*, 426 U.S. 341, 344-345, 96 S. Ct. 2074, 2077, 48 L. Ed. 2d 684, 690 (1976)).

As explained by the Supreme Court, if the property interest arose from a state statute, the required procedures are still governed by federal law, not state law. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("minimum procedural requirements are a matter of federal law, and are not diminished by the fact that the state may have specified its own procedures that it may deem adequate.") (citing *Vitek v. Jones,* 445 U.S. 480, 491 (1980)).

While a Texas city operating under "home rule" has the ability to amend its charter in any manner it may desire, its removal provisions can "not conflict with the Constitution and statutes." *Barnett v. Plainview*, 848 S.W.2d 334, 339-340 (Tex. App. 1993).

1. Procedural Due Process

"If an individual is deprived of a property right, the government must afford an appropriate and meaningful opportunity to be heard consistent with the requirements of procedural due process." *House of Praise Ministries, Inc. v. City of Red Oak*, 2017 Tex. App. LEXIS 4095, at *18 (Tex. App. May 3, 2017). Requirements include both notice and "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Tercero v. Tex. Southmost College Dist*., 2018 U.S. Dist. LEXIS 239209, at *7 (S.D. Tex. June 4, 2018) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976); *Gibson v. Tex. Dep't of Ins.,* 700 F.3d 227, 239 (5th Cir. 2012)).

The "root requirement of the Due Process Clause" is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 542 (emphasis in original). "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Id*. at 546. Further, "[f]airness and impartiality" of the proceedings is necessary. *Robbins v. United States Railroad Retirement Bd.,*586 F.2d 1034, 1035 (5th Cir. 1978).

While technical "judicial forms and procedures are not essential to meet procedural due process requirements… there must be a hearing before an impartial tribunal with the right of confrontation and cross-examination of witnesses." *Robbins v. United States Railroad Retirement Bd.,*586 F.2d 1034, 1035 (5th Cir. 1978); *see also Richardson v. Pasadena*, 513 S.W.2d 1, 4 (Tex. 1974) ("The right to cross examination is a vital element in a fair adjudication of disputed facts. The right to cross examine adverse witnesses and to examine and rebut all evidence is not confined to court trials, but applies also to administrative hearings."). Similarly, the Texas Supreme Court has recognized "the right to counsel and a fair representation at an administrative hearing is one of constitutional dimensions." *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984).

While the Supreme Court has suggested the cross examination is not always necessary, *Loudermill, at* 548,[1] the opportunity to be heard "in a meaningful manner' is required, *Matthews*, at 313, and the requirements of due process are "flexible and calls for such procedural procreations

[1] J. Marshall concurring, "I continue to believe that *before the decision is made to terminate*…an employee is entitled to an opportunity to test the strength of the evidence by confronting and cross-examining adverse witnesses and presenting witnesses on his own behalf, whenever there are substantial disputes in testimony….Because the Court suggests that even in this situation due process requires no more than notice and an opportunity to be heard…I am not able to join the Court's opinion in its entirety."

as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971).[2] "[T]he timing and nature of the required hearing will depend on appropriate accommodation of the interests involved." *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 434 (1982) (footnote omitted). "Those interests are the importance of the private interest involved and the length or finality of the deprivation; the likelihood of error by the government; and the magnitude of the governmental interest involved." *Id*. (citations omitted).

To state a claim for a violation of procedural due process, an individual must demonstrate a protected interest, and the court must determine "whether the state provided constitutionally sufficient procedures before infringing on that interest." *Grant v. Owens*, 2005 U.S. Dist. LEXIS 60867, at *11 (W.D. Tex. Dec. 28, 2005).

As discussed herein, Plaintiff has alleged a protected property interest in his elected position on City Council. *Tarrant Cty v. Ashmore*, 635 S.W.2d 417, 422 (Tex. 1982); *Crowe v. Lucas*, 596 F.2d 985, 993 (5th Cir. 1979).[3]

Plaintiff has similarly demonstrated the insufficient procedures to be utilized against him. Here, Plaintiff is not permitted to ask questions of any witness, even his own witnesses. (Compl. ¶ 14, 30, 33, 96, 99). This does not adequately provide an opportunity to be heard. Presenting

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[2] For example, in *Goldberg v. Kelly*, 397 U.S. 245, 267-268 (1970), "an effective opportunity to defend by confronting any adverse witnesses" was required prior to termination of welfare benefits.

3 "A property interest is created where the public entity has acted to confer, or alternatively, has created conditions that infer [sic, imply?], the existence of a property interest by abrogating the right to terminate an employee without cause." *Bolton v. City of Dallas*, 472 F.3d 261, 264 (5th Cir. 2006) (quoting *Muncy v. City of Dallas,* 335 F.3d 394, 398 (5th Cir. 2003) (bracketed text added in *Bolton*); *see also Gilbert v. Homar*, 520 U.S. 924, 928-929 (1997) (stating that "employees who can be discharged only for cause have a constitutionally protected interest in their tenure and cannot be fired without due process.").

witness testimony on one's behalf is quite difficult without the ability to ask any questions of the witness, the traditional method of gathering such testimony.

Further, where the outcome of the hearing is predetermined, such a "sham" hearing cannot be considered a "meaningful" opportunity to be heard. *See Tercero v. Tex. Southmost College Dist*., 2018 U.S. Dist. at *12. Here, Plaintiff has alleged that Defendants have not conducted any investigation prior to the hearing to find Plaintiff in violation of the Charter and thus required to forfeit his office. (Compl. ¶ 18, 91). Plaintiff has alleged that Defendants are attempting to oust him from office solely because of this protected conduct and opposition to unlawful conduct of Defendants and not for any violation of the rules governing the conduct of Leon Valley City Councilors. (*Id*. at ¶ 12-23, 42-61, 67-70, 115-137). When "the outcome of the hearing was predetermined [it is] therefore not meaningful." *Tercero*, at *12. The hearing against him has no basis and Defendants refusal to actually investigate anything demonstrates the lack of impartiality in the procedures. (*Id*. at 18, 91).

In this situation, where there is evidence of improper motivations for the initiation of a removal hearing against Plaintiff and a previous councilmember, and where Plaintiff is a public official democratically elected to serve the residents of Leon Valley, the requirements of procedural due process are greater to protect Plaintiff's interest, and the public's interest, in his continuing ability to serve the residents of Leon Valley without unlawful interference. The ability to confront witnesses against him and ask questions of both adverse and supporting witnesses is essential where Plaintiff is an elected official facing frivolous allegations.

The Charter's procedures violate Plaintiff's right to procedural due process because he is not permitted to examine or cross-examine witnesses and is not permitted to be meaningfully

represented by counsel or have his counsel ask questions of his accusers when facing the charges brought against him. (*Id*. at ¶ 14, 30, 33, 96, 99).

Recently, the United States Supreme Court weighed in on the requirements of procedural due process in the face of vague laws. *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("Vague laws contravene the first essential of due process of law that statues must give people of common intelligence fair notice of what the law demands of them."). As noted by the Fifth Circuit, in "the civil context, the statute must be so vague and indefinite as really to be no rule at all." *Tex. Democratic Party*, 961 F.3d 389, 409 (5th Cir. 2020) (quoting *Groomes Res. Ltd. v. Par. of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000)).

The removal procedures that permit the majority of the City Council to vote out the minority on City Council are overly vague and ambiguous with regard to what constitutes removable conduct. (*Id*. at ¶ 99-113). The reasons for forfeiture of elected office are in contradiction to each other, cannot be reconciled, and do not give fair notice of the relevant requirements and penalties. (*Id*.). For example, under 3.12(B)(10), a violation of 3.08 mandates the city council vote on forfeiture of office. Under 3.12(B)(11), a violation of 3.09 only permits the city council to vote to sanction the individual. (*Id*. at ¶ 110-111) (use of word "shall" vs "may"). However, 3.08 specifically mentions and includes violations listed in 3.09. This contradiction cannot be reconciled and does not give fair notice to councillors what penalty they may face if they violate The Charter. The removal procedures outlined in The Charter do not give notice of what the law demands, and are not clearly defined, thereby violating Plaintiff's right to procedural due process. For these reasons, Plaintiff is likely to succeed on the merits of his procedural due process claim.

2. Substantive Due Process

To succeed on a substantive due process claim, "the plaintiff must show two things: (1) that he had a property interest / right in his employment, and (2) that the public employer's termination of that interest was arbitrary or capricious." *Tercero v. Tex. Southmost College Dist*., 2018 U.S. Dist. at *13; *see also House of Prairie Ministries, Inc. v. City of Red Oak*, 2017 Tex. App. LEXIS 4095, at *19 (Tex. App. Waco May 3, 2017) (same). "Government action is arbitrary and capricious when it constitutes an abuse of power that shocks the conscience." *Tercero*, at *14. "On the other hand, an action that is "rationally related to a legitimate governmental interest" passes constitutional muster." *Id*. (quoting *Simi Inv. Co., Inc. v. Harris Cty*., 236 F.3d 240, 249 (5th Cir. 2000)).

In the public employment context, Courts have determined that a substantive due process violation can be shown by evidence that the decision to terminate "so lacked a basis in fact that it could be said to have been made without professional judgment." *Edionewe v. Bailey*, 860 F.3d 287, 293-294 (5th Cir. 2017) (citation omitted).

Plaintiff's verified complaint demonstrates a violation of substantive due process. The procedures utilized to terminate Plaintiff, i.e. a required forfeiture of office, are unconscionable because they permit the majority to remove an elected official without all councilmembers present, as long as a quorum of 3 is reached. (Compl. ¶ 31, 97). Thus, a complaining councilor, a supporting councilor, and the respondent could make up quorum of 3, (*Id*.), with only one person able to vote allowing the 2/3 vote to be met by one individual. This is arbitrary and capricious and not related to any legitimate government interest.

Further, bringing charges against Plaintiff that are frivolous and do not meet constitutional muster solely in order to remove him from elected office in response to his speaking out against unlawful government tyranny, shocks the conscience. Plaintiff's protected speech as outlined in

Plaintiff's verified complaint demonstrates that the decision to bring charges and potentially force Plaintiff to forfeit his elected position "so lacked a basis in fact" and was done without any "professional judgment" as to Plaintiff's constitutionally protected rights to speak out against government abuse. For these reasons, Plaintiff is likely to succeed on the merits of his substantive due process claim.

ii. First Amendment Retaliation

The First Amendment prohibits "adverse governmental actions against an individual in retaliation for the exercise of protected speech activities." *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002) (citing *Colson v. Grohman*, 174 F.3d 298, 508 (5th Cir. 1999)).

To prevail on a First Amendment retaliation claim, a plaintiff must show "(1) he was engaged in constitutionally protected activity, (2) the officers' action caused him to suffer any injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the officers' adverse actions were substantially motivated against Plaintiff's exercise of constitutionally protected conduct." *Alexander v. City of Round Rock*, 854 F.3d 298, 308 (5th Cir. 2017).

Here, Plaintiff was engaged in constitutionally protected conduct of disagreeing with the retaliatory arrest of a citizen and standing up to police abuse. (See Compl. ¶ 12-16, 21-22, 49-61, 62, 67-70, 115-126).

B. Plaintiff Will Suffer Irreparable Harm in the Absence of Preliminary Injunctive Relief

"An injury is irreparable if it cannot be undone through monetary remedies." *Casarez v. Val Verde County*, 956 F. Supp. 847, 864 (W.D. Tex. 1997). Threat of irreparable harm must be "likely in absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 22 (2008). "[I]t is not necessary to demonstrate that the harm is inevitable and irreparable." *Casarez*, at 864-865.

Here, Plaintiff is to be deprived of constitutionally sufficient due process through unlawful required forfeiture. The Fifth Circuit has found this action to require due process pursuant to the Fourteenth Amendment. *Crowe v. Lucas,* 595 F.2d at 993 (denying summary judgment where jury could find unlawful deprivation of elected position when alderman was removed through impermissible means). A denial of due process through a fair "pre-termination hearing" is the type of "loss [that] cannot be adequately compensated." *Jesse v. Lyndon Station* 519 F. Supp. 1183, 1189 (W.D. Wis. 1981). "[T]here is no adequate means of restoring that right [to a pre-termination hearing] once the loss is suffered." *Id*. "Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law." *De Leon v. Perry*, 975 F. Supp. at 663 (W.D. Tex. 2014); *Tex. Democratic Party v. Abbott*, 2020 U.S. Dist. at *101 (W.D. Tex. May 19, 2020) ("[T]he violation of constitutional rights for even a minimal period of time constitutes irreparable injury justifying the grant of a preliminary injunction.").

Plaintiff is a duly elected city councilor elected by the residents of Leon Valley and has a constitutionally protected interest in only being removed from office through due process, whether he be recalled by the voters, not voted back into office upon running for another term, or removed through another constitutional basis. Unlawfully removing Plaintiff from his elected position is irreparable harm. *See Crowe*, at 993; *Casarez*, at 865 ("The Court finds plaintiff, and other voters in Val Verde County, would be irreparably harmed by elected officials taking office as a result of votes improperly allowed.").

Further, the recent opinion of the Court of Appeals confirms the irreparable nature of the harm facing Plaintiff. Once removed from office, Plaintiff will no longer have standing to challenge Defendants unlawful conduct. Once Benny Martinez was removed from his elected position on Leon Valley's city council, Defendant Councilors immediately swore in a replacement.

The Court of Appeals determined that once Mr. Martinez was removed from office, he did not have standing to bring a suit to challenge the action. *See Leon Valley v. Martinez*, No. 04-19-00879-CV, p. 4-8. Once an elected official is removed from office, the only remedy is a "quo warranto action." *Id*. at p. 4. This action cannot be initiated by the removed official and can only be brought by the attorney general or district attorney. *Id*. Thus, once Defendants hold the scheduled hearing, Plaintiff will be removed, and his replacement will be sworn in immediately, as was in Mr. Martinez's case. Without an Order from this Court, Plaintiff will be irreparably harmed through his unlawful removal and unable to bring a lawsuit to seek redress for Defendants' unconstitutional conduct described herein.

This factor also weighs in Plaintiff's favor of granting the requested preliminary relief.

C. The Balance of Harms Strongly Favors Plaintiff

To prevent enforcement of an ordinance, plaintiff must show that the "threatened injuries outweigh any damage that the injunction" may cause to the municipality. *Perry,* 975 F. Supp. at 664 (enjoining enforcement of state law). There "is no harm from issuing a preliminary injunction that prevents the enforcement of a likely unconstitutional statute." *Id*. (citing *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)). "The degree of harm necessary decreases when the plaintiff demonstrates success on the merits." *Calmes v. United States*, 926 F. Supp. 582, 592 (N.D. Tex. 1996).

Unconstitutionally removing Plaintiff from his elected position as City Councilor through the ill-will of a few opposing councilmembers is a constitutional violation that demonstrates severe harm to our democratic institutions. Plaintiff and the public have a strong interest in Plaintiff's continued ability to maintain the office to which he was elected. The balance of harms in

preventing Defendants from unlawfully removing Plaintiff from his elected position favors Plaintiff.

D. Granting the Requested Injunction Will Not Disserve the Public

In this case, ordering the requested relief serves the public interest. "[I]t is in the public interest to override legislation that, as found here, infringes on an individual's federal constitutional rights." *Perry*, 975 F. Supp. at 665. "[T]he public interest is promoted by the robust enforcement of constitutional rights." *Id*. (quoting *Am. Freedom Def. Initiative v. Suburban 15 Mobility for Reg. Transp*., 698 F.3d 885, 896 (6th Cir. 2012)). Without a vote by the majority of council, not to include Plaintiff, the public won't even be able to make a public comment during the hearing to remove Plaintiff from his elected position. (Compl. at ¶ 94). Preventing an unconstitutional removal of Plaintiff from his elected position serves the public interest. This factor also weighs in Plaintiff's favor of granting the requested preliminary relief.

CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests this Court grant his requested relief. Alternatively, Plaintiff respectfully request that Court limit the defendants in their optional sanctions by not allowing them to forfeit Plaintiff Bradshaw's city council seat.

Respectfully Submitted,

EXCOLO LAW, PLLC

Dated: October 1, 2020

By: */s/ Solomon M. Radner*

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CERTIFICATE OF SERVICE

I hereby affirm that on this 1st day of October, 2020, that the foregoing document was filed with the Court's CM/ECF electronic filing system, and that a copy of said document was served upon all parties of record, via electronic service, as well as personally mailed to Defendants with Plaintiff's Verified Complaint.

/s/ Solomon M. Radner