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United States Court of Appeals
Tenth Circuit

August 23, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CRAIG HEDQUIST,

Plaintiff - Appellant,

v.

CHRIS WALSH; CITY OF CASPER,

Defendants - Appellees.

No. 18-8034
(D.C. No. 1:16-CV-00265-ABJ)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **LUCERO**, **BACHARACH**, and **McHUGH**, Circuit Judges.

This appeal turns on issues involving the Driver's Privacy Protection Act (18 U.S.C. § 2721 *et seq*.) and qualified immunity. The Act protects against someone obtaining protected driver records unless an exception applies. In the absence of an exception, liability would arise when someone obtains protected driver records.

In this case, the police chief in Casper, Wyoming (Mr. Chris Walsh) obtained Mr. Craig Hedquist's protected driver records. Mr. Hedquist sued

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* This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

the police chief and the City of Casper under the Driver's Privacy Protection Act,[1] and the district court granted summary judgment to both the police chief and the city.

The primary factual issue is why the police chief obtained these records. The summary-judgment evidence (when viewed in the light most favorable to Mr. Hedquist) shows that the police chief had acted with two purposes; one would be permissible, another impermissible. Thus, on summary judgment, we would ordinarily need to decide whether the police chief could incur liability by obtaining protected driver records when he had both permissible and impermissible purposes.

But even if the police chief would otherwise incur liability under the Driver's Privacy Protection Act, he would enjoy qualified immunity unless his conduct violated a clearly established statutory right. Any statutory violation here wouldn't be clearly established because no precedent exists on liability when one of the defendant's purposes is permissible under the Driver's Privacy Protection Act. Given the lack of precedent, the police chief enjoys qualified immunity. And Mr. Hedquist failed to adequately brief the issue of qualified immunity for the city. We thus affirm the grant of summary judgment to the police chief and the city.

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[1] Federal jurisdiction exists under 28 U.S.C. § 1331.

1. A feud within the city council leads the police chief to obtain Mr. Hedquist's protected driver records.

This appeal grew out of a feud between city leaders in Casper, Wyoming. The feud led the police chief to investigate where Mr. Hedquist resided. Residency mattered because Mr. Hedquist was a member of the city council, representing the city's Ward II. Given his representation of Ward II, he needed to reside there. Casper City Ord. 2.04.030; *see* note 3, below. In light of this requirement, he signed a sworn declaration stating the address of his residence. That address was in Ward II. If he had resided outside Ward II when becoming a candidate, he might have been guilty of a felony (false swearing). *See* Wyo. Stat. §§ 22-26-101(a), 108.

The police chief received reports indicating that Mr. Hedquist might have been residing outside Ward II. In light of these reports, the police stated under oath that he had investigated residency in order to determine whether Mr. Hedquist had committed the crime of false swearing. Mr. Hedquist disputes this purpose, alleging that the investigation was designed to oust him for political and personal reasons.[2]

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[2] In his opening brief, Mr. Hedquist states only that the police chief had a political purpose. In his reply brief, he alleges for the first time that the police chief was trying "to unseat a political rival." Appellant's Reply Br. at 13.

2. The police chief is entitled to qualified immunity.

The Driver's Privacy Protection Act restricts law-enforcement officers from obtaining protected records. 18 U.S.C. § 2722(a). To recover under the statute, Mr. Hedquist needed to prove three elements:

1. An official knowingly obtained personal information.
2. This personal information was obtained from a database drawing on state motor vehicle records.
3. The official acted with an impermissible purpose.

See id. (prohibiting individuals from obtaining protected information without a proper purpose); 18 U.S.C. § 2724(a) (creating a cause of action); *see also Taylor v. Acxiom Corp.*, 612 F.3d 325, 335 (5th Cir. 2010) (noting these elements). The third element is not met if the personal information was obtained for a permissible purpose, including a law-enforcement agency's execution of its functions. 18 U.S.C. § 2721(b)(1).

This appeal turns on qualified immunity based on the police chief's purposes in obtaining Mr. Hedquist's protected information. The evidence (when viewed favorably to Mr. Hedquist) shows that the police chief simultaneously had dual purposes: (1) a permissible purpose of carrying out a law-enforcement function by investigating a possible crime, *see* 18 U.S.C. § 2721(b)(1), and (2) an impermissible purpose of unseating a political rival for reasons unrelated to a legitimate investigation. Given the

lack of precedent involving dual purposes, a statutory violation wasn't clearly established.

A. We engage in de novo review to determine whether Mr. Hedquist satisfied his burden to overcome qualified immunity.

The appeal involves a ruling on summary judgment on qualified immunity, so we engage in de novo review. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). In conducting de novo review, "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)); *see also Thompson v. Salt Lake Cty.*, 584 F.3d 1304, 1312 (10th Cir. 2009) ("In determining whether the plaintiff has met its burden of establishing a constitutional violation that was clearly established, we will construe the facts in the light most favorable to the plaintiff as the nonmoving party."). We then consider whether this version of the evidence would entail the violation of a clearly established statutory right. *Gutierrez v. Cobos*, 841 F.3d 895, 900–01 (10th Cir. 2016).

B. Even when viewed favorably to Mr. Hedquist, the summary-judgment evidence shows that the police chief's purpose was at least partly to determine whether a crime (false swearing) had been committed.

For this inquiry, we view the evidence in the light most favorable to Mr. Hedquist. *Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226, 1231 (10th Cir. 2008).

On the third element of the claim, the police chief argues that he had a permissible purpose in obtaining the driver records. According to the police chief, he lawfully obtained the driver records to determine where Mr. Hedquist resided. In his briefs, Mr. Hedquist does not deny that the police chief was investigating residency.

But the parties disagree on why the police chief was investigating Mr. Hedquist's residency. The police chief testified that he was trying to determine whether Mr. Hedquist had committed the crime of false swearing by lying in a sworn declaration about where he resided. Mr. Hedquist disagrees, arguing that the purpose of investigating residency was to oust him for political and personal reasons unrelated to a legitimate investigation. *See, e.g.*, Appellant's App'x, vol. I, at 15; Oral Arg. at 7:12–9:22. When the summary-judgment evidence is viewed favorably to Mr. Hedquist, it shows that the police chief had both purposes.

The first, permissible purpose was to investigate the reports to the police (that Mr. Hedquist had been residing outside Ward II) in order to

determine whether he had lied in a sworn declaration. The police chief suspected that Mr. Hedquist had not been residing in Ward II, the ward that he represented in the city council. If Mr. Hedquist had falsely attested to residency in Ward II, he might have been guilty of false swearing. Wyo. Stat. §§ 22-26-101(a), 108.[3] So the statute allowed the police chief to obtain the protected driver records to investigate the possibility of a crime (false swearing). *See* 18 U.S.C. § 2721(b)(1) (exempting any government agency, including law enforcement, "in carrying out its functions").[4]

Mr. Hedquist points to a second, impermissible purpose: ousting him from the city council. To prove this purpose, Mr. Hedquist points to eight aspects of the evidence:

1. The police chief refused to obtain the protected driver records in 2012 because he believed that obtaining these records would

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[3] If he had moved outside the ward, the investigation could also have triggered litigation over Mr. Hedquist's disqualification from the city council. *See* Casper City Ord. 2.04.030 ("Councilmen shall be residents of the wards from which they are elected and if any councilman removes from the ward from which he/she is elected, his/her seat shall be declared vacant."); *see also* p. 3, above. The police chief contends that he obtained the information partly to determine whether Mr. Hedquist remained eligible for the city council. We need not address this contention.

[4] Mr. Hedquist argues that the police chief had no legal grounds to investigate his residency because the state criminal statute applies to candidates running for office, not government officials already serving in office. We are not persuaded. Mr. Hedquist identifies no provision of state law barring the police chief from investigating election-related conduct, and we have found no such provision. The police chief was authorized to investigate Mr. Hedquist's sworn statement about his residency because a lie could have constituted a crime.

have been unlawful. But he changed his mind in 2013 with little new evidence.

2. Before obtaining the protected driver records, the police chief had already obtained other information about Mr. Hedquist's residency.

3. The police chief could not remember why he had looked for information about Mr. Hedquist after saying that obtaining the information would have been unlawful.

4. The police chief testified inconsistently about why he had decided in 2013 to obtain the protected driver records.

5. In a recorded conversation, the police chief stated that he wanted to be vague, adding that he had found extensive information about Mr. Hedquist.

6. In the recorded call, the city manager told the police chief that a "final solution" would be desirable because Mr. Hedquist had "been raising hell."

7. In the recorded call, the police chief referred to Mr. Hedquist as a "wing nut" and suggested the possibility of some helpful ideas.

8. When a rumor circulated about the police chief's infidelity, he blamed Mr. Hedquist.[5]

Viewed in the light most favorable to Mr. Hedquist, this evidence suggests that the police chief was motivated at least in part by a political vendetta. This political vendetta focused on residency: If Mr. Hedquist had not resided in Ward II when becoming a candidate, he might be ousted

[5] Mr. Hedquist also points to the use of his name as a search query. But the police chief admits that he was specifically looking for information about Mr. Hedquist.

from office and guilty of false swearing. So the fact-finder could reasonably infer that the police chief was both

- carrying out a law-enforcement function by investigating the possibility of a crime involving false swearing and
- trying to instigate Mr. Hedquist's removal from the city council for political and personal reasons.[6]

Our dissenting colleague disagrees, arguing that the summary-judgment evidence could allow a reasonable finding that the police chief was not investigating the possibility of a crime. Dissent at 7. For this argument, the dissent relies on evidence that the police chief lacked credibility. *Id.*[7] But Mr. Hedquist "must do more than merely assert that

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[6] The police chief obtained the protected driver records only after reviewing other records bearing on Mr. Hedquist's residency. Mr. Hedquist contends that the other records were less expansive. We need not decide whether the unprotected documents would have sufficed. Even with the prior access to other records, any reasonable fact-finder would infer that the police chief obtained the protected records at least in part to investigate whether Mr. Hedquist had submitted a false declaration as to his residency. *See* pp. 6–7, above.

[7] Our dissenting colleague disputes that the evidence in question relates to credibility. As an example, he points to the police chief's changes in testimony over the course of multiple depositions. For these changes, however, the *only* possible relevance would involve credibility. *See United States v. Lemon*, 497 F.2d 854, 857 (10th Cir. 1974) (stating that prior inconsistent statements "are admissible solely for purposes of impeachment"); *United States v. Eaton*, 485 F.2d 102, 104–05 (10th Cir. 1973) (stating that prior inconsistent statements "are admissible only to impeach or discredit the witness"). So the prior inconsistent statements did not constitute the affirmative evidence required to defeat summary judgment. *See Nat. Am. Ins. Co. v. Am. Re-Ins. Co.*, 358 F.3d 736, 742 (10th Cir. 2004) ("Standing alone, attacks on the credibility of evidence offered by a summary judgment movant do not warrant denial of a

the jury might disbelieve the testimony of [the police chief]; [he] must present [his] own affirmative evidence of those facts which are contradicted by the interested testimony." *Helget v. City of Hays, Kansas*, 844 F.3d 1216, 1223 n.3 (10th Cir. 2017) (quoting *Wood v. Handy & Harman Co.*, 318 F. App'x. 602, 606–07 (10th Cir. 2008) (unpublished)); *see also Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) ("[I]f the defendant-official has made a properly supported motion, the plaintiff may not respond simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive." (footnote omitted)).

Mr. Hedquist has not satisfied this requirement with his evidence impugning the police chief's credibility. Apart from this attack on the police chief's credibility, nothing rebuts the police chief's testimony that he was investigating residency to determine whether Mr. Hedquist had committed a crime. The police chief might have hoped that the investigation into residency would lead to Mr. Hedquist's removal from the

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summary judgment motion."); *accord Santos v. Murdock*, 243 F.3d 681, 683–84 (2d Cir. 2001) (per curiam) (holding that an affidavit was admissible only for impeachment as a prior inconsistent statement, so it could not be used to oppose summary judgment); *see also* pp. 9–10, below.

city council. But the possibility of a crime was unquestionably part of the police chief's focus.

C. Acting with proper and improper purposes would not violate a clearly established statutory right.

As discussed above, the plaintiff's evidence (when viewed in the light most favorable to him) indicates that the police chief was not only carrying out a law-enforcement function by investigating a possible crime but also trying to engineer Mr. Hedquist's ouster from the city council for political and personal reasons. When viewed in Mr. Hedquist's favor, the record indicates that the police chief would have had dual purposes, one permissible (carrying out a law-enforcement function by investigating a possible crime) and the other impermissible (trying to unseat a political opponent). With dual purposes, the police chief would enjoy qualified immunity unless he had violated a clearly established statutory right. *Cummings v. Dean*, 913 F.3d 1227, 1239 (10th Cir. 2019). A statutory violation is ordinarily clearly established only if a precedent renders the violation undebatable. *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

Neither the Supreme Court nor our court has decided whether someone can lawfully obtain protected records under the Driver's Privacy Protection Act when at least one purpose is permissible.[8] Given the lack of

[8] In *Maracich v. Spears*, the Supreme Court held that an attorney's solicitation of prospective clients falls outside the scope of the exception for use in connection with anticipated litigation. 570 U.S. 48, 71 (2013). In

applicable precedent or weighty authority elsewhere, we would ordinarily decline to regard a statutory violation as clearly established.

Mr. Hedquist contends that the face of the statute was enough to clearly establish the illegality of the police chief's conduct. The statute provides:

> [Protected driving information] may be disclosed as follows:
>
> (1) For use by any government agency, including any court or law-enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

18 U.S.C. § 2721(b)(1). This language is broad, stating that law-enforcement officers "may" disclose protected driving information in carrying out law-enforcement functions. *See Koss v. Hunt*, 983 F. Supp. 2d 1121, 1123 (D. Minn. 2013) (stating that § 2721(b) "uses broad language in allowing for the use of data by a government agency 'in carrying out its functions'"); *see also Senne v. Vill. of Palatine, Ill.*, 695 F.3d 597, 608

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reaching this holding, the Supreme Court explained that when a communication might serve multiple purposes, the test is which purpose predominated. *Id.* at 72. But the Supreme Court expressly declined to decide whether the same result would apply under the exception for government functions (which includes use by law-enforcement agencies in carrying out their investigations). *Id.* at 78. Given the Supreme Court's reservation of a decision under the exception for law-enforcement functions, *Maracich* did not clearly alert the police chief to a statutory violation based on which of his purposes predominated. *See Gutierrez v. Cobos*, 841 F.3d 895, 904 (10th Cir. 2016) (concluding that the defendant was entitled to qualified immunity in part because the Supreme Court had "pointedly declined to express any view" on the underlying issue).

(7th Cir. 2012) ("[T]he legislative history reflects the view that law enforcement has a legitimate need for information contained in state records and the authority to use that information to effectuate the purposes identified in the [Driver's Privacy Protection Act] without fear of liability.").

We must apply this broad statutory language to Mr. Hedquist's evidence, which suggests that the police chief wanted not only to investigate a possible crime but also to spur Mr. Hedquist's removal from the city council for political and personal reasons. If a law-enforcement officer has a permissible purpose, the statutory language does not restrict access to protected information if the officer also has an impermissible purpose. Thus, the statutory language would not have alerted the police chief to a violation.

Nor could the police chief obtain meaningful guidance from the case law: neither we nor any federal court has ever said in a published opinion that an officer must refrain from obtaining protected driving information for the permissible purpose of carrying out a law-enforcement function if the officer also has an impermissible purpose. *See Foy v. Holston*, 94 F.3d 1528, 1534 (11th Cir. 1996) ("That state officials can be motivated, in part, by a dislike or hostility toward a certain protected class to which a citizen belongs and still act lawfully is . . . well established."). Thus, the police chief would enjoy qualified immunity when investigating residency

for a possible crime even if he had also hoped to unseat Mr. Hedquist. *See Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1297 (11th Cir. 2002) (holding that a police chief enjoyed qualified immunity for a firing if he had a lawful motive even if he also had an improper motive).

D. The possibility of an impermissible purpose does not preclude eligibility for qualified immunity.

Mr. Hedquist contends that qualified immunity is unavailable upon proof of an impermissible purpose. We are not sure how to read this contention. Two possibilities exist:

1. Qualified immunity was unavailable because obtaining protected records for an impermissible purpose would clearly violate the Act.

2. Qualified immunity is unavailable whenever a public official has an impermissible purpose.

If Mr. Hedquist is making the first argument, it would fail based on the absence of a clearly established statutory violation. When purpose is an element of the claim, we assess the defendant's purpose by viewing the evidence in the light most favorable to the plaintiff. *See, e.g.*, *Langley v. Adams Cty., Colo.*, 987 F.2d 1473, 1476, 1479 (10th Cir. 1993). If we view the evidence favorably to Mr. Hedquist, we would regard one of the police chief's purposes as permissible (investigating a possible crime) and another purpose as impermissible (unseating a political rival). As discussed above, this view of the evidence would entitle the police chief to qualified immunity based on our lack of precedent involving liability under

the Driver's Privacy Protection Act when the defendant bears dual purposes.

But Mr. Hedquist may be going further. (We can't tell.) He might be arguing that the existence of any improper purpose would always preclude eligibility for qualified immunity. If this is Mr. Hedquist's argument, he forfeited it by failing to present it in district court. *See Wright v. Experian Info. Solutions, Inc.*, 805 F.3d 1232, 1244 n.6 (10th Cir. 2015) ("The rule that an issue not raised to the district court is forfeited 'is particularly apt when dealing with an appeal from a grant of summary judgment because the material facts are not in dispute and the trial judge considers only opposing legal theories.'" (citing *Tele-Commc'ns, Inc. v. Comm'r of Internal Revenue*, 104 F.3d 1229, 1232 (10th Cir. 1997))). Given this forfeiture, we decline to consider whether the district court erred by failing to consider this legal theory.

* * *

Mr. Hedquist's evidence, when viewed in his favor, would indicate that the police chief was trying both to investigate a possible crime and to instigate the removal of a political opponent. One purpose was permissible, the other wasn't; and we lack precedent or meaningful other guidance on liability under the Driver's Privacy Protection Act when the defendant obtains protected driver records for both permissible and impermissible purposes. Given the absence of meaningful guidance, any statutory

violation by the police chief would not have been clearly established. The police chief thus enjoys qualified immunity, and we affirm his award of summary judgment.

3. Mr. Hedquist did not adequately brief the city's entitlement to qualified immunity.

The district court granted qualified immunity to the "Defendants," which include the City of Casper. Appellant's Opening Br., Addendum at 14. Mr. Hedquist argues that cities are not entitled to qualified immunity. But in his opening appeal brief, Mr. Hedquist did not question the city's entitlement to qualified immunity. He instead

- raised the possibility of an argument in two stray sentences in his summary of argument and
- observed in a footnote that "[t]he district court's failure to provide any basis for dismissing the municipal defendant may merit automatic remand."

Appellant's Opening Br. at 10 & n.1.

These cursory statements did not adequately challenge the city's entitlement to qualified immunity. *See Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1031 (10th Cir. 2007) (holding that a short discussion in the "Introduction to Argument" section did not adequately present an issue for appellate review); *Echo Acceptance Corp. v. Household Retail Servs., Inc.*, 267 F.3d 1068, 1077 n.5 (10th Cir. 2001) (stating that a conclusory assertion in a footnote did not constitute adequate briefing). And Mr. Hedquist acknowledged in his reply brief that

these two sentences had "not [been] intended to raise an unbriefed and undecided issue." Appellant's Reply Br. at 9.

He also urges remand based on the district court's failure to say why the city was entitled to summary judgment. But this contention was raised too late. *See Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1236 n.2 (10th Cir. 2016) (concluding that the appellants' assertion of a new challenge in their reply brief was too late). Because Mr. Hedquist failed to adequately brief these arguments in his opening brief, we decline to consider them.

Mr. Hedquist contends that the lack of discussion leaves part of the district court's ruling unexplained. But we do not typically conduct sua sponte inquiries into the sufficiency of a district court's explanation. *See Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1227 (10th Cir. 2015) ("We are not . . . in the business of making arguments for the parties.").[9] We instead depend on the appellant to frame the issues for us. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of

[9] We occasionally consider the possibility of reversing based on arguments that we have raised sua sponte. *See United States v. Tee*, 881 F.3d 1258, 1269 (10th Cir. 2018) ("In a few civil appeals, we have raised grounds sua sponte to reverse."). But these instances are rare, and we reverse sua sponte "only when the circumstances are exceptional and the parties are given an opportunity to address the issues raised by our court." *Id.* These exceptional circumstances are absent here.

matters the parties present."); *see also United States v. Burkholder*, 816 F.3d 607, 620 n.11 (10th Cir. 2016) ("In our adversary, common-law system, courts properly answer only the questions that the parties present to them and that are necessary for the resolution of the case at hand."). Given Mr. Hedquist's framing of the issues, we lack any meaningful basis to review the district court's award of summary judgment to the city. We thus affirm this part of the ruling.

Entered for the Court

Robert E. Bacharach
Circuit Judge

18-8034, Hedquist v. Walsh

LUCERO, J., dissenting.

Deception is a complicated matter. Fortunately, credibility is not in our bailiwick. That is for jurors to decide with a witness on the stand, looking each other in the eye, questioned by competent counsel in adversarial proceedings. My dispute with my colleagues in this case arises from a credibility issue. We all agree that the undisputed evidence shows that Casper Police Chief Chris Walsh was acting with one plainly impermissible purpose in pursuing a "political vendetta." (Majority Op. 8.) He was trying to dig up political dirt by accessing the driver record of plaintiff Craig Hedquist in July 2013. So far so good. But on contested evidence, my colleagues accept the proposition that Walsh was searching, at least in part, for information about Hedquist's residency. (Id. at 10.) I do not think it proper for us to make that determination on disputed material evidence on point.

Walsh was deposed on three occasions. In his first deposition, he testified that City Manager John Patterson asked him to conduct a search of Hedquist's driver record in fall 2012 over concern Hedquist was living outside of his Ward. Walsh swore under oath that he "couldn't do it, and the conversation didn't go any further." In the same deposition, he was asked if this subject "came up again" and responded that it did not. A jury, at trial, can well accept that some or all of the testimony of the first deposition is true, in which event it logically follows, given that residency was not Walsh's concern in 2013, that the only purpose of accessing Hedquists's record was digging up political dirt. The matter is a bit more complicated, however, because in his second and third

depositions Walsh contradicted himself and claimed that his 2013 search was to determine residency. That creates a material conflict in the evidence. I choose not to resolve the conflict. My colleagues, however, choose to accept the latter testimony and reject the former. It is not in our office to resolve such an evidentiary dispute. I choose not to do so and would leave it to a jury.

The Majority Opinion characterizes my concern about the material dispute in Walsh's testimony as a general concern about his credibility. (Id. at 9-10 & n.7.) Respectfully, I cannot accept that mischaracterization. Contrary to the Majority's assertion that "nothing rebuts the police chief's testimony that he was investigating residency," (id. at 10), Walsh himself testified the subject of Hedquist's residency never came up in the summer of 2013. With such a clear and material dispute in the two versions of events, we should not be choosing the narrative that better fits our conclusion. A jury could well choose to believe that Walsh was telling the truth the first time he was placed under oath, and only chose to rationalize his testimony when he felt the noose of the consequence of his first and truthful testimony tightening. Accordingly, I respectfully dissent.

I

Hedquist's Driver's Privacy Protection Act ("DPPA") claims arose following discovery in a separate lawsuit he filed relating to his time on the Casper City Council. See Hedquist v. Beamer, No. 17-8036, 2019 WL 588592 (10th Cir. Feb. 13, 2019) (unpublished). Walsh was deposed on three separate occasions over the course of the

two cases. At the first deposition, in June 2015, Walsh denied ever having checked Hedquist's driver record. Given the importance of this testimony, I reproduce it here:

> Q. Let me ask you about license plates. Did [City Manager John] Patterson ever ask you to run a license plate on Mr. Hedquist?
> A. Yes. And to give you a time frame is it would have been around the election time, and I just can't tell you if it was prior or post formal election.
> Q. General—general election, you probably had to wear a coat?
> A. Yes.
> Q. Okay. So just tell us about that conversation. What do you remember?
> A. There was some question on whether or not Hedquist was living within his ward or outside his ward, and could I run a license plate at the house where people had seen his vehicle. And told him I couldn't do it, and the conversation didn't go any further.
> Q. And did that take place all during one conversation, or did you get back to it?
> . . . .
> A. No. I believe that was all just one conversation.
> Q. . . . Okay. And was that the only request that Mr. Patterson made?
> A. Of me?
> Q. For—for Mr. Hedquist.
> A. Yes.
> Q. And it never came up again?
> A. No.
> Q. Were you ever asked to run any other license plates by Mr. Patterson?
> A. No.
> Q. Did any city council members ask you to run license plates for them?
> A. No. . . .

To summarize Walsh's initial testimony: Patterson requested a license plate check based on concerns about Hedquist's residency in fall 2012, Walsh declined to conduct a search, and the topic "never came up again."

We do not know whether Walsh's testimony on the why is false, but we do know there is no material dispute on the second proposition that a search was conducted. There is a phone recording between Walsh and Paterson regarding the search. And there are logs showing searches were conducted in the fall of 2012 and the summer of 2013.

After phone recordings were disclosed, Walsh was deposed a second time in March 2016. When confronted with a recorded call between himself and Patterson from August 2013, Walsh suddenly remembered that he had conducted a search of Hedquist's driver record in a "TLO database" around that time. He claimed Patterson had requested such an investigation in the summer of 2013.

Walsh then sat for a third deposition in January 2018, at which he was shown records indicating he had searched Hedquist's driver record in July 2013. At that time he claimed that Patterson, the mayor, and an unidentified City Council member all expressed concerns to him that Hedquist might be living in a Council Ward other than the one he represented. Walsh also submitted an affidavit to the same effect. Yet he struggled to explain why that search was permissible after having claimed a similar search would have been impermissible when requested in fall 2012.[1] Walsh stated that there was "more information" the second time around, but the only evidence he identified was the alleged fact that Hedquist's vehicle had been seen parked in front of a home—the same information he received the year prior.

In addition to Walsh's contradictory testimony, the record contains a recorded phone call between Patterson and Walsh shortly after the search at issue occurred. Neither man addresses the question of whether Hedquist might be living in a different Ward. Walsh opens the conversation by stating he "wanted to be a little bit vague." He

[1] The record demonstrates that Walsh did in fact conduct a search of Hedquist's information in fall 2012. However, that search, conducted in a database referred to as "Spillman," does not contain records protected by the DPPA. Walsh was unable to explain why that search was conducted.

tells Patterson that he would "put all this together . . . get it to you and we can see what you find [to] use." After Patterson explains that Hedquist has been "raising hell" and it would be nice to have a "final solution," Walsh responds that Hedquist is "a wing nut" and that Walsh has "some ideas . . . that might be helpful." Walsh explains that he has a "mountain of stuff" on Hedquist including "past and present house, land purchases, [and] associations," and that he would follow up once he organized it.

I do not quarrel with my colleagues' assertion that Walsh could have been looking for evidence of residency as requested. The problem with the Majority's thesis is that it is no more a possible explanation than the one consistent with the potentially truthful and material testimony of the first deposition which is to the contrary. Again, we should not pick and choose which version we prefer.

II

The DPPA regulates the disclosure of personal information contained in state driver record databases. It provides that "[a] person who knowingly obtains, discloses, or uses [such information] for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains . . . ." 18 U.S.C. § 2724(a). The statute identifies fourteen "permissible uses" for personal information and four permitted uses for "highly restricted personal information," which includes social security numbers (included in the TLO report at issue here). § 2721(a)(2), (b). My colleagues in the Majority rely on the law enforcement exception for the July 2013 search conducted by Walsh, which permits a search "[f]or use by any government agency, including any court

or law enforcement agency, in carrying out its functions." § 2721(b)(1); (see Majority Op. 4, 7.)

If Walsh were truly looking into whether Hedquist lived in the proper Ward, his investigation might arguably fit within this purpose.[2] But to reach the conclusion that Walsh was interested in residency, the Majority necessarily relies on the self-serving testimony Walsh provided in his second and third depositions. We view the summary judgment evidence in the light most favorable to the non-moving party. Copelin-Brown v. N.M. State Pers. Office, 399 F.3d 1248, 1253 (10th Cir. 2005). I acknowledge that even with that standard, a DPPA plaintiff must offer more than "sheer conjecture rooted solely in the blanket allegations of misconduct." McDonough v. Anoka Cty., 799 F.3d 931, 949 (8th Cir. 2015). But it seems to me that Hedquist has provided much more than mere speculation.

Walsh testified in his first deposition that Patterson approached him on a single occasion in fall 2012 to request an investigation of Hedquist's residency, and that "it never came up again." We know that Walsh did not testify truthfully in that deposition. He denied having conducted a search when Patterson first approached him, only later conceding he did so. But the jury could well find, based on Walsh's own testimony, that the residency issue did not come up in the summer of 2013 when he conducted a search

[2] Walsh also relied on another exception, applicable to searches "[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process [or] investigation in anticipation of litigation." § 2721(b)(4). The same factual basis for rejecting reliance on the law enforcement exception applies equally to this subsection.

of the TLO database. I agree with the Majority that Hedquist was required to present "affirmative evidence of those facts which are contradicted by the interested testimony." (Majority Op. 10 (quoting Helget v. City of Hays, Kansas, 844 F.3d 1216, 1223 n.3 (10th Cir. 2017)).) He has done so by highlighting Walsh's testimony in his first deposition that residency concerns did not arise in the summer of 2013.

The Majority opinion declares that "the only possible relevance" of Walsh's first deposition testimony "would involve credibility." (Majority Op. 9 n.7.) This declaration is incorrect. To resolve this appeal in favor of Walsh, the Majority relies on a single material fact: its finding that Walsh was searching in part for residency information when he accessed the TLO database in July 2013. But Walsh testified in his first deposition that concerns Hedquist's residency were not present in the summer of 2013. Based on that testimony, a jury could conclude that the sole basis for that search was Patterson and Walsh's desire to find ammunition for attacking a political opponent, and that the residency concern was invented later as a cover for the search. That reading is supported by a recorded call between the two shortly after the search, in which Walsh insults Hedquist and states that he has "some ideas . . . that might be helpful" to Patterson in finding a "final solution" to their Hedquist problem.

A jury could find that Walsh conducted the search for the sole impermissible purpose of harassing a political adversary, in which case he would not be entitled to qualified immunity. Although courts generally should not "define clearly established law at a high level of generality," Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011), "there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently

clear even though existing precedent does not address similar circumstances," District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) (quotation omitted). And "the words of the pertinent federal statute . . . in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the total absence of case law." Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002) (italics omitted).

There is no straight-faced argument to be made that rummaging through the driver record of a political opponent in hopes of finding damaging information fits within one of the DPPA's permitted purposes. See § 2721(a)(2), (b). In Collier v. Dickinson, 477 F.3d 1306 (11th Cir. 2007), the Eleventh Circuit held that "[t]he words of the DPPA alone are specific enough to establish clearly the law" in a case involving the selling of driver data to mass marketers. Id. at 1312. That court has since stated that the DPPA will not make every violation a clearly established one. See Watts v. City of Miami, 679 F. App'x 806, 809 (11th Cir. 2017) (unpublished). But as in Collier, any reasonable officer would understand, merely under the text of the statute, that a search done for the purpose of political harassment is impermissible. See Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (the relevant inquiry is whether it would be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right").

III

Upon a proper view of the record, a jury could find that Walsh's conduct was plainly abusive and plainly violated the DPPA. The trial court granted summary judgment favoring the City of Casper on its determination that there was a lack of

showing of a statutory violation and did not engage in the vicarious liability analysis. I would also reverse the entry of summary judgment in favor of the City. Accordingly, I respectfully dissent.