IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

JESUS GONZALEZ

Plaintiff, Case No. 09CV0384

v.

VILLAGE OF WEST MILWAUKEE,
CHARLES DONOVAN,
PATRICK KRAFCHECK,
CITY OF CHILTON, and
MICHAEL YOUNG,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY VILLAGE OF WEST MILWAUKEE, CHARLES DONOVAN, PATRICK KRAFCHECK, CITY OF CHILTON and MICHAEL YOUNG

Village of West Milwaukee, Charles Donovan, Patrick Krafcheck, City of Chilton, and Michael Young, by their attorneys, Crivello Carlson, s.c., submit the following Brief in support of their Motion for Summary Judgment.

FACTUAL BACKGROUND

I. Introduction

Jesus Gonzalez filed this action under 42 U.S.C. § 1983 alleging that the Village of West Milwaukee and its police officers Charles Donovan and Patrick Krafcheck and City of Chilton and its police officer Michael Young violated the Fourth and Fourteenth Amendment during the officers' detention of him for openly carrying a firearm within a retail store, specifically a West Milwaukee Menards on May 14, 2008 and a Chilton Wal-Mart on April 10, 2009. **Complaint ¶**

1. Gonzalez also alleges that the West Milwaukee Defendants violated the Privacy Act by requesting his social security number during the booking process. ***Id***.

Depositions have been taken in this case of the parties and most witnesses. Plaintiff has not named experts. Plaintiff has submitted initial disclosures that do not elaborate on his claims and offer only brief allegations about his damages; nothing in the initial disclosures elaborates on the Privacy Act claim. **See Affidavit of Bitar, Exh. 9**. The record in this case also includes, among other exhibits, Gonzalez's admissions on a website called "OpenCarry.com" where he admittedly posts under the user name of "Parabellum," which means "if you seek peace, prepare for war." **Gonzalez Dep. p. 20-21**.

II. Gonzalez's Advocating for the Right to "Openly Carry" a Firearm

Gonzalez admits that he was the first to "open carry" his firearm into retail stores like the West Milwaukee Menards or the Chilton Wal-Mart, particularly in Milwaukee where he was "going to lead the open carry charge":

> Q. Prior to you walking into the Menards in West Milwaukee or the Wal-Mart in Chilton, had you ever done any type of research to determine whether or not people were carrying firearms into those particular stores?
>
> A I was -- when I started carrying, I was already under the assumption that nobody carried their firearm openly in the state of Wisconsin.

Gonzalez Dep. p. 66-67, 143. Gonzalez posted about his intent to open carry in Milwaukee:

> Q. We've marked as Exhibit 12 an Open Carry forum topic on the subject of "Intent to Open Carry in Milwaukee." Am I reading that correctly?
>
> A You are.
>
> Q And this is a forum topic that you began, correct?
>
> A It is.
>
> Q And it looks like you posted it sometime about May 4th, 2008, at about 1 o'clock in the morning, correct?

A Yes.

Q In your first paragraph you say, "Hi, I'm new to these forums as a member but have been coming here as a guest for some time. I've noticed that there seems to be no one in Milwaukee willing to get the OC started, but I was never one to wait for others. So I am going to start open carrying around Milwaukee County, in particular, the city of Milwaukee. I'm a 6 foot 3, 280-pound Hispanic male with very long hair and a big beard (almost no mustache, weird). I almost always wear black and I always, without fail, wear either a big black leather coat, black hooded sweater, or black windbreaker." Am I reading that correctly?

A You are.

Q So when you posted this, as you've indicated here, you were going to get the OC started, correct?

A Yes.

Q And OC means open carry, correct?

A Open carry, yes.

Q And so you were going to lead the charge; fair to say?

A Yes.

Gonzalez Dep. p. 67-68. Gonzalez also acknowledged that he is not "one to wait for others" and that his approach may have ran contrary to those of other open carry advocates:

Q. You say that you were never one to wait for others, correct?

A Yes.

Q You say in this post, "I've decided only to go to places that have an entrance from their parking lot as it is considered private property and is exempt from the school zone restriction. Please note that I have read a lot of your posts and understand that my attire and way of grooming are not what you would advise, but I don't believe I should be dressed in a certain way to exercise my right to bear arms. I'll keep adding to this post as things happen or don't happen. . ." Is that a fair reading?

A It is.

Gonzalez Dep. p. 68-69.

Prior to these events Gonzalez did not speak with or seek permission from the West Milwaukee Menards or the Chilton Wal-Mart employees or managers about whether or not he could openly carrying a firearm into their store. **Gonzalez Dep. p. 65**. "I do not request permission to carry anywhere." ***Id***.

Prior to the events in this lawsuit, Gonzalez had never seen any type of communications from the West Milwaukee Police Department, Chilton Police Department or any Milwaukee County law enforcement department regarding the firearm laws or the open carry laws. **Gonzalez Dep. p. 51**.

The West Milwaukee incident was the first of its kind. **Gonzalez Dep. p. 12**. The second incident was the Chilton incident. ***Id***. Since then, he has openly carried his firearm in both Chilton and West Milwaukee without incident.[1]

Gonzalez has never sent any communications to any law enforcement department regarding the right to carry his firearms. **Gonzalez Dep. p. 27**. "I don't ask police officers about matters of law. They obviously don't know." ***Id*. p. 37**. Nevertheless, he agrees that fellow members of his open carry organization communicate with their local law enforcement about their firearm rights.

[1] During the summer 2009, Gonzalez said he was "slightly detained" at an IHOP restaurant by the West Milwaukee Police Department. **Gonzalez Dep. p. p. 13**. He explained that security at the IHOP attempted to detain him and some of his friends who were openly carrying. ***Id*. p. 14**. He believes that security may have called the police when they walked into the restaurant, but he does not know for sure. ***Id*. p. 15**. As he was explaining their conduct with security and handing them a pamphlet about "the most relevant firearm statutes," police officers arrived at the restaurant. ***Id*. p. 14-15**. By the time the officers arrived, his group was outside. ***Id*** The officers approached him, but he did not "say much." ***Id***. ***Id*. p. 15**. He refused to give him them his name because "they had no reason to detain me." ***Id***. After the officers discussed the situation "amongst themselves," they returned and told them to leave. ***Id*. p. 17, 20**. More recently, Gonzelaz again "openly carried" his firearm in the Chilton Wal-Mart but without incident. **Fairchild Dep. p. 35-36**.

Id. Gonzalez has encouraged other firearm advocates to send letters to law enforcement about clarification of their right to open carry under various circumstances. ***Id*. p. 46**.

III. The Developing Scope of the Right to Carry a Firearm in Wisconsin

Wisconsin's right to "keep and bear arms," under Article I, Sec. 25 of the Wisconsin Constitution, became part of the Wisconsin Constitution on November 30, 1998. Gonzalez understands that Wisconsin citizens have divergent views about the open carry issue and that the interplay between the right to carry a firearm and the disorderly conduct statute is unclear. **Gonzalez Dep. p. 51-52**. After the events in the West Milwaukee Menards and the Chilton Wal-Mart, Gonzalez drafted a pamphlet about Wisconsin Firearms laws which included his own commentary that the interplay between disorderly conduct and openly carrying "has never been tried in any court of law in Wisconsin." ***Id*. p. 62-63; Aff. Bitar, Exh. 4 -5**. Indeed, during his deposition, Officer Young volunteered: "I think the whole reason why we're here is this area of the law is kind of a gray area… as to what the limitations are because it hasn't been set by the courts or the government as to what the exact limitations are." **Young Dep. p. 79-80**.

Prior to the event at Menards, Gonzalez posted that he is "not afraid of a court battle." **Gonzalez Dep. p. 118-119**. Some of his fellow members warned him to "get a lawyer." ***Id*. p. 119**. Gonzalez understood that his conduct fell in a gray area; other statutes may "come into play" when someone is carrying a firearm. ***Id*. p. 119-120**. Indeed, Gonzalez acknowledged reading Wisconsin Legislative Reference Bureau Brief No. 00-11 which stated: "Wisconsin law does not specifically prohibit the open carrying of loaded or unloaded firearms in public, but a person doing so *may risk being arrested and charged with disorderly conduct, on the ground that the display threatens the public peace or safety*." ***Id*. p. 121** (emphasis added). **See also Aff. Bitar, Exh. 7**.

Gonzalez agrees that there are a number of Wisconsin statutes regarding firearms. **Gonzalez Dep. p. 26**. The words "open carry" do not appear anywhere in the Wisconsin Constitution or Wisconsin Statutes. ***Id*. p. 70**.

Nevertheless, Gonzalez is part of a movement that defines the Second Amended differently, including seeking to withdraw limitations on carrying firearms in school zones and vehicles. **Gonzalez Dep. p. 174**. Gonzalez believes that there should be no limitations, restrictions or qualifications on the right to bear arms under the Second Amendment. ***Id*. p. 176**. Gonzalez believes that the Wisconsin Amendment is narrower than the Second Amendment. ***Id*. p. 177**.

Gonzalez believes that openly carrying a weapon without concealment is never illegal even if that carry results in conduct that tends to cause or provoke a disturbance. **Gonzalez Dep. p. 28-29**. Although other people disagree with that interpretation and believe that disorderly conduct can result from carrying a firearm, he believes that openly carrying a firearm cannot be disorderly conduct "because it's constitutionally protected" and "rises above the requirements of the disorderly conduct statute." ***Id*.** Nevertheless, he agrees that an officer could arrest an individual for disorderly conduct if they are armed and being disorderly. ***Id*. p. 185**.

On April 20, 2009, the Wisconsin Attorney General issued an Advisory Memorandum to Wisconsin District Attorneys after the commencement of this lawsuit about the interplay between the right to carry and the disorderly conduct statute. **Gonzalez Dep. p. 30-31**. The Memorandum stated that "[t]he Wisconsin Department of Justice … believes that the mere open carrying of a firearm by a person, absent additional facts and circumstances, should not result in a disorderly conduct charge from a persecutor." **Aff. Bitar, Exh. 6(a) (Advisory Memorandum ¶ 1)**. "The

decision to charge a defendant with disorderly conduct necessarily depends on the totality of the circumstances. Reasonableness, not bright-line rules, should guide your decision." ***Id.* (¶ 5)**. "Even when an act facially resembles the exercise of a protected right, the facts and circumstances of a case may give rise to a disorderly conduct charge." ***Id***. Moreover, "we recognize that under certain circumstances, openly carrying a firearm may contribute to a disorderly conduct charge." ***Id.* (¶ 6)**. The Attorney General provided an example:

> [A]s illustrated by a recent municipal court case in West Allis, a person openly carrying a holstered handgun on his own property while doing lawn work should not face a disorderly conduct charge. If, however, a person brandishes a handgun in public, the conduct may lose it constitutional protection. Again, "[i]t is the combination of conduct and circumstances that is crucial in applying the [disorderly conduct] statute to a particular situation."

***Id.* (¶ 7)**. "Finally, several law enforcement agencies have asked whether, in light of Article I, § 25, they may stop a person openly carrying a firearm in public to investigate possible criminal activity, including disorderly conduct. We say yes." ***Id.* (¶ 8)**.

Gonzalez himself is unsure of the state of the law. He says the Attorney General's Advisory Memorandum "has no force of law." **Gonzalez Dep. p. 31**. Yet, he also says that oral argument by attorneys before the Wisconsin Supreme Court in cases involving the interplay between the 1998 constitutional amendment and the concealed carry statutes have the force of law. ***Id.* p. 22-23**. Gonzalez believes that the Attorney General has failed to "clearly define the contours" of the interplay between open carrying a firearm and the disorderly conduct statute. ***Id.* p. 39**.[2]

In addition to the Attorney General's Advisory Memorandum, other Wisconsin authorities have issued statements providing their views on the interplay between the Wisconsin Constitutional

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[2] Gonzalez believes the Attorney General made the "mistake of allowing officers to think that they still have the power to violate the Fourth and Fifth Amendments, …" **Gonzalez Dep. at p. 8**. He believes that that Advisory Memorandum is wrong to consider that a firearm is a factor in determining disorderly conduct. ***Id.* p. 184-185**. Gonzalez is not aware whether any individual or groups have sent any communications to the Attorney General asking for clarification of the Advisory Memorandum. ***Id.* p. 41, 42-43**. Gonzalez has never sent the Attorney General any type of communication regarding the Advisory Memorandum. ***Id.* p. 36, 42**.

provision granting the right to "bear arms" and the disorderly conduct statute. For instance, the Milwaukee Police Department issued a "Training Bulletin" which reminded officers about the limited nature of the Advisory Memorandum. "[The Attorney General's Advisory Memorandum] does not mean that officers are restricted from their responsibility to stop, investigate, and determine whether a person carrying an open firearm is doing so legally." **Aff. Bitar, Exh. 6(b) (Training Bulletin p. 1)**. "The circumstances of the situation may rise to the level of disorderly conduct based on articulable facts that you as a law enforcement officer will need to document in any arrest you make for disorderly conduct." ***Id***. The Milwaukee Police Department Chief of Police also reminded his officers that "there are numerous Wisconsin statutes that are not affected by [the Attorney General's] Advisory Memorandum …" ***Id***. The Sheboygan County District Attorney has also issued his own interpretation. **Aff. Bitar, Exh. 6(c)**.

Gonzalez wants this Court to "put it out that it's constitutionally protected; the disorderly conduct statute is too vague; it encompasses all sorts of other protected conduct but that conduct is permissible because it's protected." **Gonzalez Dep. p. 54**. "So open carry, because it's protected should be beyond the reach of disorderly conduct, at least by itself." ***Id.*** Gonzalez wants a decision from this Court that tracks the Attorney General's Advisory Memorandum. ***Id.* p. 55**. "I would just hope that it would be better understood by the law enforcement." ***Id***. As another example of possible future litigation, open carry members have some confusion about the firearm regulations in state forests, so Gonzalez has advocated filing a declaratory judgment to question its validity. ***Id.* p. 56**.

IV. Incident at West Milwaukee Menards

On May 14, 2008, Gonzalez and his brother went to Menards in West Milwaukee for some bricks and river rocks. **Gonzalez Dep. p. 70**. The West Milwaukee Menards is located

about 1 mile south of Miller Park on Miller Park Way. **Jensen Dep. p. 8**. The Menards is not located in a high-crime type area. **McCloy Dep. p. 9**. It is surrounded by a mix of retail, commercial and residential. ***Id.* p. 8**. Other than shoplifting incidents, the store manager felt safe in that area and believed that his customers also felt safe in the area. **Jensen Dep. p. 9**. On the day in question, the store was "fairly busy" with customers and may have had up to 75 employees. **Jensen Dep. p. 8; McCloy Dep. p. 7-8**; **Gonzalez Dep. p. 79**.

Prior to the events in this case, no customer had walked into Menards with a gun. **Jensen Dep. p. 9-10; McCloy Dep. p. 9; Hannon Dep. p. 7-8**. Nor had the store employees involved in this incident ever been in a store like a Menards, Wal-Mart, or Target where a customer had a gun. ***Id***. "If [the Menards' store manager] had been in that store with my kids, I would have walked right out with them if I would have seen him with a gun ***Id*. p. 11**. He would have done that because "it's a retail environment," there are kids in the store, and "[i]t's really not the time or the place" to carry a firearm into a retail store. ***Id***. "There's a time and place for everything." ***Id***. In his opinion "it's just not commonly accepted" and "[y]ou don't see that ever." ***Id***. "It's the first time that I had ever seen it. In fact, I didn't even really know how to react. The first thing that I did was call the police just to find out. I thought it was against the law." ***Id***.

The Menards' manager and employees did not have any type of training through Menards on how to deal with someone who may walk in with a gun. **Jensen Dep. p. 10**. Nor was there any signage at the front door indicating whether or not someone could bring in a gun. ***Id***. Although Menards may not have had a specific written policy on customers carrying a firearm, Menards did have a policy that disallowed employees from carrying weapons. **McCloy Dep. p. 10**.

Gonzalez never contacted the store to ask whether he could carry a gun into the store. **McCloy Dep. p. 9; Hannon Dep. p. 9**. Prior to the incident at the West Milwaukee Menards, Gonzalez had never open carried in that area. **Gonzalez Dep. p. 73**. "I am pretty sure that I was the first person to open carry in Milwaukee." ***Id.*** By that he means the entire County. ***Id.***

Upon arrival at Menards, Gonzalez exited the car and put his firearm in his holster. **Gonzalez Dep. p. 75-76**. Neither he nor his brother considered whether they should carry the firearm into Menards. ***Id***. As Gonzalez walked into the Menards, with the gun shimmering on his holster, an employee spotted him and the firearm and immediately walked away. **Gonzalez Dep. p. 76; Hannon Dep. p. 10.** "At the time [Gonzalez] just thought that [the employee] was somebody that got too close." **Gonzalez Dep. p. 77**. Gonzalez did not have any conversations with that employee; just a glimpse that he got too close. ***Id.* p. 77**. At that point, Gonzalez did not have any thought or question in his mind as to whether he should bring the firearms into Menards. ***Id.* p. 77-78**. Gonzalez was wearing a big black leather coat and black pants. ***Id.* p. 106**. He wears a black holster. ***Id.***

Mr. Hannon, the employee who first observed Gonzalez, testified that he was "startled." **Hannon Dep. p. 11**. "I didn't see a badge on him, so I was startled, and I thought let me let the store manager know and see what he wants to do, just letting them know there's potentially other people that may see it and think the same thing, may be startled." ***Id***. He believed that others may become concerned for their safety. ***Id.* p. 11-12**. He, too, had concern for his own safety. ***Id*. p. 11-12, 19**.

Accordingly, Mr. Hannon alerted his managers to what he saw. **Hannon Dep. p. 13**. Although Mr. Hannon and two managers offered conflicting accounts as to whether Mr. Hannon personally told them or called them, they all had consistent memories of the managers' reactions.

Mr. Kris McCloy, the assistant store manager, reacted: "First I thought that he was joking." **McCloy Dep. p. 11**. "Where I am from it's illegal to carry guns period, let alone have somebody in the store with a gun. So we kind of like – I asked him are you serious? What's going on with that? You know, are you serious that you saw a gun? I questioned him several times if in fact it was a gun." **McCloy Dep. p. 12**. After Hannon confirmed that he saw a gun, assistant store manager had concerns: "oh, yeah. Like I said, I came from Illinois, you're not allowed to carry a gun anywhere in Illinois without some kind of permit or badge. So immediately it was a serious situation." ***Id***.

Mr. Jeff Jensen, the store manager, was in the front office with Kris McCloy. **Jensen Dep. p. 12**. The store managers "were shocked, surprised." **Jensen Dep. p. 13**. "I didn't know what he was doing in the store with a gun." **Jensen Dep. p. 12**. "I never seen that." ***Id***. "We got a call from a team member who was distressed or upset; hey, there's a guy in here with a gun. So yeah, there was some sense of urgency." ***Id***. He definitely felt concern for the safety of his customers and his employees. ***Id***.

"We immediately left the office to go look for the person with a gun." **Jensen Dep. p. 13**. They did so in order to "find out what was going on and ask him to take the gun outside." **Jensen Dep. p. 13**.

The Menards' managers and employee eventually located Gonzalez in the garden center near the play area by the concrete blocks. **Jensen Dep. p. 14**. Gonzalez had a "trench coat" type jacket, which the store manager found to be unusual for the type of season. **Jensen Dep. p. 16**. Gonzalez's overcoat hung a couple inches below the waist. **Jensen Dep. p. 39**. "I remember thinking that was kind of odd to go menacing in the middle of – it was in summer." **Jensen Dep. p. 17**. Gonzalez's outfit "seemed out of place." ***Id***. There were customers and there were kids

playing in the play area. **Gonzalez Dep. p. 87; Jensen Dep. p. 14; McCloy Dep. p. 13**. Gonzalez recalled three employees confronted him; two in front of him and a voice from behind. **Gonzalez. p.79-80**. He says his brother recalled up to 5 employees. ***Id***.

Kris McCloy approached Mr. Gonzalez first while Mr. Jenson quickly dispatched an unrelated phone call that came in. **Jensen Dep. p. 14-15**. McCloy approached the situation carefully: "We don't want to go running up to him screaming and yelling. We might start a situation there." **McCloy Dep. p. 14**. "So we talked about the best way to approach somebody that's armed …" **McCloy Dep. p. 14-15**. They had concern about their safety and well being as well as for their customers. **McCloy Dep. p. 15**. McCloy then approached Gonzalez:

> Q: And then what happened?
>
> A Then we started talking about whether it was right or whatever to carry a gun. He said, it's okay to carry a gun. There's no law against it. I said, that's fine and good. It might be okay, but this is private property, not a public place. We don't allow guns to be around or in the store. I need you to either leave or go put it in your vehicle in the front, but whatever you want to do, you can't be here with a gun on you.
>
> Q And what did Mr. Gonzalez say?
>
> A Well, he argued with me for a bit about how I couldn't do that because it's not legal to have a gun in here, and we went into, again, it's private property, it doesn't matter, and he is – he's making people uncomfortable. He needs to do that one way or another. And then after a couple minutes, he conceded and said he would go ahead and put it away.
>
> Q When you said that there was a discussion about whether it was okay to carry a gun, are you referring to you having that discussion or Mr. Gonzalez was having that discussion with you?
>
> A We were talking back and forth. He said in Wisconsin, it is not illegal to carry an open firearm. And I said, I don't know about that, but here in this -- on our private property, you can't when there's people around.
>
> Q You asked him on more than one occasion to leave and put the gun in the vehicle?

A	At least three times.

Q	And would you describe his initial reaction to those requests as argumentative –

A	Very.

Q	-- including that he didn't want to leave?

A	Um-hum.

Q	Did you feel a sense of urgency in dealing with Mr. Gonzalez?

A	Yeah. I didn't want any more people getting more upset than they already were, and I didn't want a bunch of parents with their kids seeing a guy walk around with a gun on him. And that would have caused a little bit of panic, I believe.

Q	And so when you were having your conversation with Mr. Gonzalez, you felt a sense of fear for your customers?

A	Um-hum.

McCloy Dep. p. 15-17. Gonzalez's recollection was not that different. After one of the employees received confirmation from him that he had a "real gun," they asked him whether he had a permit to carry the same. **Gonzalez Dep. p. 83**. Gonzalez told them that he did not have a permit. ***Id*. p. 84**. After being asked him to put the firearm in his car and then come back and finish his purchase, "I told him that I would feel uncomfortable leaving the gun in the car unattended, and I said someone might steal it." ***Id*. p. 84**. Moreover, Mr. Hannon, standing close by, did not hear the conversation but observed that Gonzalez seemed like he was getting mad when his managers told him to leave. **Hannon Dep. p. 16-17**. Hannon had concern for himself, customers and employees. **Hannon Dep. p. 18**. "Just that if something were to escalate the situation, that Mr. Gonzalez might pull out the gun, whether you use it or not, you could use it as a threat or something." **Hannon Dep. p. 18**.

After dispatching his call, the store manager, Mr. Jensen, walked up to Gonzalez and McCloy and observed "some arguing going on." **Jensen Dep. p. 15**. "It wasn't like a heated argument. It was more – it sounded more like a debate." ***Id***. "I pretty much just jumped in right away and said something along the lines of, we need you to take the gun outside, and you can leave it in your car and come back in and shop or – he was with somebody at the time, or you can wait out in the car until whoever you're with here comes out to meet you or what ever." **Jensen Dep. p. 15**. The manager found Gonzalez's conduct to be "argumentative and belligerent." **Jensen Dep. p. 32**. "I mean there was five to 10 minutes of conversation and debate and arguing before he left." ***Id***. The level of Gonzalez's voice that day seemed "a little louder than normal …" ***Id*. p. 45**. "It wasn't like yelling or screaming at the top of the lungs, but it felt like heated conversation." ***Id***.

The argument between the assistant store manager and Gonzalez concerned the store manager: "I just jumped in right away because I didn't know what the argument was or what they were talking about or if it was going to escalate." **Jensen Dep. p. 15**. He also had concerns that what was transpiring would spill over and cause concern or fears to other employees or customers. **Jensen Dep. p. 16, 41**. "It was definitely a lot of adrenalin pumping." **Jensen Dep. p. 16**. "It felt like a pretty heated situation." ***Id***. Jensen was concerned about disruptions to the peace, order and safety of himself, his employees and his customers. **Jensen Dep. p. 42**. At some point before Gonzalez left, Jensen did have some feelings of fear. **Jensen Dep. p. 32**. He had such feelings both for his employees and customers. **Jensen Dep. p. 33**. That was one reason he called the police. ***Id***. Jensen believes that Gonzalez's conduct that day was against the good order of his store. **Jensen Dep. p. 32**. Jensen believed that Gonzalez's conduct caused a

disturbance that day. **Jensen Dep. p. 30-31**. Gonzalez's conduct was something more than a simple personal annoyance. **Jensen Dep. p. 31**.

Gonzalez acknowledged that the employees raised some concern about nervous employees or customers:

Q. At any point did any of the employees tell you that you were making the employees or customers nervous?

A He said something about there are kids here, because they have some sort of playground area next to the garden center.

Q How did you respond?

A I don't believe I responded to that comment.

Gonzalez Dep. p. 84.

After Gonzalez told the employees that he was uncomfortable leaving the gun in the car they told him to leave or that they would call the cops. **Gonzalez Dep. p. 85**. At some point during the conversation, McCloy told Gonzalez that he wanted him to leave the store. **McCloy Dep. p. 33**. Gonzalez then took the keys from his brother, left the store and went to the truck. ***Id*. p. 85**.

Gonzalez does not believe he caused a disturbance because the Menards employees treated him in a "friendly" manner. **Gonzalez Dep. p. 126-127**. He would have expected them to treat him "unfriendly" if they were concerned about his firearm. ***Id*. p. 127**. Gonzalez testified:

Q. I mean, is it possible that they treated you friendly but still had concerns about the safety of themselves and their customers?

A Well, I would assume that if they were truly concerned for their safety, they would have assaulted me instead of simply accosting me and asking me questions and then asking me to leave instead of demanding it.

Q So if the employees and managers at Menards were concerned about themselves or the safety of their customers, you would have expected them to assault you?

A If I'm armed and they're not, I would have -- yes.

Gonzalez Dep. p. 127. Assistant Manager McCloy disagreed with Gonzalez's logic. **McCloy Dep. p. 22**. "It doesn't seem quite right. It would be kind of stupid to assault a person with a gun." ***Id***. The store employee testified that it would have been "the wrong way" to handle the situation by assaulting or attacking Gonzalez. **Hannon Dep. p. 19**. The store manager testified that although he did not have any specific training on dealing with customers with a firearm, he did have some training on dealing with customers who appeared to be agitated, irate or disgruntled. **Jensen Dep. p. 41**. In those types of situations, employees are trained to be calm and try to be as pleasant as possible with the customer. ***Id***. It would not have been the best course to deal with Gonzalez by trying to assault of attack him. ***Id***.

If any of the Menards employees testified that Gonzalez objected and refused to leave, Gonzalez admits that he does not have any evidence to dispute that. **Gonzalez Dep. p. 86**. Nevertheless, Gonzalez believes that the Menards employees owe him an apology because he was "a paying customer who got kicked out." **Gonzalez Dep. p. 131**. Gonzalez admits that one could be trespassing on private property if an owner asks him to leave, but he refuses to do so, regardless of whether there is a trespassing sign. ***Id*. p. 19**.

Once Gonzalez left, General Manager Jensen called the West Milwaukee Police Department. **Jensen Dep. p. 19**. He expressed concern to the dispatcher about what was going on that day: "I just had a guy in the store with a gun strapped to his leg and a holster." **Jensen Dep. p. 21, 27**. He told the dispatcher that he did not want that in his store. **Jensen Dep. p. 27**.

He also told dispatch that when he asked Gonzalez to leave, Gonzalez was "kind of begrudging about it …" **Jensen Dep. p. 21-22**.

Dispatch then put Manager Jensen on the phone with Officer Krafcheck. **Jensen Dep. p. 28**. The transcript of that audio is at page 22 -27 of Jensen's deposition. Jensen told Officer Krafcheck that he was not sure about the laws in this area. ***Id***. He told Officer Krafcheck that he had a guy with a gun in his store. ***Id***. He told Officer Krafcheck that it "creeped out people." ***Id***.[3] Jensen also told Officer Krafcheck that he did not feel comfortable with it, that Gonzalez's actions that day "really bothered me," and that Gonzalez became argumentative and that he (Jensen) became really uncomfortable. **Jensen Dep. p. 29**. Jensen also explained to Officer Krafcheck that Gonzalez was "a big guy" with a "black leather jacket on, and he's got this gun strapped to his leg, and everyone is like, Oh, my God, this guy's got a gun in the store …" **Jensen Dep. p. 24, 29**. Jensen explained to Officer Krafcheck that he and his employees were nervous and called the police. **Jensen Dep. p. 30**. He also expressed that at one point he was "really nervous about it." **Jensen Dep. p. 30**. General Manager Jensen also agreed with Officer Krafcheck's response that, depending on the circumstances, it could be disorderly conduct and that the officers should come out to investigate. **Jensen Dep. p. 26, 30**.[4]

Although Officer Krafcheck did not review the audio of the call during his deposition, his testimony was consistent with Jensen's. "The manager had called and told dispatch there was a

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[3] By "creeped out," Jensen meant that it made people feel uncomfortable. ***Id***. "The fact that an employee called to complain about it, I think that they were uncomfortable with it, and I know that I personally am uncomfortable with it and was." ***Id*. at Jensen Dep. p. 28-29**. His duties as general manager do not include approaching customers and asking them to leave unless the circumstances warrant it. ***Id*. Jensen Dep. p. 29**.

[4] Although the assistant manager did not contact the police, he agreed that Gonzalez created a disturbance at the store. **McCloy Dep. p. 20**. There were times during his interaction with Gonzalez that he believed Gonzalez became upset. **McCloy Dep. p. 20**. "Um-hum, yea, from the moment that I walked up and asked him about it." **McCloy Dep. p. 20**. McCloy believes the Gonzalez's conduct presented a safety issue for him, his staff and customers. **McCloy Dep. p. 21**. Gonzalez's conduct that day rose to something went above simple personal annoyance. **McCloy Dep. p. 34**. His conduct disrupted the good order and peace of the store. ***Id*** His conduct had the potential to spill over and create a disruption among other customers or employees. ***Id***.

man in the store carrying a gun and that he and some of his employees were not pleased with it, unhappy with it, nervous about it." **Krafcheck Dep. p. 7**. After taking the call from dispatch, Officer Krafcheck learned "who he was and what he did at Menards and he was a manager and that there was a man in the store with a gun and he was wondering what the rules and laws were pertaining to guys carrying guns in stores." **Krafcheck Dep. p. 8**. Officer Krafcheck told him that carrying a gun "wasn't so much against the law, but if it made him nervous, if it made his employees nervous that it could constitute disorderly conduct. **Krafcheck Dep. p. 8**.

After the call, Officer Krafcheck told Officer Donovan "we needed to go over the store because the manager is complaining about a guy in the store with a gun" and that "employees were nervous, wigged out, freaked out, geeked out, something to that effect." **Krafcheck Dep. p. 8, 11**. Officer Donovan recalled being told that employees were upset, that they asked the suspect to leave and, in doing so, the suspect got upset, argumentative and then left the store. **Donovan Dep. p. 12**. The officers also learned that "he was a large male wearing a black leather jacket." **Donovan Dep. p. 12**. Like the Menard's employees, the officers would have also known that it was unusual to carry a gun into a retail store in West Milwaukee. **Aff. Krafcheck, p. 5; Aff. Donovan p. 5**.

Upon arrival, Officer Donovan took a tactical position in the parking lot while Officer Krafcheck met the store manager, who told him that "there was a man in the store that was carrying a gun on his thigh, on his right thigh, and that the employees were nervous about him being in there." **Krafcheck Dep. p. 13; Donovan Dep. p. 13-14**. The store manager then pointed out Mr. Gonzalez and his truck in the parking lot. **Krafcheck Dep. p. 13**. "He described him as a large white male with dark hair wearing a black leather jacket." **Krafcheck Dep. p. 13-**

14. Officer Krafcheck radioed this information to Officer Donovan and they then began to approach Gonzalez. **Krafcheck Dep. p. 14-15; Donovan Dep. p. 15-16**.

As Officer Krafcheck approached Gonzalez, he told Officer Donovan that "I didn't think that there was a gun in the holster, but I wasn't positive on that." **Krafcheck Dep. p. 15-16**. Officer Krafcheck "gave him that information because I didn't think that Officer Donovan could see his right thigh based on the way the man's body was [turned in a certain direction]." **Krafcheck Dep. p. 16**. "So I just wanted to tell that for safety reasons …" ***Id***. Officer Krafcheck provided "cover" while Officer Donovan talked with Gonzalez. **Krafcheck Dep. p. 16**. Officer Krafcheck watched over both Officer Donovan, Mr. Gonzalez and the other person standing with Gonzalez. **Krafcheck Dep. p. 18**.

Officer Donovan approached Gonzalez and observed that "he was indeed wearing a thigh holster, that there was a magazine in it but no firearm." **Donovan Dep. p. 17**. The following dialog then took place:

Q. Okay. What did you say to him?

A I asked him if he was wearing the holster inside the store. He acknowledged with yes. I asked him if there was a firearm in it. He acknowledged with yes. I asked him where the firearm was. He wanted to start talking about Wisconsin's law on open carrying and constitutional rights. And I said you need to tell us where the firearm is. He refused, said he didn't have to answer that question. At that point I placed him in handcuffs

Donovan Dep. p. 17. Gonzalez told him twice that he didn't have to answer questions about the location of the firearm. **Donovan Dep. p. 18**. Gonzalez admitted refusing to answer the officers questions when they confronted him. **Gonzalez Dep. p. 172**. Officer Donovan decided to arrest him at that point. **Donovan Dep. p. 18**. Officer Donovan explained his reasons:

A I had several facts on the way to the store. I had the fact that he was in the store carrying a firearm, that it had created a disturbance inside the store, it caused several employees to become uneasy, which, in turn, contacted the manager, which, in turn, caused him to have contact with Mr. Gonzalez, at which time he had an argument with this manager, which made him upset, and that he had left the store. And upon my arrival, I made contact with Mr. Gonzalez. He refuses to tell me where the firearm is. Of course I'm going to place him under arrest and detain him. I have no idea where this weapon is. I don't know if he's concealed this weapon inside of his jacket at this point. I don't know where the gun is, and he's refusing to tell us where it is. And there's a second person involved in this, too, and there's a good possibility that that person might have the weapon. So we need to secure the scene here. And he's admitted -- made an admission to me that he did have a firearm, so –

Donovan Dep. p. 18-19. The fact that Gonzalez admitted that he had a firearm was significant because "I need to keep myself safe." **Donovan Dep. p. 20**. Officer Donovan did not know where the weapon was located and he did not know what Gonzalez's intentions were. ***Id***. "Why … if he was carrying this weapon in a holster inside the store and then came out, what was the reason for him to remove the holster and do whatever he did with it prior to us arriving there, I guess? I mean, I just don't understand the logic behind that. I would have felt more comfortable if the weapon was in a holster. " ***Id.*** "And at this point I feel very uncomfortable because I have absolutely no idea where this weapon is, and he is flat-out refusing to tell me where it is. That is definitely an officers safety issue, in my experience." ***Id***.

Officer Donovan did not arrest Mr. Gonzalez simply because he knew that Gonzalez had a weapon but did not know its location. **Donovan Dep. p. 21**. Donovan explained:

A No. I arrested him based on the facts that I had at that time: That he had gone into the store, that he had created a disturbance enough where the manager called the police; that the manager felt very uneasy and uncomfortable, and so did several employees; and that he was out in the parking lot. And I identified him. He admitted to me in the parking lot that he was the guy in the store with the gun. And I believe that was enough to arrest him for disorderly conduct. So not only was he in handcuffs for officer safety, but he was under arrest at that point for disorderly conduct.

Donovan Dep. p. 21. Officer Donovan received information that Gonzalez had an argument with the manager, which meant to him that Gonzalez had created a disturbance inside the store. **Donovan Dep. p. 22**. Although Officer Donovan did not have information that Gonzalez was boisterous or loud, "I had information that he been involved in an argument, which in my eyes at the time, standing there arguing with a manager inside of a store with a firearm, I think in my mind, would create a disturbance." **Donovan Dep. p. 22-23**.

After Officer Donovan secured Gonzalez in handcuffs, Officer Krafcheck approached Gonzalez's brother, Adan. **Krafcheck Dep. p. 19; Donovan Dep. p. 26**. He asked him for identification and what they were doing. **Krafcheck Dep. p. 20**. Adan Gonzalez told Officer Krafcheck that his brother was wearing a gun in the store, told him that he had read up on … gun laws and that it was his right to carry a gun in the store." ***Id***. Officer Krafcheck inquired as to the location of the gun and Adan explained that it was in the truck. ***Id*. p. 21**. Adan Gonzalez then reached into the truck to get the gun, but Officer Krafcheck told him that he would retrieve the firearm. ***Id*. p. 22-23**. Adan did not object to Officer Krafcheck going into the truck. ***Id*.p. 23**. Officer Krafcheck seized the gun as evidence as a possible disorderly conduct charge. ***Id***.

After Officer Krafcheck retrieved the gun from the truck, he secured it and then drove Mr. Gonzalez back to the station while Officer Donovan stayed behind to interview the three Menards employees. **Krafcheck Dep. p. 24; Donovan Dep. p. 30-34**.

At the station, Officer Krafcheck did most of the booking, except Officer Krafcheck may have done the fingerprinting. **Krafcheck Dep. p. 25-26**. Officer Krafcheck read Gonzalez the Miranda warning at the station. **Krafcheck Dep. p. 27**. As part of the information required by the booking process, Officer Krafcheck asked Gonzalez for his social security number. **Krafcheck Dep. p. 29; Donovan Dep. p. 36-37**. Officer Krafcheck needed it for the booking

cards. **Krafcheck Dep. p. 30**. **See also Aff. Krafcheck p. 7, Exh 8; Aff. Donovan p. 7, Exh. 8**. "It was the information needed for the card." **Krafcheck Dep. p. 30**. During the booking process "there was some what's your name, what's your date of birth, where do you live, what's your social security number." **Krafcheck Dep. p. 32**. "All these things became hard to get from him. And we needed to get that information before we could … let him go." ***Id*. p. 32, 33**. "So all those things were necessary to get" and Officer Krafcheck may have said "something to the effect of, [if] we can't get the information, you're going to be here longer than you need to be." ***Id*. p. 32**. "Because we can't let somebody go without knowing who there are." ***Id***. The officers retrieved his social security number from his card in his wallet. **Krafcheck Dep. p. 31; Donovan Dep. p. 38**.

Officer Krafcheck searched Gonzalez at the station. **Krafcheck Dep. p. 34**. Officer Krafcheck did not make note of Gonzalez's belongings because they were not going to "hold him … but he was going to be released soon enough." **Krafcheck Dep. p. 34-35**. All items on his person were placed in a plastic bag and he received them after booking. **Krafcheck Dep. p. 35**. The officers did not interrogate Gonzalez. **Krafcheck Dep. p. 35**. After booking him they provided him with an order to attend a charging conference with the District Attorney. **Krafcheck Dep. p. 35; Gonzalez Dep. p. 112-113**. Gonzalez's firearm, seized for use as evidence of the crime of disorderly conduct, was placed in the property room. **Donovan Dep. p. 38, 44**. There were two charging conferences by the Milwaukee County District Attorney's Office, but no charges were issued against Gonzalez. **Gonzalez Dep. p. 114-116**. Gonzalez subsequently filed a petition for return of his firearm. **Gonzalez Dep. p. 185-186**. About ten months later he received an order granting his petition and the picked-up his gun. **Gonzalez Dep.**

p. 139. Over that ten month period, Gonzalez's counsel asked for an adjournment of that case because they were waiting for the result in another firearm case. **Gonzalez Dep. p. 186-187**.

The Menards store manager did not have any criticisms of Officers Krafcheck or Donavan. **Jensen Dep. p. 31**. They have always been professional. **Jensen Dep. p. 31-32**.

V. <u>Incident at Chilton Wal-Mart</u>

Prior to this event, no other customer had openly carried a firearm into the Chilton Wal-Mart. **Fairchild Dep. p. 8; Woefel Dep. p. 8**. Gonzalez had not contacted any of the store employees or managers to ask whether or not he could carry a firearm into the store. **Fairchild Dep. p. 11**. The Chilton Wal-Mart manager has served at other Wal-Marts over the past 14 years, and she is not aware of any other customer openly carrying a firearm into any other Wal-Mart. **Fairchild Dep. p. 6, 8**. The two employees involved in this incident had never seen a customer walk into a retail store like a Wal-Mart, Menards or a Target openly carrying a firearm. **Fairchild Dep. p. 8; Woefel Dep. p. 8**. In other businesses in Chilton, such as restaurants and gas stations, the Wal-Mart manager has not seen anyone carry a firearm into those establishments. **Fairchild Dep. p. 8**.

On April 10, 2009, Gonzalez and his cousin arrived at the Wal-Mart after 11:00 p.m. **Gonzalez Dep. p. 136-137**. Gonzalez dressed in dark colors that evening. **Woefel Dep. p. 23**. They sought to purchase ammunition for different firearms for both himself and his cousin. **Gonzalez Dep. p. 143**. Wal-Mart did not have any type of signage at the front doors telling customers whether or not they can carry a firearm. **Fairchild Dep. p. 10**. That evening the store had approximately four customers and ten employees. **Fairchild Dep. p. 38; Woefel Dep. p. 13**.

As employee Herbert Woefel was stocking shelves, another associate came up to him and said that there was a gentleman in the store and he had a gun on his side. **Woefel Dep. p. 11**.

The other employee "seemed concerned about it because she had never seen anyone with a gun on prior to that either." ***Id***. Although he was not "overly concerned," Mr. Woefel did have some concern about his safety and the safety of others with what Gonzalez was doing that day. ***Id***.

Mr. Woefel then received a call on his "walkie-talkie" from another associate stating that they needed assistance in sporting goods. **Woefel Dep. p. 11**. He walked over to sporting goods, asked Gonzalez and the other gentleman if he could help them, and they said that they wanted to buy some ammunition shells. ***Id***. "So I said, wait a minute, I will go in the back room and I will get keys so that I can get the cabinet open." ***Id***.

The night-time store manager first learned that Mr. Gonzalez was in the store at approximately 11:30 p.m. when Herb Woelfel summoned her to the back of the store for the keys for the ammunition case. **Fairchild Dep. p. 12**. "And then at that time [the manager] gave me the keys, and I told her that I had a customer in sporting goods that wanted to buy some shells, and I also mentioned the fact that the gentleman had a gun on his side." **Woefel Dep. p. 12-13**. Mr. Woelfel informed Jennifer Fairchild about the gun because "it was a concern as far as being in the store" and another employee had notified him of the gun. ***Id***. "My concern was just the point of someone having a gun on, which is unusual to see." ***Id*.p. 14**.

When the manager learned that a customer was in the store with a firearm, "I was a little uneasy myself because it was that late in the evening, and the gentleman was asking to purchase ammunition." **Fairchild Dep. p. 13**. "I thought that that was very odd considering that we were in such a little town and that … [customer service managers] up front were collecting the money from the registers, so it made us a little bit more uneasy because we did not know what the situation was truly going on." ***Id***. She did not believe that it was common for her store: "It was totally not common for my Wal-Mart." ***Id***. **p. 39**. Nor did she believe that it was "common for

that community." ***Id***. She believed that the event that evening was outside her everyday experiences. ***Id***.

The manager's initial reaction to what Mr. Woelfel told her was that she needed to follow the protocol in the Wal-Mart manual and contact the police. **Fairchild Dep. p. 14**. Wal-Mart has "a manual we have for calling for emergencies" which directs her to "notify the police department." ***Id***. **p. 8**. Circumstances which warrant notifying the police department arise "[i]f we felt at any time that the person would be of any harm to any of the associates or customers that were in the building." ***Id***. Prior to the events in this case, she had never contacted the police concerning potential harm to the customers or employees. ***Id***. **p. 9**. This event is the only time that Jennifer Fairchild has acted pursuant to her store's manual to notify the police. ***Id***. **p. 26-27**. Before she decided to contact the police, she had concern about safety of herself, her customers and her employees. ***Id***. **p. 14**. She had concern that what Mr. Gonzalez was doing could somehow spill over and disrupt the peace and good order of her store. ***Id***. She did not believe that what he did was within good order. ***Id***. Based on her experiences as a manager and her understanding of the community, she found that Gonzalez's carrying a firearm into the store that day was unusual. ***Id***. **p. 11**.

Accordingly, the manager called 911, answered by the Calumet County Sheriff's Department dispatch. **Fairchild Dep. p. 23**. The complete dispatch call follows:

> **MS. FAIRCHILD**: Hi. This is assistant manager Jennifer Fairchild calling from the Chilton Wal-Mart store.
>
> **DISPATCH**: Uh-huh.
>
> **MS. FAIRCHILD**: I was just wondering if there was an officer on duty I could speak with. I have a gentleman in the store -- kind of giving you a heads up, I guess. He potentially has a weapon on him.
>
> **DISPATCH**: Okay. And you saw it?

MS. FAIRCHILD: Well, we can't -- it looks as if he has a weapon, but we do not know if it's loaded or if it's real. And he is in the store buying ammunition, but the ammunition he's buying doesn't look like it's for the weapon he currently has with him.

DISPATCH: Okay. So then you can tell me what type of weapon he has?

MS. FAIRCHILD: Do you have any clue what type of weapon it is? No. It's a handgun of some kind that's inside his jacket. It's in a holster? In a holster on the side of his belt.

DISPATCH: Okay. All right. So do you want me to have an officer come over or –

MS. FAIRCHILD: I guess possibly -- I'm not sure if I'm supposed to ask him to leave because he has the weapon. I guess I've never had to deal with this. I need to know what protocol –

DISPATCH: It's not in plain view, correct? It's under his jacket?

MS. FAIRCHILD: It's not in plain view? Yes, it is in plain view.

DISPATCH: Okay. Hang on a second.

MS. FAIRCHILD: Okay.

Fairchild Dep. p. 23-25. Jennifer Fairchild agreed that she conveyed to the police department that Gonzalez was buying ammunition for what appeared to be a different gun, that she was not sure what to do, that the situation was something that never happened before and that she was conveying that information to the dispatcher due to her concern about safety. ***Id*. p. 25-26**. Although Mr. Woelfel did not speak with dispatch, he agreed that his manager's safety concern would have been for both employees and customers. **Woefel Dep. p. 15**. He also agreed that his

manager treated the situation with urgency and that it was not something he had previously experienced. ***Id*. p. 22, 36**.[5] He described Gonzalez's conduct as "unnecessary." ***Id*. p. 36**.

After the manager contacted the police, she told Mr. Woelfel to service Mr. Gonzalez. **Fairchild Dep. p. 15**. "I did not want to upset the gentleman by refusing the ammunition sale;" ***Id***. She did not want to "upset the situation" because Gonzalez had a weapon and "I did not know at the time if it was loaded or what the intention was and why he wanted the ammunition." ***Id***. She therefore believed that the situation should be handled at peacefully as possible in order to avoid escalating the situation. ***Id*. p. 15-16**. The manager expressly or implicitly told Mr. Woelfel to stall. ***Id*. p. 16; Woefel Dep. p. 15-16**. "From what the police department had told me to try to keep the situation under control until the officer that was on duty could show up and do what we could to not upset the person at the counter." **Fairchild Dep. p. 16**.

As the employee continued with the sale, the manager walked past the counter to verify that Gonzalez had a weapon on him and then she met Officer Young at the front door. **Fairchild Dep. p. 16**. As she observed Gonzalez, it took her "a couple of seconds" to observe the firearm. ***Id***. The manager did not believe that simply because she did not ask Gonzalez to leave did not mean that he was not creating a disturbance to the peace and good order to her store. ***Id*. p. 39**.

The Calumet County Sheriff's Department dispatched Officer Young at approximately 11:47 p.m. advising of a report from the Wal-Mart manager of a man with a gun attempting to purchase ammunition for a different weapon. **Young Dep. p. 17**. On his way to the store, he learned that a Sheriff's Deputy would arrive to assist him. ***Id*. p. 21**. Upon arriving at the Wal-Mart, he met the manager. ***Id*. p. 22**. He understood that she had called the sheriff's department

[5] Mr. Woelfel worked with Jennifer Fairchild approximately 18b months before this event. **Woefel Dep. p. 22**. He agreed that she seemed a "little bit" afraid, "kind of shocked" and a little nervous and anxious. ***Id***. He, too, felt that the matter needed to be handled with some urgency and that the situation was not common for Wal-Mart or Chilton. ***Id*. p. 23, 35-36**.

and was concerned. ***Id*. p. 22-23**. The manager "seemed like she was anxious and nervous" or "upset." ***Id*. p. 23**. Officer Young had dealt with the assistant manager before on other issues of a smaller nature but, on this occasion, "she was acting differently than what she was on the prior occasions." ***Id*. p. 78**. "Again, meaning that she seemed upset and also the fact that this type of situation doesn't generally occur there because it's a lower-crime-rate area." ***Id***. The manager also explained that her employee was "startled or shocked by this, didn't know what to do, so he pretended like he didn't have keys to get the ammunition for that individual and had told him he'd have to get keys for the case which the ammunition was stored in." ***Id*. p. 24**. "And at the time, the individual was being stalled until we could arrive." ***Id***.

When Officer Young arrived, Jennifer Fairchild "told him that the gentleman who had the weapon was back at the sporting goods counter with one of our sales associates." **Fairchild Dep. p. 17**. She also provided Officer Young with a description of the firearm. ***Id***. She agreed that, based on her prior dealings with Officer Young, he likely interpreted her behavior as anxious and nervous "because it was my first time having to deal with such an episode." ***Id*.. p. 18**. When Officer Young arrived she felt a sense of urgency. ***Id*. p. 21.** She was "very nervous" because:

> I guess being in management and being in the building by yourself at night, you get very cautious of who comes in and out of the building because of your safety to be concerned with and all the safety of all who's ever in the store, and I guess that night just kind of put the test to everything making sure that everything in the building stayed peaceful as the customers were shopping and the associates were in the building.

Fairchild Dep. p. 19.

Officer Young asked her to keep all associates and customers away from that area of sporting goods and Jennifer Fairchild proceeded to block off that area. **Fairchild Dep. p. 19**. She had two associates assist her in keeping customers away from that area. ***Id***. "I told them at

that time there were was an issue going back in sporting goods, and the police department was coming to handle and we just needed to keep everybody calm." ***Id***. **p. 20**.

As the manager walked towards the sporting goods section with Officer Young, she answered his questions about what time Gonzalez came in, what he looked like and whether he was with anybody. **Fairchild Dep. p. 20**. She told Officer Young "that the gentleman that was back there was a taller gentleman" and that "[t]he gun was not completely visible, but I could see the end of it …" **Fairchild Dep. p. 21**. She continued to feel that sense of urgency when escorting Officer Young back to the sporting goods section. **Fairchild Dep. p. 21**.

Once they arrived near the sporting goods section, "Officer Young took over, and he just told me to step back out of the picture." **Fairchild Dep. p. 21-22**. By that point, the employee and Gonzalez were completing the ammunition purchase when Gonzalez heard an officer shout "freeze." **Gonzalez Dep. p. 145**. The officer, standing about six feet away and visibly shaking, told Gonzalez and his cousin not to move. ***Id*. p. 147; Young Dep. p. 26**.[6] Officer Young did not point his firearm at Gonzalez. **Young Dep. p. 31**.[7] He did not have his finger on the trigger. ***Id***. Officer Young showed Gonzalez that his finger was not on the trigger when Gonzalez asked him "something to the effect … for me to basically take it easy and take my finger off the trigger." **Young Dep. p. 32**.[8]

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[6] Mr. Woelfel heard Officer Young say "excuse me, sir," and then ask Gonzalez if he had permission to carry that gun. **Woefel Dep. p. 18**. After that point, Mr. Woelfel walked away. ***Id*. p. 19**. Mr. Woelfel proceeded to monitor the store "just to make sure that no other customers in the store came in that area for safety sake." ***Id*. p. 19**.

[7] Mr. Woelfel recalls that Officer Young had his gun drawn and pointed "somewhere in between" the ground and Mr. Gonzalez. **Woefel Dep. p. 18**. "It was kind of pointed down." ***Id***. The manager also saw Officer Young's weapon drawn, pointed more towards the floor rather than directly at Gonzalez, and "I think that he had asked him something about his gun …" **Fairchild Dep. p. 22, 23**.

[8] Gonzalez asked the officer to "index," which is the practice of keeping "your finger off the trigger until you're ready to fire," and then Officer Young pointed the gun sideways to show him that his finger was "indexed." **Gonzalez Dep. p. 148-149**.

When he arrived at the sporting goods section, Officer Young immediately observed Gonzalez hand his cousin his driver's license. **Young Dep. p. 29; Gonzalez Dep. p. 158**.[9]

Officer Young asked Gonzalez if he was a law enforcement officer, and Gonzalez responded "no." **Young Dep. p. 26**. By that point, he had heard that his assisting officer had arrived at the Wal-Mart. ***Id.* p. 27**. Officer Young told Gonzalez and his cousin to "sit tight" until his back-up arrived. **Gonzalez Dep. p. 149**. In the interim, Gonzalez said that he did not consent to any search or seizure of his person. **Young Dep. p. 31**.

While they were waiting for back-up Gonzalez explained that he had been involved in similar incident and that his gun had been seized and returned. **Gonzalez. p. 150**. Gonzalez "told him that it wasn't against the law." ***Id.* p. 151**.

Calumet County Sheriff's Department Deputy Sablich arrived within a minute or two. **Young Dep. p. 30**. At that point, with Deputy Sablich providing cover, Officer Young approached Gonzalez, disarmed him, hand-cuffed him and separated him from his cousin. **Gonzalez Dep. p. 151; Young Dep. p. 35**. Officer Young explained that they were placing Gonzalez in handcuffs for the safety of customers and themselves. **Gonzalez Dep. p. 151-152; Young Dep. p. 35**. Officer Young removed the gun from the holster on Gonzalez's right side. **Young Dep. p. 36**. The gun was "partially obscured" by his shirt or jacket. ***Id*. p. 37**. Indeed, when he first arrived, it took Officer Young a second or two to located the position of where the gun was …" ***Id*. p. 38**.

Officer Young told Gonzalez that he did not have a choice "at this time" about a search and he proceed to pat-down Gonzalez. **Young Dep. p. 40**. Officer Young also patted down his cousin. ***Id*. p. 41**. After Officer Young and Gonzalez had a short dialog about the legality of his

[9] Gonzalez explained in his deposition that he gave his cousin his ID because "I don't like cops looking at my papers." **Gonzalez Dep. p. 158**.

conduct, Officer Young told him to "sit tight" while he attempted to contact the District Attorney on his call phone. **Gonzalez Dep. p. 153-154**. Gonzalez could hear Officer Young running through the laws on his cell phone and making comments like: (1) "well, that doesn't count. It wasn't concealed"; (2) "This being way over my head"; and (3) "I have never seen anything like this before." ***Id*. p. 155**. Gonzalez believed that these officers "seemed like they honestly thought that open carry might be illegal, and then they did not know what to do." ***Id*. p. 157**. The officers were friendly and professional. ***Id***. Gonzalez believed that the officers "seemed utterly confused" by the situation and its legality, so he tried to clarify things. ***Id*. p. 160**.

The officers had a brief conversation and then came back to the counter and told Gonzalez that he was not under arrest but that they wanted to "take this down to the police station." **Gonzalez Dep. p. 161**. Once they arrived outside at the police cars, Officer Young made a call on his cell phone. ***Id*. p. 162**. In the parking lot, Officer Young "again explained what was happening to Mr. Gonzalez, that he was being detained until I could determine what… the proper course would be with this and that I was trying to determine whether or not he had broken any laws regarding the open carry law." **Young Dep. p. 49**. "Because it's not a complete right. There are limitations to it, and there are limitations as far as whether it being a certain distance from a school or… whether or not the place sold alcohol or whether it was a public building." ***Id***.

Officer Young contacted the Chilton Police Chief and explained the situation. **Young Dep. p. 52**. The Chief mentioned that the situation may be disorderly conduct, "but we weren't really sure, so we wanted to get guidance from the District Attorney's Office as to what their wishes were on this, as well as if they felt a crime had been committed." ***Id***.

Because Officer Young did not have the district attorney's telephone number, "I determined the quickest way to resolve this issue and get the guidance was to take [Gonzalez] over to the police department where I could take the handcuffs off of him where we were in a controlled environment, and I could then phone the district attorney and also gain their phone numbers." **Young Dep. p. 53**. On the way, Officer Young again explained to Mr. Gonzalez "that he was simply being detained until I could contact the district attorney as to what was happening and get his viewpoint on this issue because I wasn't at the time able to determine with the information I had at the time whether or not he had committed any crimes." ***Id*.. p. 54**.

At the police station, Officer Young placed Mr. Gonzalez in an interviewing room and removed the handcuffs. **Young Dep. p. 54-55; Gonzalez Dep. p. 163**. He did not lock the door. **Young Dep. p. 55**. Officer Young again explained to him "I was simply detaining him until I could refer or confer with the district attorney regarding this." ***Id***. Officer Young contacted both district attorneys and left messages on their home and cell phones. **Young Dep. p. 56-57**. Neither returned the call. **Young Dep. p. 57**.

Officer Young returned to tell Gonzalez that he was not under arrest and that they would not be holding him, but that they could not let him keep his gun in the event the District Attorney "decides he wants to press charges, we might need it for evidence later." **Gonzalez. p. 164**. Mr. Gonzalez replied that he did not break any laws but Officer Young replied that "we're not… going to have the discussion with him at the time regarding whether or not it was legal." **Young Dep. p. 57-58**. Officer Young completed an evidence receipt or evidence tag for the gun and placed the gun into an evidence locker. ***Id*. p. 60-61**. At that point, Gonzalez began to walk out "because he was free to go by this point." ***Id.* at p. 57-58**. By the time Officer Young released Gonzalez it had been approximately a little over an hour since arriving at Wal-Mart. ***Id*. p. 59**.

Because the Chilton Police Chief wanted clarification immediately, he saw the district attorney the following day and discussed the matter with him. **Young Dep. p. 69**. At that time, the district attorney advised that there would not be any prosecution. ***Id***. The district attorney later notified Officer Young by memo that their office would not take any action against Mr. Gonzalez. ***Id*. p. 67**. About two weeks later, the district attorney advised Gonzalez that he would not be issuing charges and that he could make arrangements to retrieve his firearm, which Gonzalez immediately did. **Gonzalez Dep. p. 116, 167-168**.

Gonzalez agrees that Officer Young kept telling him that he was not under arrest. **Gonzalez Dep. p. 134-135**. Although following the event he told people that he had been detained but not arrested, he has since come to believe that he was arrested. ***Id*. p. 134-135**.

The store manager has had other experiences with Officer Young, such as for shoplifting incidents; she has always found him to be professional and she has no criticism of him. **Fairchild Dep. p. 9**. In her opinion, Officer Young handled himself professionally in responding to Gonzalez. ***Id*. p. 10**. Mr. Woefel also believed that Officer Young handled the situation in a professional manner. **Woefel Dep. p. 21**.

STANDARD OF REVIEW

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, establish that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. **Fed. R. Civ. P. 56**. The initial burden is on the moving party to demonstrate, with or without supporting affidavits, the absence of a genuine issue of material fact and that judgment as a matter of law should be granted to the movant. ***Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)**. A material fact is one that is outcome determinative of an issue in the case with substantive law

identifying which facts are material. ***Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)**. Once the moving party has met this initial burden, the opposing party must go beyond the pleadings and designate the specific facts showing that there is a genuine issue for trial. ***Anderson*, 477 U.S. at 248**. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. ***Id.* 242**. Nor will speculation, hearsay or conclusory allegations suffice to defeat summary judgment. **See *Stagman v. Ryan,* 176 F.3d 986, 995 (7th Cir. 1999)**.

LEGAL ANALYSIS

I. THIS COURT SHOULD GRANT SUMMARY JUDGMENT ON CLAIMS FOR MUNICIPAL LIABILITY.

As to the City of Chilton and the Village of West Milwaukee, summary judgment is warranted for three reasons. First, Plaintiff has not alleged and cannot establish an unconstitutional policy, practice or custom. Under ***Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658 (1978),** municipal liability under § 1983 exists only "when execution of a government's policy or custom, whether made by its law-makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." ***Id*. at 694**. A plaintiff seeking to find a municipality liable under § 1983 must establish a causal nexus between his injury and the municipality's alleged "policy or custom." ***Id*. at 693-94**. The complaint must allege that an official policy or custom not only caused the constitutional violation, but was "the moving force" behind it. **See *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)**. The "official policy" requirement for liability under § 1983 is to "distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." ***Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986)**. A plaintiff may demonstrate an official policy through: (1) an express policy

that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." ***Lewis v. City of Chicago*, 496 F.3d 645, 656 (7th Cir. 2007)**. Here, Plaintiff cannot establish a viable claim under ***Monell*** against Chilton and West Milwaukee. Plaintiff has not alleged in his Complaint, Rule 26(a)(1) initial disclosures or expert disclosures that his detention and arrest resulted from an unlawful policy, practice or custom, that it was caused by a person with final policymaking authority or that it resulted from a widespread practice. Plaintiff has not offered any evidence to support such claims.

Second, with regard to the widespread practice method of establishing municipal liability, this case involves an isolated incident which is insufficient to establish a claim under ***Monell*** (and also supports the qualified immunity analysis discussed in Section II(A) below). Neither West Milwaukee nor Chilton have had similar claims presented against them. **Aff. Young ¶ 5; Aff. Krafcheck ¶ 6; Aff. Donovan ¶ 6**. (This is also true of the Privacy Act claim. ***Id***.) Indeed, as Gonzalez admits, he is the first; he has "led the charge" on issues of open carry. Under these facts, Plaintiff's claims against the municipalities cannot succeed. ***See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985)** ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under ***Monell***, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."); ***Palmer v. Marion County*, 327 F.3d 588, 596 (7th Cir. 2003)** ("Palmer's alleged personal knowledge of two incidents of misconduct by correctional officers in a period of one year certainly fails to meet the test of a widespread unconstitutional practice by the Jail's staff that is so well settled that it constitutes a custom or usage with the force of law.").

Third, because Plaintiff cannot establish that the officers violated the Constitution (as set forth more fully below in Section II), neither West Milwaukee nor Chilton can be held liable. The municipalities were only sued because they were alleged to be responsible for the officers' conduct and, if the officers committed no constitutional deprivation, the municipalities cannot be liable. **See *Pepper v. Village of Oak Park*, 430 F.3d 805, 812 (7th Cir. 2005)**.

II. THIS LAWSUIT SHOULD BE DISMISSED BECAUSE QUALIFIED IMMUNITY SHIELDS THE OFFICERS AS A MATTER OF LAW AND BECAUSE PLAINTIFF CANNOT SHOW THAT THE OFFICERS VIOLATED THE FOURTH AMENDMENT.

A. The Officers are Entitled to Qualified Immunity Because They did not Violate a Clearly Established Right and They Had "Arguable" Probable Cause.

Qualified immunity protects the officers in their individual capacity against all of Gonzalez's claims. Qualified immunity shields a public official from suit when he makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances he confronted at the time. ***Saucier v. Katz*, 533 U.S. 194, 201-202 (2001)**. This analysis requires two steps. First, the court considers whether "taken in the light most favorable to the party asserting the injury . . . the facts alleged show [that] the officer's conduct violated a constitutional right." ***Saucier*, 533 U.S. at 201**. If the court finds a constitutional violation has been demonstrated, it must then consider whether the violation involved clearly established constitutional rights of which a reasonable person would have known. ***Id***.[10] The plaintiff has the burden of showing that the constitutional right was clearly established. ***Purtell v. Mason*, 527 F.3d 615, 621 (7th Cir. 2008)**.

For a right to be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." ***Anderson***

[10] The Supreme Court has recently clarified that the ***Saucier*** sequence is not an inflexible requirement. ***See Pearson v. Callahan*, 129 S.Ct. 808, 813, (2009)**.

***v. Creighton*, 483 U.S. 635, 639 (1987)**. Although it need not be the case that "the very action in question has been previously held unlawful … in the light of pre-existing law the unlawfulness must be apparent." ***Id.* at 640**. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" ***Saucier*, 533 U.S. at 201-202**. The inquiry into whether a right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." ***Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)** ("Qualified immunity shields an official from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.").

Here, Gonzalez cannot establish a constitutional deprivation. **See Sections II(B)(1)-(2), II(C)(1)-(3), III, and IV below**.

Moreover, Gonzalez cannot establish a violation of a "clearly established" right. Given the number of ways a Wisconsin citizen could possess a gun illegally in 2008 and 2009,[11] including the possible application of the disorderly conduct statute, which the Attorney General has since clarified (but not withdrawn as a ground for unlawful use of a gun), it cannot be said that the state of the law in 2008 and 2009 gave the officers fair warning that their alleged treatment of Gonzalez was unconstitutional. No prior court decisions in Wisconsin gave reasonable warning to these officers that the disorderly conduct statute could not be applied to an individual carrying a firearm in a retail store where the officer receives first-hand information

[11] Such laws include those prohibiting certain persons from possessing firearms, such as felons (Wis. Stats. § 941.29), minors (Wis. Stats. § 948.60), certain persons with mental illness (Wis. Stats. § 941.29), and persons under court-ordered domestic or child abuse orders (Wis. Stats. §§ 813.12(4m), 813.122(5m) and 813.125(4m)). Additionally, Wisconsin makes certain firearms illegal (such as plastic firearms and imitation firearms pursuant to Wis. Stats. §§ 941.25 *et seq*.). Firearms are also illegal in certain places. See Wis. Stats. § 941.235 (public buildings owned or leased by the State or any political subdivision); Wis. Stats. § 941.237 (taverns); Wis. Stats § 167.31(2) (vehicles unless unloaded and in a carrying case) and Wis. Stats. § 948.605 (within 1000 feet of school grounds).

from reliable witnesses including management that, *inter alia*, the individual's conduct and actions caused store employees and management to become concerned for the safety, well-being and good order of their store such that they believed a disturbance had been created necessitating a call to the police for assistance and investigation.

Where there is a legitimate question as to the existence of the right at issue, as in this case, then qualified immunity attaches. **See *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985)**. In the present case, courts are still developing the contours of the Wisconsin right to bear arms, as seen by legal developments in the last 10 years. Wisconsin's new right to "keep and bear arms" became part of the Wisconsin Constitution on November 30, 1998. Since then, no published Wisconsin case law addressed the interplay between the Wisconsin amendment and the disorderly conduct statute. The Wisconsin Attorney General did not issue any guidance in this regard until after the commencement of this lawsuit. Exploring related developments fails to disclose clearly established law. In July 2003, for example, the Wisconsin Supreme Court, in ***State v. Hamdan*, 2003 WI 113, 264 Wis.2d 433, 665 N.W.2d 785**, had it first opportunity to review the new right but only in the context of the state's concealed carry statute, not the disorderly conduct statute. Interestingly, Gonzalez seems to think that ***Hamdan*** is so clearly established (or so clearly broad in its scope) even with regard to the disorderly conduct statute, **Gonzalez Dep. p. 121-123**, but he has failed to consider the portion of the ***Hamdan*** decision that, in dicta, stated that the disorderly conduct statute could pose limitations on a Wisconsin gun owner. ***Hamdan*, 2003 WI 113, ¶ 73**. The landmark U. S. Supreme Court decision in ***Heller v. District of Columbia*, 128 S.Ct. 2783 (2008)**, issued June 26, 2008, a month after the West Milwaukee Menards incident, created a wave of applause from gun advocates but close examination reveals that even the Supreme Court has not touched on every state limitation on

gun possession and use. "Of course the right was not unlimited, just as the First Amendment's right of free speech was not, …Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." ***Id*. at 2799** (emphasis in original). Moreover, the Court stated:

> Like most rights, the right secured by the Second Amendment is not unlimited. …. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [FN26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]

***Id*. at 2816-2817**. Finally, the Supreme Court has accepted certiorari this term on the issue of whether the Second Amendment rights are incorporated against the States, and issue which has divided the Circuit Courts. **See *National Rifle Ass'n of America v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009)** (collecting cases and concluding that the Second Amendment is not one of the parts of the Bill of Rights that has been incorporated by the Fourteenth Amendment and thereby made applicable to the states.)[12]

Finally, qualified immunity still protects the officers if a reasonable officer could have mistakenly believed that probable cause existed. **See *Humphrey v. Staszak,* 148 F.3d 719, 725 (7th Cir. 1998)**. Courts refer to this inquiry as asking whether the officers had "arguable" probable cause. ***Id***. Arguable probable cause exists when "a reasonable police officer in the same circumstance and with the same knowledge … as the officer in questions *could* have reasonable believed that probable cause existed in light of well-established law." ***Id***. Here, even

[12] To the extent Gonzalez, in this case, rests his right to bear arms on the Second Amendments, the ***NRA v. City of Chicago*** says that right is not applicable against these defendants, and these defendants incorporate in full the result and reasoning in that decision.

assuming some were to conclude that the circumstances did not rise to probable cause, "arguable" probable cause exists because a reasonable police officer could have reasonably believed that probable cause existed in light of the established law. This conclusion is most obviously supported by the fact that the Wisconsin Attorney General, and others like the Sheboygan District Attorney's Office and the City of Milwaukee Police Chief, have issued statements indicating that, depending upon the circumstances, law enforcement officers may reasonably believe that probable causes exists to find that carrying a firearm may violate the disorderly conduct statute.

B. The Investigative Stop, Detention and Protective Frisk Did Not Violate the Fourth Amendment.

The constitutional provision for analyzing Gonzalez's claims is the Fourth Amendment, not the Fourteenth Amendment's "generalized notion" of substantive due process. **See *Graham v. Connor*, 490 U.S. 386, 395 (1989)**. Under the Fourth Amendment, made applicable to the States by the Fourteenth Amendment, ***Mapp v. Ohio*, 367 U.S. 643 (1961)**, the people are "to be secure in their persons … and effects, against unreasonable searches and seizures, . . . and no Warrants shall issue, but upon probable cause . . . ." **U.S. Const., Amdt. 4**. The fact that alleged seizure took place without a warrant, however, does not end the inquiry because the courts have evolved exceptions if law enforcement officers support their conduct with the requisite level of suspicion to satisfy the Fourth Amendment.

A ***Terry*** "stop and frisk" is one such exception. An investigatory stop not amounting to an arrest is authorized if the officer is able to point to "specific and articulable facts" that give rise to a reasonable suspicion that a crime is about to be or has been committed. ***Terry v. Ohio,* 392 U.S. 1, 21-22, (1968)**. Further, "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to

the officer or to others," the officer may conduct a limited search ("patdown") of the person "to determine whether the person is in fact carrying a weapon." ***Id.* at 24**.

"Reasonable suspicion" must be based on some "objective manifestation" that the suspect is involved in criminal activity. ***United States v. Wimbush,* 337 F.3d 947, 949 (7th Cir. 2003)**. Although the police may not detain a suspect based merely on a hunch, the likelihood of criminal activity need not rise to the level required for probable cause to arrest and falls well short of meeting the preponderance of the evidence standard. ***Id***. In evaluating the reasonableness of a stop, courts must examine the totality of the circumstances known to the officer at the time of the stop. ***Id.* at 950**. To qualify as a lawful ***Terry*** stop, a detention must be limited in scope and executed through the least restrictive means. **See *United States v. Ienco,* 182 F.3d 517, 523 (7th Cir. 1999)**. Reasonable suspicion need not be based on an officer's personal observations, but rather may be based on information supplied by another person, so long as the information bears sufficient indicia of reliability. **See *Adams v. Williams,* 407 U.S. 143, 147 (1972)**.

Under this doctrine, a number of stops are permissible including stops based on an officer's observation of entirely legal acts, where the acts, when viewed through the lens of a police officer's experience and combined with other circumstances, lead to an articulable belief that a crime was about to be committed. One of the best examples is ***Terry*** itself. There, the Supreme Court upheld a stop based on an officer's belief that Terry and his cohorts were "casing" a store. ***Terry*, 392 U.S. at 6**. In so doing, the Court articulated how seemingly innocent actions can lead to a reasonable belief that criminal activity is afoot, and provided the prototypical example of particularized suspicion. The Court stated:

> There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as

> here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away.

***Id*. at 22-23**. The Court concluded that these "specific, reasonable inferences" of criminal activity furnished more than a mere inchoate hunch and therefore justified the stop. ***Id*. at 27**.

Similarly, in ***Wardlow***, the Court held that officers acted reasonably in stopping a man whose acts, when viewed in isolation, were entirely legal, but when taken in combination with other circumstances gave rise to a reasonable suspicion of criminal activity. ***Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)**. There, police officers were patrolling an area known for heavy narcotics trafficking. They stopped a man who was carrying an opaque bag and had fled immediately upon seeing them. ***Id*. at 121-22**. The Court held that the stop did not violate the Fourth Amendment, and confirmed that the standards is less demanding than probable cause, i.e., the standard requires only "a minimal level of objective justification for making the stop." ***Id*. at 123**. The Court explained that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." ***Id.* at 124**. In addition, a suspect's "evasive behavior" is a "pertinent factor in determining reasonable suspicion. ***Id***. **See also *United States v. Arvizu*, 534 U.S. 266, 268 (2002)** (holding that it was reasonable for a border patrol agent to infer that the defendant was attempting to avoid a smuggling checkpoint because, among other factors, the defendant's minivan turned away from the known recreation areas and the children in the back seat were waving oddly as if they were being instructed); ***United States v. Sokolow*, 490 U.S. 1, 3, (1989)** (finding stop to be reasonable where a man had paid for two expensive airline tickets with a roll

of $ 20 bills, was traveling under a name that did not match the name listed for his telephone number, returned to Hawaii from Miami within 48 hours of departing, appeared nervous during the trip, and did not check any luggage).

Moreover, under ***United States v. Pedroza*, 269 F.3d 821, 827 (7th Cir. 2001)**, "a protective pat-down search … is appropriate only if the agents have at a minimum some articulable suspicion that the subject is concealing a weapon or poses a danger to the agent or others …" When evaluating a situation, officers are entitled to consider practical considerations of everyday life. **See *United States v. Lawshea*, 461 F.3d 857, 859 (7th Cir. 20006)** (citing ***Ornelas v. United States,* 517 U. S. 690, 695 (1996)**).

The officers' knowledge of the location and the uncommonness of openly carrying are also relevant factors in their determination of reasonable suspicion. **See *Arvizu*, 534 U.S. at 273** (explaining that the reasonable suspicion determination "allows officers to draw on their own experience and specialized training to make inferences about the cumulative information available to them").

Finally, the determination of whether an investigatory stop has become an arrest requiring probable cause depends on the intrusiveness of the stop and the justification for the police methods used. The reasonableness of handcuffing a suspect depends, in particular, on whether handcuffs are reasonably necessary "to allow the officer to pursue his investigation without fear of violence." ***Adams v. Williams,* 407 U.S. 143, (1972)**.

1. The West Milwaukee Officers Had Reasonable Suspicion.

In the West Milwaukee matter, before the officers stopped Gonzalez, patted him down and seized his firearm, the undisputed facts known to Officers Donovan and Krafcheck included the following facts: The manager of a large retail store open for business called the station's

dispatch who routed the call to Officer Krafcheck about an individual with a gun in a retail store, something that was not commonplace for their community. **Krafcheck Dep. p. 7-8; Donovan Dep. p. 12, 18-19; see also Aff. Donovan ¶ 5; Aff. Krafcheck ¶ 5**. The officers further knew that the suspect, a large man, made the manager and others nervous, that the individual's actions caused undue concern to the manager and employees and that the individual became argumentative causing the manager to become really uncomfortable. **Krafcheck Dep. p. 7-8**; **Donovan Dep. p. 12, 13-14, 18-19, 21-23; Jensen Dep. p. 28-30; see also Aff. Donovan ¶ 4; Aff. Krafcheck ¶ 4**. Additionally, based on the manager's affirmation that the situation could be disorderly conduct depending on the circumstances, the officers knew that the suspect had created or was creating more than simple personal annoyances but engaging in conduct that disrupted good order of the store and provoked a disturbance. **Jensen Dep. p. 24, 29-30; Donovan Dep. p. 12, 18-19; Krafcheck Dep. p. 8, 13-14**. As the officers approached Gonzalez, they further knew that they could not see the gun, a significant fact because it raised safety concerns for the officers. **Krafcheck Dep. p. 15-16; Donovan Dep. p. 17-18, 20**. Upon initiating contact with Gonzalez, he admitted having a gun in the store but refused to answer further questions, particularly about the location of the firearm and his intentions. **Donovan Dep. p. 17-18; Gonzalez Dep. p. 95, 172**.

2. Chilton Police Officer Michael Young Had Reasonable Suspicion.

In the Chilton matter, before Officer Young stopped Gonzalez, patted him down and seized his firearm, the undisputed facts known to Officer Young included the following facts: The manager of a large 24 hour retail store at close to midnight called 911 to inform law enforcement that an individual had a firearm, that the individual was buying ammunition for what appeared to be a different gun, that the Wal-Mart employees did not know how to react,

that an employee was stalling until police arrived, that upon observing Gonzalez his gun was not completely visible and that Gonzalez had someone with him. **Young Dep. p. 17, 24, 29**. Officer Young also know that the manager would take steps to keep all associates and customers away from that area of sporting goods, **Fairchild Dep. p. 19**, which underscored the seriousness of the situation. Officer Young also knew the manager's demeanor; she appeared nervous and anxious as compared to past occasions where he dealt with her. **Young Dep. p. 22, 72, 78-79**. He knew that she sought law enforcement due to her concern about safety and that she felt uneasy. ***Id***. Based on his training and experiences, Officer Young further understood that the manager treated the situation with urgency and that the situation was beyond the everyday experiences of the reporting Wal-Mart employees. **Young Aff. ¶ 5**. Officer Young also knew his jurisdiction: this Wal-Mart sold alcohol, the immediate neighborhood was a peaceful community surrounded in part by residential apartments or condos, and that openly carrying a firearm in a retail store was not common for Chilton. **Young Dep. p. 49, 72, 78-79; Aff. Young ¶ 5**. When Gonzalez first saw Officer Young, Gonzalez handed his cousin his Wisconsin driver's license such that Officer Young further suspected that Gonzalez was trying to hide his identity. **Young Dep. p. 77**. Finally, based on all of the above, Officer Young also knew that he faced a situation that caused the Wal-Mart manager and employees to deviate from their everyday job responsibilities in order to focus on a single customer out of concern for the safety of themselves and customers and the good order of their store. **Young Dep. p. 22-23, 23-24, 78**. **See also Aff. Young ¶ 5**.

3. Conclusion.

In both cases, the facts and circumstances known to the officers established the amount of suspicion necessary to justify their ***Terry***-stop. Additionally, because the officers were engaged in a lawful encounter with Gonzalez, ***Terry*** further allowed them to pat him down for weapons

for reasons of officer safety upon mere reasonable suspicion and that is what happened here. Gonzalez acknowledges that officers may "freely" approach a suspect and ask questions. **Gonzalez Dep. p. 39**. Lastly, underscoring the fact that the officers had reasonable suspicion that the crime of disorderly conduct may be occurring was the fact that store management treated the situation as an emergency by calling law enforcement's 911 or 311 systems. **See *United States v. Richardson,* 208 F.3d 626, 630 (7th Cir. 2000)** ("A 911 call is one of the most common-and universally recognized-means through which police and other emergency personnel learn that there is someone in a dangerous situation who urgently needs help."). Unlike an anonymous call, here the officers had communications from the management that they viewed the situation as a disturbance unlike their general day-to-day interactions with customers.

C. The Officers Had Probable Cause Under the Fourth Amendment.

In order to prevail on a claim of an arrest in violation of the Fourth Amendment, Gonzalez must show that he was arrested without probable cause. Probable cause bars a § 1983 claim. **See *Purtell v. Mason*, 527 F.3d 615, 626 (7th Cir. 2008)**. "Police ordinarily have probable cause if, at the time of the arrest, the 'facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.'" ***Id***. (citing, among others, ***Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)**). The facts and circumstances are considered as they appeared to the officers the time of arrest. ***Id***. The validity of the arrest is not dependent on whether the suspect actually committed any crime, and "the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant." ***DeFillippo*, 443 U.S. at 36**. Probable cause gives officers "fair leeway" for enforcing the laws and is not subject to mathematical formulas:

> On many occasions, we have reiterated that the probable-cause standard is a "'practical, nontechnical conception'" that deals with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" …. "[P]robable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." …
>
> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances …We have stated, however, that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt," ... (internal quotation marks and citations omitted), and that the belief of guilt must be particularized with respect to the person to be searched or seized, …

***Maryland v. Pringle,* 540 U.S. 366, 371 (2003)**. "Perhaps the best that can be said generally about the required knowledge component of probable cause …. is that it raise a 'fair probability,' or a 'substantial chance,' of discovering evidence of criminal activity." ***Safford Unified School Dist. v. Redding,* 129 S.Ct. 2633, 2639 (2009)**.

"The complaint of a single witness or putative victim alone generally is sufficient to establish probable cause to arrest unless the complaint would lead a reasonable officer to be suspicious, in which case the officer has a further duty to investigate." ***Beauchamp v. City of Noblesville,* 320 F.3d 733, 743 (7th Cir.2003)**. "And in crediting the complaint of a reasonably believable witness or putative victim, the police are under no constitutional obligation to exclude all suggestions that the witness or victim is not telling the truth." ***Id*.** "[I]t is not the function of the police to establish guilt; the responsibility of sorting out conflicting testimony and assessing the credibility of putative victims and witnesses lies with the courts." ***Id.* at 745**.

A warrantless arrest of an individual in a public place for a misdemeanor committed in the officer's presence is consistent with the Fourth Amendment if the arrest is supported by probable cause. ***United States v. Watson*, 423 U.S. 411, 424 (1976)**. Indeed, "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in

his presence, he may, without violating the Fourth Amendment, arrest the offender." ***Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001)**. Thus, under ***Atwater***, the Constitution permits custodial arrests even when the sole authorized punishment is a fine. The Supreme Court has held that if an arrest is otherwise reasonable, the fact that it is not for an "arrestable" offense does not make it unconstitutional. **See *Virginia v. Moore*, 128 S. Ct. 1598, 1606 – 1607 (2008)**.

Lastly, the claims here may be foreclosed if there is "arguable" probable cause, which exists when "a reasonable police officer in the same circumstance and with the same knowledge … as the officer in questions *could* have reasonable believed that probable cause existed in light of well-established law." ***Humphrey v. Staszak,* 148 F.3d 719, 725 (7th Cir. 1998)**.

1. Wisconsin's Disorderly Conduct Statute.

This determination of probable cause requires reviewing the crime of disorderly conduct. Wisconsin Statute § 947.01 states: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." The statute creates two elements for disorderly conduct: (1) conduct of the type enumerated in the statute; and (2) circumstances in which the conduct would tend to cause a disturbance. **See *City of Oak Creek v. King*, 148 Wis.2d 532, 540, 436 N.W.2d 285 (1989)**. The final clause of the statute (i.e., "otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance") – generally denominated as the "catchall clause" – proscribes otherwise disorderly conduct which tends to disrupt good order and to provoke a disturbance. **See *id.* at 541**.

Under Wisconsin law, "it is not necessary that an actual disturbance must have resulted" from a person's conduct for that particular conduct to qualify as the "type which tends to cause

or provoke a disturbance." **See *King,* 148 Wis.2d 532, 545, 436 N.W.2d 285, 289 (Wis. Ct. App. 1989)** (emphasizing the totality of circumstances in deciding whether conduct is disorderly and upholding the disorderly conduct conviction of a person who had refused to obey a lawful police order). The law only requires that the conduct be of a type which tends to cause or provoke a disturbance, under the circumstances as they then existed. ***Id***. The disorderly conduct statute emphasizes "the relatedness of conduct and circumstances" and "is no more than a recognition of the fact that what would constitute disorderly conduct in one set of circumstances, might not under some other." **148 Wis.2d at 542, 436 N.W.2d at 288**. Wisconsin law permits consideration of onlookers' subjective reactions as evidence of whether under the circumstances a person's actions "tended to create or provoke" a disturbance. **See *State v. Migliorino,* 170 Wis.2d 576, 594, 489 N.W.2d 678 (Wis. Ct. App. 1992)**.

Disorderly conduct does not necessarily require disruptions that implicate the public directly. **See *State v. Schwebke*, 2002 WI 55, ¶ 30, 253 Wis.2d 1, 644 N.W.2d 666** (sending repeated, unwelcome, and anonymous mailings was "otherwise disorderly conduct."). This section encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that the disturbance or disruption will spill over and disrupt the peace, order, or safety of the surrounding community as well. ***Id***. Causing a minor disturbance, even if it involves private interactions, may be sufficient to violate the statute.[13] In the law enforcement context, there have not been similar cases but the courts

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[13] **See, e.g., *State v. Douglas D.*, 2001 WI 47, ¶¶ 6-7 & 28, 243 Wis.2d 204, 626 N.W.2d 725** (statute applied to threatening essay from a student to a teacher because, even though the conduct involved a private interaction, because the threat jeopardized the proper functioning of the school itself, which was regarded as a threat to public order, even if the teacher did not become upset); ***State v. Maker*, 48 Wis.2d 612, 180 N.W.2d 707 (1970)** (The defendant was properly convicted of disorderly conduct when he appeared on a stage wearing a minimum of clothing intending to and succeeding in causing a loud reaction in the audience.); ***State v. Elson*, 60 Wis.2d 54, 208 N.W.2d 363 (1973)** (An attorney was properly convicted under this section for refusing to leave a ward in a mental hospital until he had seen a client after having made statements in the presence of patients that caused some to become agitated.).

have held that defiance of a police officer's order to move is itself disorderly conduct if the order is lawful.[14] The courts have also applied the statute to conduct occurring in retail stores.[15]

2. The West Milwaukee Officers Had Probable Cause to Act.

Further to those facts and circumstances outlined above in the ***Terry*** analysis, Officers Krafcheck and Donovan had probable cause to arrest Gonzalez for disorderly conduct because reliable witnesses informed them that Gonzalez disturbed the peace and good order of the store by startling employees and managers, causing those employees and managers to track him down, cordon him off from other nearby customers and become involved in a heated quarrel about his right to carry a firearm. It is further undisputed that Gonzalez argued with the management, that the conversation became heated and that he caused the managers and employees to become concerned about the safety and well-being of themselves and their customers. Upon making contact with Gonzalez, the officers learned that he was the individual in the store who caused the disruption and that he had a firearm but he refused to answer further questions including the location of the firearm. These facts and circumstances, when taken together, constituted disorderly conduct under the statute.

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[14] **See *Braun v. Baldwin*, 346 F.3d 761 (2003)** (In considering a disorderly conduct ordinance similar to that of Wisconsin's the Court found officers had probable cause to arrest and individual under the catch all "or otherwise disorderly" provision of the ordinance where individual created a "strange spectacle" inside the Milwaukee County Courthouse while protesting in favor of jury nullification and where he photographed the police officers, refused to explain why, threatened to sue the officer, and refused the officer's order to step outside the lobby); ***Ryan v. County of Du Page,*** **45 F.3d 1090, 1093 (7th Cir. 1995)** (in construing similar Illinois law concerning disorderly conduct, finding that defiance of a police officer's order to move is itself disorderly conduct if the order is lawful)**; *King*, 148 Wis.2d 532, 436 N.W.2d 285 (1989)** (newsperson's refusal to obey police command at scene of helicopter crash constituted disorderly conduct).

[15] **See, e.g., *State v. Becker*, 51 Wis.2d 659, 188 N.W.2d 449 (1971)** (defendant's violent conduct against police officer in public department store constituted disorderly conduct).

3. Chilton Officer Michael Young Had Probable Cause to Act.

Although Gonzalez initially believed he was not arrested by Chilton Officer Young, such that this claim could be considered waived, the outcome is the same: Officer Young also had probable cause to believe that Gonzalez was committing the offense of disorderly conduct.

Further to those facts and circumstances outlined above in the ***Terry*** analysis, in the Chilton Wal-Mart incident, Officer Young had probable cause to arrest Gonzalez for disorderly conduct because reliable witnesses informed him that Gonzalez disturbed the peace and good order of the store by startling employees and managers, causing those employees and managers to isolate and stall him and to take steps to make sure other patrons and employees stayed away from him. Officer Young also knew that Gonzalez caused the manager to be anxious and nervous, quite unlike her demeanor in past occasions where he dealt with her. Upon approaching Gonzalez, Officer Young observed him hand his ID to another subject standing next to him and it took Officer Young a few seconds to locate the firearm in the holster. These facts and circumstances, when taken together, constitute disorderly conduct under the statute for which the officers had probable cause or at least "arguable" probable cause.

Even if this Court considered Gonzalez's statement that Officer Young seemed "confused" – that is, about whether Gonzalez's conducted violated the disorderly conduct statute, concealed carry statute or the alcohol prohibition on carrying firearms – the result would be the same. Police officers are not required to be legal scholars, which means, among other things, "that the arresting officers knowledge of facts sufficient to support probable cause is more important to the evaluation of the propriety of an arrest than the officer's understanding of the legal basis for the arrest." ***Williams v. Jaglowski*, 269 F.3d 778, 784 (7th Cir. 2001)**. "This is why an arrest is justified if the officers had probable cause (or arguable probable cause) to arrest

the suspect either for the precise offense the officers cited or for a closely-related offense." ***Id***.

Here, given the unsettled laws in this area concerning the interplay between the right to "openly carry" and the numerous limitations, that Wal-Mart sold alcohol, that Gonzalez's firearm was not immediately or so obviously visible, Officer Young would have at least "arguable" probable cause to arrest Gonzalez. "[A]ny remaining question about the propriety of the arrest raises only an issue of state law, not a federal constitutional problem." ***Id*. at 783**.

4. Conclusion.

In both cases, Gonzalez's conduct and behavior fell within the sweep of the disorderly conduct statute. The fact that so many people complained about his conduct not only underscores the disturbance he created, but also shows that Gonzalez – knowing that he was going to lead the "open carry" campaign – really paid no attention to the effect that his behavior was having on those around him. It is irrelevant that the district attorneys later chose not to prosecute and that no convictions arose in this case. It should also be noted that the totality of circumstances known to these officers included the actual times and locations of these events, which tended to corroborate that Gonzalez did or was about to cause a disturbance. His conduct on these occasions – as he anticipated and as his fellow "open carry" advocates forewarned – crossed the line. Most telling in this regard is that Gonzalez has subsequently carried in the Chilton Wal-Mart without creating a disturbance. On the day in question, however, he *did* create a disturbance.

The conclusion that the officers' actions were proper – and also entitled to qualified immunity - is further bolstered by the following analysis which is instructive here:

> Thus, when a supermarket security guard witnesses an individual shoplifting, and the police arrest the individual based on the guard's report, qualified immunity shields the arresting officers from § 1983 liability. ... So long as a reasonably credible witness ... informs the police that someone has committed, or is

> committing, a crime, the officers have probable cause to place the alleged culprit under arrest, and their actions will be cloaked with qualified immunity [even] if the arrestee is later found innocent…

***Jenkins v. Keating*, 147 F.3d 577, 5885 (7th Cir. 1998)**.

Lastly, any claim that the officers unlawfully seized Gonzalez's firearm also fails. Seizures that are founded on probable cause, as here, are reasonable and do not lead to liability. **See, e.g., *Lee v. City of Chicago,* 330 F.3d 456, 466 (7th Cir. 2003)**.

III. THE PRIVACY ACT CLAIMS FAIL AS A MATTER OF LAW.

Gonzalez alleges two claims: (1) a violation of Section 7(a)(1) of the Privacy Act, which provides that "[i]t shall be unlawful for any Federal, State, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." **Privacy Act of 1974, Pub. L. No. 93-579, § 7(a)(1), 88 Stat. 1896, 1909** (codified as amended at **5 U.S.C. § 552a** (note)); and (2) a violation of Section 7(b) of the Privacy Act, which provides that "[a]ny Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it." ***Id.*.**

These claims fail for at least five reasons.

First, the Privacy Act creates no cause of action against local municipalities like West Milwaukee.[16] Nor does the Privacy Act apply against individuals; it authorizes lawsuits against federal agencies only, ***Martinez v. Bureau of Prisons,* 444 F.3d 620, 624 (D.C.Cir. 2006)**. The Privacy Act outlines the term "agency" by referencing the Freedom of Information Act

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[16] **See *Schmitt v. City of Detroit*, 395 F.3d 327, 330-331 (6th Cir. 2005)** (finding that Section 7 only applies to federal agencies); ***Stoianoff v. Commissioner of Motor Vehicles,* 107 F. Supp.2d 439, 444 (S.D.N.Y. 2000)** ("the Privacy Act … does not apply to State agencies or officials because … it incorporates the FOIA definition of 'of agency' as limited only to federal agencies.").

("FOIA"). **See 5 U. S. C. § 552 a(a)(1)**. Under the FOIA, "agency" is defined as: "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." **5 U.S.C. § 552(f)**.

Second, the Privacy Act does not create a private cause of action enforceable under § 1983.[17] In case of a violation, the Act provides for certain civil remedies. The Privacy Act provides for four separate and distinct civil causes of action, **see 5 U.S.C. § 552a(g)**, but only two provide for compensatory relief in the form of monetary damages. The remedies provided for by the Privacy Act are exclusive. **See *United States v. Berney* 713 F.2d 568, 572 (10th Cir. 1983)** (Privacy Act "contains its own remedies for noncompliance"). The Privacy Act allows for injunctive relief in "amendment" lawsuits under 5 U.S.C. § 552a(g)(1)(A) as well as "access" lawsuits under 5 U.S.C. § 552a(g)(1)(B). As such, injunctive relief is not applicable here. Nor is this an "accuracy" lawsuit under 5 U.S.C. § 552a(g)(1)(C) for failing to "maintain any record concerning any individual with such accuracy … as is necessary to assure fairness in any determination … that may be made on the basis of such record …"

[17] Generally, a Federal Statute is enforceable under § 1983 if the statute creates a federal right. **See *Golden State Transit Corp. v. City of Los Angles*, 493 U. S. 103, 108 (1989)**. In order to determine whether a statute creates such a right, three factors are considered: (1) whether Congress intended that the provisions in questions benefit the plaintiff; (2) whether the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence; and (3) whether the statute unambiguously imposes a bindingly obligation. **See *Blessing v. Freestone*, 520 U. S. 329, 340-341 (1997)**. However, even if a plaintiff is able demonstrate a statute creates a federal right because it meets these three criteria, doing so creates only a rebuttable presumption that the right is enforceable under § 1983. ***Id.* at 341**. If Congress specifically foreclosed a remedy under § 1983, dismissal is proper. Such foreclosures can be done expressly, by forbidding recourse via § 1983 and the statute itself, or implicitly by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983. ***Id***. The courts are split as to whether Section 7 creates a federal right enforceable under § 1983. Compare ***Schwier v. Cox* 340 F.3d 1284 (11th Cir. 2003)** (finding § 1983 causes of action are appropriate for violations of Section 7) with ***Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999)** (finding that a private plaintiff may not maintain an action under § 1983 to remedy alleged violations of Section 7(a)(1) of the Privacy Act). **See also *Pennyfeather v. Tessler*, 431 F.3d 54 (2nd Cir. 2005)** (no private cause of action under Privacy Act); ***Polchowski v. Gorris*, 714 F.2d 749, 752 (7th Cir. 1983)** (finding no private cause of action under Section 3).

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The remaining avenue for civil remedies for monetary damages is under 5 U.S.C. § 552a(g)(1)(D): "whenever any agency … fails to comply with any other provision of the section … in such a way as to have an adverse effect on an individual … the individual may bring a civil action against the agency …" However, it is undisputed that the Village of West Milwaukee is not a Federal "agency" that can be held liable under the Privacy Act per the authorities above. **See also *Polchowski v. Gorris,* 714 F.2d 749, 752 (7th Cir. 19983)** (noting that the Privacy Act "applies only to agencies of the United States Government"). Gonzalez cannot show that the Village of West Milwaukee operates with Federal Government oversight, supervision or direction; that it organized pursuant to any federal charter or Act of the United States; that it is subject to federal audits, financial oversight or management; or that the law enforcement officers in this case were federal employees. Any interaction between West Milwaukee and the United States Government, if any, is of a limited nature.[18]

Third, even if the Court addressed the merits of a Privacy Act claim, Gonzalez cannot prevail. The Complaint does not allege that Gonzalez refused to provide his social security number and that he was forced to do so. Instead, he alleges that he "did not respond to the request for his social security number and then told the officers that his social security card was in his wallet after they told him that if he did not cooperate he would be held in custody over the weekend." **Complaint ¶ 16-17**. Moreover, he does not allege with any particularity a "right, benefit or privilege" that he was denied, which is a prerequisite under Section 7(a). At his deposition, he could not identify what right or benefit he believes he was denied. **Gonzalez Dep.**

[18] **See *Burch v. Pioneer Credit Recovery Inc.* 551 F.3d 122, 124 -125 (2nd Cir. 2008)** (Privacy Act claim failed because Plaintiff alleged only a few weak connections between the Defendant and the federal government and rejected Plaintiff's arguments that Defendant which had contracted with federal agencies was thus an "agency" of the United States); ***Dong v. Smithsonian Institute* 125 F.3d 877, 879-890 (D.C. Cirp. 1997)** (Finding that the Smithsonian Institute was not an "agency" of the federal government even though it workforce consisted of 70% federal employees, received extensive federal funding, submitted annual financial statements to congress, enjoyed federal immunity and received representation from the U. S. Department of Justice).

p. 111. "I guess the privilege they stole would be my secrecy or my right to privacy." ***Id***. Gonzalez understood that the officers were completing booking forms and that his only concern when viewing the forms was whether there was an admission of guilt. ***Id*. p. 109**.

Moreover, there are other flaws with Gonzalez's alleged private right of action. The Complaint alleges no "adverse effect" as required by cases like ***Doe v. Chao*, 540 U.S. 614 (2004)** ("'[A]dverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue." Here, Gonzalez alleges no specific injury in terms of monetary damages due to the alleged Privacy Act violation.[19] His initial disclosures are silent on these points. **Aff. Bitar, Exh. 9**. Gonzalez has also failed to show causation, i.e., that the violation caused an adverse effect and that the violation caused "actual damages." **See *Quinn v. Stone* 978 F.2d 126, 135-136 (3rd Cir. 1992); *Orekoya v. Mooney,* 330 F.3d 1, 10 (1st Cir. 2003)**. "For there to be a causal link between the injury and the violation of the Act, the injury necessarily must be distinct and independent from the violation of the Act itself." ***Schmidt v. Veterans Administration,* 218 F. R. D. 619, 632 (E.D. WIS 2003)**. In addition, an agency must be found to have acted in an "intentional and willful" manner in order for a damages action to succeed.[20] The terms "intentional" and

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[19] While it is unclear whether a claimant may seek damages for nonpecuniary harm, such as mental distress, embarrassment, or emotional trauma, Gonzalez does not allege the same. Although the Supreme Court in ***Doe*** held that the Privacy Act requires actual damages, it did not address whether nonpecuniary damages for mental injury satisfy the definition of actual damages. **124 S. Ct. at 1212** (noting division among court of appeals on "the precise definition of actual damages"). **See, e.g., *Hudson v. Reno,* 130 F.3d 1193, 1207 & n. 11 (6th Cir. 1997)** ("The weight of authority suggest that actual damages under the Privacy Act do not include recoveries for 'mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries'").

[20] "In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the courts determine that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of … actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less then the sum of $1,000." **5 U.S.C. § 552a(g)(4)**.

"willful" are "terms of art." ***White v. OPM*, 840 F.2d 85, 87 (D.C. Cir. 1988)**. Gonzalez cannot overcome this formidable barrier for a plaintiff seeking damages.[21] Gonzalez has neither alleged such a high standard of culpable conduct nor can he produce evidence in this regard. The officers testified that they requested his social security number simply because it was part of the booking forms. Gonzalez cannot satisfy this high standard of proof where the testimony shows nothing more than routine efforts to comply with booking information sought by the state and federal authorities. **See Aff. Donovan, ¶ 7, Exh. 8; Aff. Krafcheck, ¶ 7, Exh. 8**. This simply went to the officers efforts to identify him clearly.

Indeed, 5 U.S.C. §552a(j) contains a specific exemption where a system of records is maintained by an agency "which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutes, courts, correctional, probation, pardon or parole authorities and which consists of [information compiled for individual alleged criminal offenders, information compiled for the purpose of a criminal investigation or reports compiled at any stage of enforcement of the criminal laws.]" **5 U.S.C. § 552a(j)(2)(A)-(C)**. That requirement is met here given the law enforcement context and the components of the booking process as required by the FBI and State of Wisconsin law enforcement authorities. **See Aff. Donovan, ¶ 7, Exh. 8; Aff. Krafcheck, ¶ 7, Exh. 8**. In ***Chambers v. Klein,* 419 F.Supp. 569, 580 (D.N.J. 1976)**, the court found that there was no Section 7(b) violation under the

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[21] **See *Moskiewicz v. U. S. Dept. of Agriculture.,* 791 F.2d 561, 564 (7th Cir. 1986)** (noting that "elements of reckless often have been a key characteristic incorporated into a definition of willful and intentional conduct"); ***Rose v. United States,* 905 F.2d 1257, 1260 (9th Cir. 1990)** ("Conduct amounting to more than gross negligence" is required); and ***Andrews v. Veterans Admin. of U.S.*, 838 F.2d 418, 424-425 (10th Cir. 1988)** (Standard "clearly requires conduct amounting to more than gross negligence" and "must amount to, at the very least, reckless behavior").

circumstances of that case, and thus no basis to enter a preliminary injunction, in part because the disclosure of the social security number was found to be within one of Section 7(a)'s exceptions.

Fourth, qualified immunity protects the officers. Gonzalez cannot point to a single case establishing a clearly established constitutional right of which a reasonable officer would have known that precluded an officer from asking for his social security number. Nor can he point to any state law, statutory or common law that restricted, limited or prohibited the West Milwaukee police officers for asking for a social security number that is part of a general booking form mandated by the State and Federal government. Indeed, given that the above discussion and authorities failed to establish with any clarity the application of the Privacy Act under the circumstances of this case, it is doubtful that Gonzalez can point to any analogous case. The Office of Privacy and Civil Liberties at the United Stated Department of Justice, which has primary responsibility concerning the Privacy Act, admits there is no clearly established law:

> [T]he Act's imprecise language, limited legislative history and some what outdated regulatory guidelines have rendered it a difficult statute to decipher and apply. Moreover, even after more than twenty-five years of administrative and judicial analysis, numerous Privacy Act issues remain unresolved or unexplored. Adding to these interpretational difficulties is the fact that many Privacy Act cases are unpublished district court decisions.

See "Introduction" to the "Overview of the Privacy Act of 1974" on the web at http://www.justice.gov/opcl/1974privacyact-overview.htm. Indeed, Section 7 of the Privacy Act is not codified and appears only in the "Historical and Statutory Note" sections following the codified sections at 5 U.S.C. § 552a.

Fifth, and finally, finding no Privacy Act violation here would comport with the Act's purpose. The Privacy Act was designed to discourage improper uses of social security numbers. **See *Yeager v. Hackensack Water Co.,* 615 F.Supp. 1087, 1091 (D.N.J. 1985)**. However,

Gonzalez has neither alleged nor can he show that the West Milwaukee law enforcement officers violated this purpose by improperly *using* his social security number.

IV. THE DECLARATORY JUDGMENT CLAIM FAILS AS A MATTER OF LAW

The Court should decline declaratory relief for several reasons.

First, similar to the Privacy Act claim, Gonzalez has not adequately pled this claim. A complaint must contain factual allegations sufficient to "raise a right to relief above the speculative level." ***Bell Atl. Corp. v. Twombly*, 550 U. S. 544, 127 S. Ct. 1955, 1965 (2007)**. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." ***Id.* at 1964-65** (quoting **Fed. R. Civ. P. 8(a)(2)**. The Supreme Court has explained that a plaintiff must "nudge" its claims "across the line from conceivable to plausible" in order to survive a motion to dismiss. ***Id.* at 1974**. The complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." ***Ashcroft v. Iqbal,* ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009)**. "Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." ***The Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)**.

Here, Gonzalez has not pled with any specificity what he wants this Court to declare. If he seeks invalidation of Wisconsin's disorderly conduct statute, not only has he failed to allege specifics in that regard but he has failed to name and serve the Wisconsin Attorney General.[22]

[22] **See Fed. R. Civ. P. 5.1; Wis. Stat. § 806.04(11)** ("If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall . . . be served with a copy of the proceeding and be entitled to be

The same can be said if Gonzalez seeks any clarification of the Attorney General's Advisory Memorandum. Gonzalez offers virtually no allegations to support a specific request for declaratory relief. Rather, he seems to throw himself at the mercy of the Court. Under ***Twombly***, the claim should be dismissed.

Second, even if the Court deemed the claim sufficiently pled, standing and ripeness doom the claim. Under the Declaratory Judgment Act, federal courts may give declaratory judgments in "a case of actual controversy within its jurisdiction," but it is not an independent grant of jurisdiction. Rather, jurisdiction must be predicated on some other statute. **See *Rueth v. EPA*, 13 F.3d 227, 231 (7th Cir. 1993); 28 U.S.C. § 2201(a)**. In the absence of an actual controversy, this Court remains both constitutionally and statutorily constrained from reaching Gonzalez's claim seeking a declaratory judgment. **See *Deveraux v. City of Chicago*, 14 F.3d 328, 330 (7th Cir. 1994)** ("Courts may not exercise [their] discretionary power [to issue declarations under the Declaratory Judgment Act)] in the absence of an 'actual controversy' between the parties."); **see also U.S. Const. Art. III, § 2; 28 U.S.C. § 2201**. Ripeness is predicated on the "central perception . . . that courts should not render decisions absent a genuine need to resolve a real dispute," ***Lehn v. Holmes*, 364 F.3d 862, 867 (7th Cir. 2004)**, and "[c]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." ***Id***. "Standing is not dispensed in gross," ***Lewis v. Casey*, 518 U.S. 343, 358 n. 6 (1996)**, but rather must be demonstrated "separately for each form of relief sought." ***Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)** (citation omitted). Declaratory judgment is a form of prospective equitable relief. Therefore, in order to have standing to bring a claim of declaratory relief under 42 U.S.C. § 1983, the plaintiff must

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heard."); ***Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 96 n. 84-86, ___ Wis.2d ___, 745 N.W.2d 1** ("Once legislation is enacted it becomes the affirmative duty of the Attorney General to defend its constitutionality.")

demonstrate a realistic threat that it will be subject to the same unconstitutional conduct in the future as it allegedly suffered in the past. ***See Tobin for Governor v. Ill. State Bd. of Elections,* 268 F.3d 517, 528 (7th Cir. 2001)** (citing ***City of Los Angeles v. Lyons,* 461 U.S. 95 (1983)**). The Supreme Court recently stated that the standing and ripeness considerations boiled down to a similar consideration: "[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." ***MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 & n. 8 (2007)**.

Here, Gonzalez seeks a declaratory judgment proclaiming that defendants violated his Fourth Amendment rights under the Constitution. Yet, his complaint alleges only past illegal conduct by defendants. Gonzalez has not alleged any future plans to re-enter retail stores in Chilton or West Milwaukee, nor has he alleged that defendants continue to resort to illegal stops, detentions, arrests or seizures.

CONCLUSION

For these reasons, it is respectfully requested that this Court enter judgment in favor of Village of West Milwaukee, Charles Donovan, Patrick Krafcheck, City of Chilton, and Michael Young, and dismiss the Plaintiff's Complaint on its merits and with prejudice.

Dated this 30th day of November, 2009.

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