

## Caution Ahead: Balancing First Amendment Rights and Police Enforcement in Traffic Operations

### Description

The Court of Appeals for the Second Circuit issued a decision in *Friend v. Gasparino*, a case that grapples with alleged violations of an individual's First, Fourth, and Fourteenth Amendment rights following the arrest of citizen Michael Friend, for displaying a sign on a public sidewalk that warned drivers of a police operation ahead.

Friend pursued five claims against Officer Gasparino and the City of Stamford. The district court found in favor of law enforcement and granted summary judgment to the officer involved and the City of Stamford. Friend appealed to the Second Circuit, which vacated and affirmed in part the lower court's holding and remanded the case for further proceedings. Expressly, the Second Circuit affirmed the grant of summary judgment to the City on the Fourteenth Amendment issue and vacated the lower court's grant of summary judgment to the officer, Gasparino, on the First and Fourth Amendment issues.

In efforts to prevent distracted driving, the Stamford Police Department led an enforcement operation in April 2018, where drivers who engaged in distracted driving would be ticketed pursuant to CGS § 14-296aa(b), which expressly prohibits the use of a cell phone while operating a vehicle. Officers set up operations near an intersection in Stamford, Connecticut. Officer Gasparino, the "spotter," was tasked with observing drivers as they passed by, which he would then alert officers down the street when he believed that a driver was using their cellphone. Citizen and appellant in this case, Michael Friend, noticed the presence of the officers conducting the operation, and decided to take part. To express his disapproval of the Department's operation, Friend created a sign that said, "Cops Ahead," and set up his own operation within two blocks of the officers. Friend stood on a public sidewalk and held the sign in the air, in efforts to warn drivers that police were located further down the road. Officer Gasparino saw Friend and approached him on the sidewalk, warning him that his actions, simply holding the sign, were interfering with the investigation. He confiscated the sign and threatened that Friend should leave the area and not return, or else he would be arrested.

Ignoring the officer's warning, Friend created a second, identical sign, and moved one block South of his original position. Friend stood on the sidewalk and continued to warn drivers for thirty minutes, until Officer Gasparino found and arrested Friend for interfering with the distracted driving investigation. Friend was subsequently charged with misdemeanor interference with an officer, pursuant to CGS § 53a-167a(a). Gasparino took Friend's cell phones and continued to police headquarters to begin the booking process. Despite his good standing as a citizen, having no prior record as a longtime citizen of the city, Gasparino set Friend's bail at \$25,000, referring to Friend's actions on scene and his personality, as an attempted justification for the unreasonable amount. Reassessment of the bail amount occurred on the next day; the Commissioner set the price to zero dollars and told Friend that he was free to leave, so long as he swore to appear in court. Upon the hearing taking place, the misdemeanor charge was dismissed.

Friend brought an action against Officer Gasparino in Federal District court under 42 U.S.C. § 1983, and subsequently added the City of Stamford as a party to the suit. In his complaint, Friend alleged violations of his First, Fourth, and Fourteenth Amendment rights.

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The Second Circuit considered the following three issues.

First, the Court considered whether Gasparino's actions of arresting Friend constituted a Fourth Amendment violation of his right to be free of malicious prosecution.

The Court determined that Gasparino lacked probable cause to arrest Friend, therefore the district court had erred in their earlier ruling. The Court began their analysis by stating the standard required for a plaintiff to successfully bring a malicious prosecution claim, indicating that Friend must show both a violation of his Fourth Amendment rights and must establish the elements of a claim for malicious prosecution. The crux of the case revolved around the probable cause standard, in which Connecticut law and federal law are substantively indistinguishable. The standard for probable cause requires "knowledge or reasonably trustworthy information of facts and circumstances that would lead a person to believe the individual to be arrested has committed or is committing a crime." Officer Gasparino contended that Friend violated § 53a-167a(a) by refusing to comply with his instruction to leave the area and not return with another sign. However, the court was unimpressed with the officer's argument, explaining that the statute in question only proscribes physical conduct and fighting words that inflict injury or incite an immediate breach of the peace. The court cited relevant district and Circuit court opinions to support their finding that the statute does not cover situations where a defendant merely questions a police officer's authority or protests their actions. Because the statutory text did not include Friend's actions and the statutory violation was the only basis suggested for believing Friend was committing a crime, the court concluded that Gasparino's directive could not create probable cause where there was none before, as Friend's refusal to leave the sidewalk did not violate any law. As a result, the court held that Friend's arrest was unsupported by probable cause, vacating the district court's grant of summary judgment on the Fourth Amendment claim, and remanding the case to the district court for analysis as to the remaining three elements of the malicious prosecution claim.

Next, the Court considered whether Gasparino violated Friend's First Amendment right to free speech by confiscating his signs and arresting him for failure to obey the directive. The Court made two determinations as to this issue.

First, the Court asserted that Friend's speech was considered protected for First Amendment purposes, contrary to the district court's determination that the speech fell into the category of unprotected speech. In recognizing the traditional categories of unprotected speech, the court noted that the speech at issue here did not fall within the scope of speech that is "obscene, defamatory, fraudulent, inciting, nor integral to criminal conduct." Addressing the district court's opinion that suggested only "expressions of an opinion related to a matter of public significance," are entitled to First Amendment

protections, the Circuit explained that the First Amendment does not permit the government to imprison any speaker so long as their speech is deemed valueless or unnecessary. Friend, a private citizen speaking on a public sidewalk when the police confiscated his signs and arrested him, did not need to establish that his speech addressed “a matter of public significance” to receive First Amendment protection. The court further noted that Friend’s speech did constitute “a matter of public concern,” as it related to the right of citizens to verbally oppose police’s conduct, without fearing the possibility of arrest. The court emphasized that a citizen need not prove that the protested police conduct is unlawful or improper to warrant objection, nor do they need to express their objection in a conventional way.

Next, the court turned to the question of whether Gasparino’s actions satisfied the standard required to render a regulation of protected speech as permissible. It is well-established that content-based restrictions on speech in traditional public places, such as the sidewalk at issue here, can only be enacted if they are necessary to serve a compelling government interest. The district court had concluded that Gasparino’s actions satisfied strict scrutiny because they served the compelling state interest of “saving lives by stopping distracted drivers and issuing citations for their behavior.” However, the court here disagreed with the district court and found that the content-based restriction on Friend’s speech was not narrowly tailored to serve the asserted interest. Because there was no existing Connecticut law that proscribes standing on a public sidewalk while holding a sign that warned of police activity ahead, Gasparino’s restriction of Friend’s speech was not necessary to serve the interest of saving lives or in enforcing traffic laws. The court ultimately held that the confiscation of Friend’s signs and his subsequent arrest violated his right to freedom of speech. As such, the court vacated the district court’s grant of summary judgment and remanded the case for consideration of whether Gasparino is entitled to qualified immunity. This decision underscores the importance of First Amendment protections and the strict scrutiny applied to content-based restrictions on speech.

Finally, the court assessed whether the City of Stamford was liable for violating Friend’s Fourteenth Amendment rights to due process and equal protection when setting Friend’s bail at \$25,000.

The Second Circuit emphasized the distinction between a final decisionmaker and a final policymaker in the context of Monell claims.<sup>1</sup> The court found that Gasparino was not a final decisionmaker because his bail-setting decision was subject to review by the bail commissioner, who ultimately reversed the decision within a few hours. Furthermore, the court held that even during the period in which Friend awaited the bail commissioner’s review, Friend’s Monell claim failed as Gasparino was not a final policymaker. As the Second Circuit established through their prior opinion in Agosto, equating a final decisionmaker with a final policymaker would effectively impose respondeat superior liability, making the municipality liable for the conduct of its employees, which would be in violation of Monell.<sup>2</sup> For these reasons, the court affirmed the district court’s judgment with respect to the Fourteenth Amendment issue.

The Second Circuit’s decision underscores the need for officers to establish probable cause before making an arrest, recognize the scope of protected speech under the First Amendment, and appreciate the distinctions between final decision-makers and final policymakers to avoid potential municipality liability under Monell claims.

- Probable cause is essential for arrests; officers must be cautious to avoid Fourth Amendment violations and potential malicious prosecution claims.

- The First Amendment protects citizens' speech, even if unconventional, as long as it doesn't fall into unprotected categories; officers should exercise caution when restricting speech in public spaces.
- Officers must understand the distinction between final decision-makers and final policymakers in Monell claims to avoid potential municipality liability; municipalities should ensure clear policies and procedures are in place to avoid liability stemming from their employees' actions.

*Friend v. Gasparino & City of Stamford*, No. 20-3644 (2d. Cir. 2023)

<sup>1</sup> See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

<sup>2</sup> *Agosto v. N.Y.C. Dep't of Educ.*, 982 F.3d 86 (2d Cir. 2020)

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