

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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Jordan Kushner,

Plaintiff,

v.

Troy Buhta, Ashlee Lange, Kathleen Temple, Kristin Tyra, Eric. W. Kaler, and Linda Lokensgard,

Defendants.

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Case No. 16-cv-2646 (SRN/SER)

**MEMORANDUM OPINION  
AND ORDER**

Jordan S. Kushner, Law Office of Jordan S. Kushner, 431 South Seventh Street, Suite 2446, Minneapolis, Minnesota 55415, and Peter J. Nickitas, 431 South Seventh Street, Suite 2446, Minneapolis, Minnesota 55415, for Plaintiff.

Timothy Joseph Pramas and Daniel J. Herber, University of Minnesota Office of General Counsel, 360 McNamara Alumni Center, 200 Oak Street Southeast, Minneapolis, Minnesota 55402, for Defendants.

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SUSAN RICHARD NELSON, United States District Judge

This matter is before the Court on Defendants' Motion for Summary Judgment [Doc. No. 115]. For the reasons set forth below, Defendants' Motion is granted.

**I. BACKGROUND**

This suit stems from the arrest of Plaintiff Jordan Kushner ("Kushner") by University of Minnesota Police Officers Troy Buhta ("Officer Buhta"), Ashlee Lange ("Officer Lange"), and Kathleen Temple ("Officer Temple") at a lecture at the University of Minnesota Law School ("the law school") on November 3, 2015. Kushner alleges that these officers—as well as defendants Officer Kristin Tyra ("Officer Tyra"), Eric W. Kaler

(“Kaler”), and Linda Lokensgard (“Lokensgard”)—violated his rights under the First, Fourth, and Fourteenth Amendments and committed several torts against him.

### **A. The Parties**

Plaintiff Jordan Kushner is a lawyer and an alumnus of the law school. (Second Decl. of Dan Herber in Supp. of Defs.’ Mot. for Summ. J. [Doc. No. 119] (“Herber Decl. II”), Ex. E [Doc. No. 119-2] (Kushner Dep., at 39<sup>1</sup>); Decl. of Jordan Kushner in Resp. to Summ. J. Mot. [Doc. No. 130] (“Kushner Decl.”) ¶ 6.)

Defendant Officers Buhta, Lange, Temple, and Tyra are police officers in the University of Minnesota Police Department (“UMPD”). (*See* Herber Decl. II, Ex. F [Doc. No. 119-3] (Buhta Dep.), Ex. S [Doc. No. 119-16] (Lange Dep.), Ex. T [Doc. No. 119-17] (Temple Dep.), Ex. U [Doc. No. 119-18] (Tyra Dep.)) All were present at the lecture when Kushner was arrested. (Decl. of Dan Herber in Supp. of Defs.’ Mot. for Summ. J. [Doc. No. 117] (“Herber Decl.”), Ex. A [Doc. No. 117-1] (Police Report).)

Defendant Lokensgard is the facilities manager of the law school. (Herber Decl. II, Ex. G [Doc. No. 119-4] (Lokensgard Dep., at 30, 121).) She was responsible for managing the event at which Kushner was arrested. (*See id.*, Ex. F (Buhta Dep., at 93).) Defendant Kaler is the president of the University of Minnesota. (*See* Compl. [Doc. No. 1] ¶ 15.)

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<sup>1</sup> When any deposition is cited, the pages referenced are those found in the deposition itself, not those assigned by ECF.

## **B. The Lecture and Protest**

On November 3, 2015, the law school presented a lecture by Moshe Halbertal, a law professor at New York University, entitled “Protecting Civilians: Moral Challenges of Asymmetric Warfare,” (“Halbertal lecture”). (Kushner Decl., Ex. 1 [Doc. No. 130-1] (Lecture Invitation).)

The lecture took place in room 25 of the law school building. (*Id.*) Room 25 is a large classroom, capable of holding at least 150 people, that is surrounded by other classrooms in the law school’s lower level. (Herber Decl. II, Ex. E (Kushner Dep., at 37-38).) The lecture was scheduled to begin at 4:00 p.m. on November 3, a Tuesday, and classes were scheduled to meet in other classrooms in the lower level at the same time. (Kushner Decl., Ex. 1 (Lecture Invitation); Herber Decl. II, Ex. G (Lokensgard Dep., at 91).)

The law school maintains a set of rules of decorum for certain “high profile events.” (Herber Decl. II, Ex. H [Doc. No. 119-5] (Event Procedures, at 1).) A document entitled “Rules of Decorum” includes the following statements:

- In order to avoid distractions and focus audience attention on the proceedings, please do not bring laptops, PDA’s, or other electronic devices to the lecture.
- Cellular telephones should be turned to the “OFF” setting during proceedings, or better yet, should not be brought into the room. Even phones on a “vibrate” setting can be disruptive.
- Tape recorders, video cameras and still cameras are prohibited without prior approval.
- The Law School honors the free speech and expression rights of our community members. However, demonstrations are not permitted during

proceedings or presentations. Impermissible “demonstrations” may include disruptive speech, interruptions, banners, or signs.

- We ask that audience members not engage in any activity that may be disruptive, impermissible activities may include, but are not limited to, unnecessary conversation, loud whispering, or newspaper or magazine reading.
- In order to protect the security of the audience and presenter(s), the Law School may enlist the assistance of University security or other law enforcement personnel to enforce these rules and, if necessary, remove disruptive individuals from the room.

(*Id.* at 1-2.) The rules of decorum were posted in two locations for the Halbertal lecture: on a freestanding sign holder at the main entrance to the law school and on one of the doors at the entrance to room 25. (*Id.*, Ex. G (Lokensgard Dep., at 33-35).)

Before the event, a professor at the law school alerted Lokensgard to social media posts indicating that some were planning to protest the lecture. (*Id.* at 30.) The protest appears to have been motivated by Professor Halbertal’s work with Israeli military forces and the perception that such work legitimized civilian deaths in the Israel-Palestine conflict. (Kushner Decl., Ex. 2 [Doc. No. 130-2] (Anti-War Committee Email Exchange, at 3).) After learning of the planned protest, Lokensgard contacted the UMPD and requested a police presence at the lecture. (Herber Decl. II, Ex. G (Lokensgard Dep., at 30-32).)

Kushner received an invitation to the Halbertal lecture in the mail. (Kushner Decl., Ex. 1 (Lecture Invitation).) He saved the invitation because he was interested in the subject matter of the lecture. (Herber Decl. II, Ex. E (Kushner Dep., at 39).) He also emailed a scanned copy of the invitation to two pro-Palestine mailing lists, with the purpose to “analyze the speaker” and to “try and figure out what kind of response to have politically, if

any.” (*Id.* at 40-43.) As the date of the lecture approached, Kushner became aware of a plan to protest the lecture, and possibly to disrupt it. (*Id.* at 49-50.) He sent an email to a person he understood to be organizing the protest, in which he encouraged restraint. (Kushner Decl. ¶ 3; *id.*, Ex. 2 (Anti-War Committee Email Exchange).)

Kushner decided to attend the lecture. He arrived at the law school a few minutes after it was scheduled to begin. (Herber Decl. II, Ex. E (Kushner Dep., at 59).) He saw that something had been posted at the entrance to room 25, but did not stop to read it because “it looked real long and I was already late for the lecture.” (*Id.* at 63.) Kushner sat near the back of the classroom, next to some people he recognized and thought “weren’t the type that were going to disrupt the lecture.” (*Id.* at 71.) When Kushner arrived, room 25 was “substantially full, but there was also a good number of empty seats.” (*Id.* at 73.)

What happened next was partially captured on video.<sup>2</sup> First, Professor Oren Gross came to the podium to introduce Professor Halbertal. (*See* Herber Decl., Ex. C (Lecture

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<sup>2</sup> The record includes several different video recordings, and they are identified as follows. The Lecture Recording is a full video-recording of the lecture, in five parts, with the camera fixed on the podium. (Herber Decl., Ex. C (Lecture Recording).)

Kushner captured six recordings with his cellphone. (*Id.*, Ex. B (Kushner Recordings).) Each of Kushner’s recordings has a numerical title, and will be identified in this record by the last four digits of that title. (*E.g.*, *id.* (Kushner Recording 0438, at 00:00).) Kushner’s recordings generally depict protest activity, as well as parts of his conversations with Officer Buhta and Lokensgard. Additionally, the record contains two recordings taken by an attendee of the lecture, depicting protest activity at the event. (Kushner Decl. ¶ 12; *id.*, Ex. 3 (Attendee Recordings).) These recordings will also be identified by the last four digits of their numerical titles.

The Surveillance Video is an “excerpted and reformatted” recording from a security camera in the hallway outside room 25. (Herber Decl. ¶ 4; *id.*, Ex. B (Surveillance Video).) This recording depicts Kushner being handcuffed. (*Id.*)

Finally, the record includes two recordings that were taken by bystanders in the hallway outside room 25. (*Id.*, Ex. B (Bystander Recordings).) These recordings depict the

Recording, Part 1, at 00:06.) Before he began speaking, a man in the audience stood and began to criticize the use of law school funds to pay Professor Halbertal to give the lecture. (*Id.* at 00:12; *id.*, Ex. B (Kushner Recording 0438, at 00:00-00:31).) Lokensgard approached the man and explained that there would be a question-and-answer period after the lecture and asked him to leave if he could not remain quiet. (Kushner Decl., Ex. 2 (Attendee Recording 4481, at 00:00-00:33).) The man left. (*Id.*) Professor Gross began to speak, but was immediately interrupted by a woman raising similar criticisms. (Herber Decl., Ex. C (Lecture Recording, Part 1, at 01:30), Ex. B (Kushner Recording 0523, at 00:00-01:10).) Lokensgard also approached this woman and explained that she would have to leave if she could not obey the rules of decorum. The woman continued to speak as she exited, and the protesters in the crowd began to loudly chant: “Free, Free Palestine.” (Herber Decl., Ex. C (Lecture Recording, Part 1, at 02:30-03:00); *id.*, Ex. B (Kushner Recording 0523, at 00:00-01:10); Kushner Decl., Ex. 2 (Attendee Recordings 4483, at 00:00-00:14).)

Next, Lokensgard came up to the podium and read the Continuum of Action, a set of guidelines for responses to disruption at University events. (*Id.*, Ex. C (Lecture Recording, Part 1, at 03:35-06:55).) The Continuum of Action divides disruptive actions into four levels of severity and authorizes police responses to such disruptions, ranging from requesting that the disrupting individual leave to immediately arresting the individual and evacuating the room. (*See* Herber Decl. II, Ex. H (Event Procedures, at 3).) For example,

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latter part of Kushner’s arrest, as he is escorted from the hallway outside room 25 to the squad car at the main entrance to the law school. The file names for these videos are “jordan.mov” (“jordan”) and “video-1447544613.mp4.mp4” (“4613”). (*Id.*)

the Continuum provides that a Level II action is “[d]isruption by members of the audience that violates Protocol, or disturbs the ability of the participants to continue the meeting,” and that the appropriate reaction to Level II action is that “[u]pon a signal from the moderator, the offending party will be removed from the room by the Police.” (*Id.*)

After Lokensgard finished reading the Continuum of Action, the Dean of the law school came to the podium and admonished the attendees to follow the rules of decorum or leave, stating, “we will ask the police to remove those who are disruptive.” (*Id.*, Ex. C (Lecture Recording, Part 1, at 06:55-08:16.) Protesters began chanting again, but the room quieted in less than a minute and Professor Gross was able to introduce the speaker uninterrupted. (*Id.* at 08:16-13:20.) Professor Gross noted that the rules of decorum were posted outside the room, and said, “when you entered, you accepted them.” (*Id.* at 09:30-09:45.) He also asked the audience to switch off any cell phones or “at least put them on silent mode.” (*Id.* at 09:55-10:02.)

As soon as Professor Halbertal came to the podium, the protesters resumed interrupting the lecture by reading speeches and chanting. During this time, UMPD officers escorted several protesters out of the room. (*Id.*, Ex. A (Police Report, at 4, 7-8, 10).) The disruptions continued for over ten minutes, causing Professor Halbertal to start his lecture approximately twenty minutes after the event began. (*Id.*, Ex. C (Lecture Recording, Part 1, at 13:20-22:00).) Even after he began speaking, protesters could be heard chanting outside the classroom for at least fifteen minutes. (*Id.* (Lecture Recording, Part 2, at 00:00-15:10).)

### C. Kushner's Recording and Removal

From his seat in room 25, Kushner recorded six videos of the protest activity on his cell phone. (*Id.*, Ex. B (Kushner Recordings).) The shortest video is 22 seconds long, and the longest is nearly three minutes long. (*Id.*) Kushner testified in his deposition that he recorded interactions between the police and protesters “just in case there was something improper in terms of overreaction or people being falsely accused of something.” (Herber Decl. II, Ex. E (Kushner Dep., at 93).) He “felt strongly” that he had the right to record police interactions with citizens. (*Id.* at 95.) He acknowledges that the University of Minnesota probably would not permit recording of the lecture itself, because it might be the property of the law school, but he maintains that he did not record any part of the lecture. (*Id.* at 66-67, 95.) Through his membership in the National Lawyers Guild, Kushner has acted as a designated legal observer at protests in the past. (*Id.* at 68.) Kushner did not attend the Halbertal lecture in order to be a legal observer, but he stated, “I’m always kind of legal observing political events in my mind.” (*Id.* at 69.)

Shortly after Lokensgard finished reading the Continuum of Action, Kushner testified that Officer Buhta approached a woman sitting near him, Maryam Zahid, who appeared to be of Middle Eastern descent. (*Id.* at 87-90; Decl. of Maryam Zahid [Doc. No. 127] (“Zahid Decl.”) ¶¶ 4-6.) Kushner states that Officer Buhta told Ms. Zahid to leave, despite the fact that she had been “sitting quietly.” (*Id.*, Ex. E (Kushner Dep., at 89).) Several attendees of the lecture also stated that Ms. Zahid had been sitting quietly. (Aff. of Erika Zurawski [Doc. No. 126] (“Zurawski Aff.”) ¶ 7; Decl. of Coleen Rowley [Doc. No.



129] (“Rowley Decl.”) ¶ 7; Zahid Decl. ¶ 5.) Suspecting racial profiling, Kushner “turned around and objected to Buhta asking her to leave.” (*Id.*, Ex. E (Kushner Dep., at 89).)

On one of Kushner’s recordings, Kushner can be heard saying that Ms. Zahid had not done anything to disrupt the lecture. (Herber Decl., Ex. B (Kushner Recording 1253, at 00:00-00:15).) Officer Buhta can then be heard stating, “We’re just gonna shut it down and arrest everybody, that’s a promise.” (*Id.* at 00:15-00:20.) Kushner responded, “Well that’ll be interesting.” (*Id.*) Then, Buhta stated, “Thank you, sir, for your commentary.” (*Id.* at 00:20-00:23.) Though Officer Buhta cannot be seen speaking in the recording, he confirmed in deposition that it was his voice. (Herber Decl. II, Ex. F (Buhta Dep., at 186-87).) Kushner testified that Buhta backed away after this exchange, appearing embarrassed. (*Id.*, Ex. E (Kushner Dep., at 93); *see also* Zahid Decl. ¶ 9.) A few minutes later, Ms. Zahid stood and began reciting a speech to protest the lecture, and she was escorted out by police. (Zahid Decl. ¶ 10.)

Shortly after Ms. Zahid was escorted out of the classroom, and while Kushner was recording, Lokensgard approached Kushner and said “Please turn your phone off, as you were asked.” (Herber Decl., Ex. B (Kushner Recording 1837, at 00:40).) Lokensgard testified that she approached several people in the room who had their phones out and appeared to be recording, to ask them to comply with the rules of decorum. (Herber Decl. II, Ex. G (Lokensgard Dep., at 58-60).) Kushner told Lokensgard that he was only recording the police behavior, and Lokensgard responded that he still had to turn his phone off “or we’ll take it.” (Herber Decl., Ex. B (Kushner Recording 1837, at 00:42-00:50).) At that point, Kushner’s recording of the interaction ends. Kushner testified that he turned off

the video camera and placed the phone face down on the table in front of him. (Herber Decl. II, Ex. E (Kushner Dep., at 95); *see also* Kushner Decl. ¶ 8; Zurawski Aff. ¶ 9.)

Lokensgard testified that she told Kushner that he would have to stop recording the event or leave, and that Kushner responded that he had “every right” to be there. (Herber Decl. II, Ex. G (Lokensgard Dep., at 64-65).) Because he still had his phone out, Lokensgard reached for it, intending to put it in the bag check for the rest of the event, but Kushner put it in his pocket first. (*Id.* at 65-66, 74-75.) Lokensgard testified, “at that point I had already asked [him] to leave multiple times and [he] said, ‘No.’ And so – then I remember asking one of the officers that was in the aisle to say, ‘You know, can you – this gentleman needs to leave. He’s not cooperating.’” (*Id.* at 65.)

Officer Lange had been nearby during this conversation. (Herber Decl., Ex. A (Police Report, at 4, 7).) Officer Lange stated in the police report that she had been trying to escort a nearby protester out of the room when Kushner “put his phone in my face” and, after Officer Lange told Kushner that he was being disruptive, “started to argue with me about free speech and his rights.” (*Id.* at 7; *accord* Herber Decl. II, Ex. S (Lange Dep., at 56).)

Officer Buhta testified that he saw Kushner and Officer Lange from another part of the room, and that it “[l]ooked like [Kushner] was shouting at her and she was shouting at [Kushner].” (Herber Decl. II, Ex. F (Buhta Dep., at 89); *see also* Herber Decl., Ex. A (Police Report, at 4).) Officer Buhta stated that he came over and spoke to Lokensgard, who told him that Kushner had been recording and had refused to put his phone away, and that he “needed to leave.” (Herber Decl. II, Ex. F (Buhta Dep., at 92).) Officer Buhta also

spoke to Officer Lange, who told him that Kushner had been recording and had interfered with Lange trying to escort a protester out of the event. (*Id.* at 95.)

Officer Buhta testified that he then asked Kushner to leave, several times, and that Kushner refused. (*Id.* at 95-96, 99, 104.) At that time, Officer Buhta testified that he was concerned about the atmosphere in the room, because protesters were being disruptive and other attendees were shouting at the protesters to be quiet, and Officer Buhta worried that a fight might break out in the “mass chaos.” (*Id.* at 86.) He stated that he was “trying to basically put out fires” because there were “so many other issues going on.” (*Id.* at 102.) Officer Buhta testified that, after asking Kushner to leave three or four times, (*id.* at 104,) he told Kushner that if he did not leave, he would be arrested, (*id.* at 99.) He testified that Kushner said “then arrest me.” (*Id.* at 106; *see also* Herber Decl., Ex. A (Police Report, at 4).)

Kushner describes these interactions differently. Kushner testified in his deposition that, after Officer Buhta came over and told him to leave, he asked what he had done wrong, but Officer Buhta would not give him an explanation. (Herber Decl. II, Ex. E (Kushner Dep., at 96).) Kushner testified that Officer Buhta said that he would arrest him if he didn't leave, and that Kushner objected and said that Officer Buhta had no right to ask him to leave. (*Id.* at 96-97.) Kushner stated that Lokensgard then said that he could stay if he gave her his phone, and that she grabbed for the phone. (*Id.* at 97.) Kushner testified that he picked up the phone first and put it in his pocket, and decided to leave. (*Id.*) In her deposition, Lokensgard stated that she did not recall telling Kushner that he could stay if he turned over his phone. (*Id.*, Ex. G (Lokensgard Dep., at 75-77).)

Accounts also differ as to whether Kushner voluntarily got up to leave at this point, or if Officers Buhta and Lange had to physically pick him up out of his seat. Kushner testified that he “started to get up, getting ready to leave at the same time I was being manhandled by – these other officers were grabbing me, physically escorting me at the same time.” (*Id.* at 97.) He also stated, “I proceeded in my mind to start to stand up and simultaneously I was practically being carried away by the police.” (*Id.* at 104.) Declarations from several attendees state that Kushner got up willingly. (*See* Zurawski Aff. ¶ 13 (“Kushner voluntarily stood up from his seat.”); Rowley Decl. ¶ 9 (“As Mr. Kushner stood up from his seat to leave, police officers forcibly led him out.”); Decl. of Dr. Barbara Jean Berg [Doc. No. 128] (“Berg Decl.”) ¶ 10 (“After a very short period of interacting, Kushner stood up from his chair and turned to leave.”).)

Officer Buhta testified that he and Officer Lange took Kushner’s arms and “[p]hysically lifted” him out of the seat, and that Kushner “didn’t stand up on [his] own.” (Herber Decl. II, Ex. F (Buhta Dep., at 107); *accord* Herber Decl., Ex. A (Police Report, at 4).) Lokensgard also testified that Kushner “kind of slumped down in [his] chair and did the jellyfish, as I call it. . . . [T]hey had to physically lift [him] up to leave.” (Herber Decl. II, Ex G (Lokensgard Dep., at 66).) Additionally, Kushner’s voice can be heard in the Lecture Recording, off-camera, about two minutes after his recorded interaction with Lokensgard;<sup>3</sup> he is repeatedly saying “I’m just sitting here,” while a female voice repeats “c’mon” and “stand up.” (Herber Decl., Ex. C (Lecture Recording, Part 1, at 16:55-17:15).)

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<sup>3</sup> The Court is able to determine the timing of this recording in relation to Kushner’s recording based on identifiable shouting by protesters in the audience. (*Compare* Herber

Officers Buhta and Lange escorted Kushner out of room 25, each holding one of his arms. (Herber Decl., Ex. A (Police Report, at 4, 7); Herber Decl. II, Exs. W-X (Still Photographs).) Officer Temple joined them at the back of the room, and they exited through a secondary door. (Herber Decl., Ex. A (Police Report, at 8).) In the hallway outside the door to room 25, there was a half-wall bordering the entrance to the lecture hall. (See *id.*, Ex. B (Surveillance Video).) Officer Buhta testified that Kushner was “waving [his] arms around” and not obeying commands to put his hands behind his back. (Herber Decl., Ex. F (Buhta Dep., at 111).) To restrict his movement and make it easier to handcuff him, Office Buhta testified that the officers brought Kushner over to the half-wall. (*Id.* at 113-16.) The half-wall came up to Kushner’s knees, approximately. (Herber Decl., Ex. B (Surveillance Video).) While Officers Buhta, Lange, and Temple were attempting to handcuff Kushner, he fell forward over the wall and caught himself against the floor on the other side with his left hand. (*Id.* at 00:13-00:16.) While falling forward, Kushner’s foot came in contact with Temple’s leg and arm. (Herber Decl., Ex. A (Police Report, at 8); Herber Decl. II, Ex. F (Buhta Dep., at 157-58).)

Kushner testified that Officer Buhta told the other officers to “throw” him over the half-wall, and that it was their motion of throwing him over the wall that caused him to fall. (Herber Decl. II, Ex. E (Kushner Dep., at 110); Kushner Decl. ¶ 11.) Officer Buhta testified that he might have told Officers Lange and Temple to bring Kushner to the wall, but that he

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Decl., Ex. C (Lecture Recording, Part 1, at 15:33 (protester can be heard shouting that “[Halbental] and the IDF teach [soldiers] to bomb indiscriminately” in Gaza)), *with id.*, Ex. B (Kushner Recording 1837, at 00:38 (showing the same statement being shouted by an exiting protester)).)

did not tell them to put him over the wall. (Herber Decl. II, Ex. F (Buhta Dep., at 115-16).) Officer Buhta also testified that, based on his review of the Surveillance Video, Kushner appeared to lose his balance and fall forward on his own momentum. (*Id.* at 114-15; *see* Herber Decl., Ex. B (Surveillance Video).)

Officers Buhta, Temple, and Lange got Kushner upright again and continued to handcuff him. (Herber Decl., Ex. B (Surveillance Video, at 00:16-00:50).) Kushner told Officer Buhta to “expect a lawsuit,” and testified that Officer Buhta then “slammed the handcuff on me really tight.” (Herber Decl. II, Ex. E (Kushner Dep., at 117).) Officer Buhta testified that he checked the tightness of each handcuff by putting his pinky finger between the cuff and Kushner’s wrist, and then double-locked the cuffs so that they could neither tighten nor loosen. (*Id.*, Ex. F (Buhta Dep., at 119-20).)

At this point, some protesters came down the hallway and began to video-record Kushner’s arrest. (Herber Decl., Ex. B (Bystander Recordings).) Kushner immediately stated that Officer Buhta had put the handcuffs on too tight, trying to cut off his circulation. (*Id.* (Bystander Recording 4613, at 00:12-00:24).) After one of the protesters asked why he was being arrested, Officer Temple told Kushner that he was under arrest for trespass and disorderly conduct. (*Id.* at 00:18-00:28.) Officers Buhta and Temple began to walk Kushner down the hallway, through a small crowd of protesters. (*Id.* at 00:30-00:52.) Kushner continued to say that the handcuffs were too tight, and that Officer Buhta had made them too tight on purpose. (*Id.*) Officer Buhta stated “I can still put a finger in there, you’re fine,” demonstrating by putting his finger in between the left cuff and Kushner’s wrist. (*Id.* at 00:40-00:45; *id.*, Ex. B (Bystander Recording “jordan”, at 00:30-00:35).) Kushner stated

that it was the right cuff that was too tight. (*Id.* (Bystander Recording “jordan,” at 00:35-0040).)

At least one protester followed Officers Buhta and Temple and recorded as they escorted Kushner to the main entrance of the law school and to the squad car. (*Id.* (Bystander Video “jordan”).) This took approximately two minutes, during which Kushner continued to complain that the handcuffs were too tight, stating that the officers were “torturing” him. (*Id.* at 00:16-02:16.) Officer Temple told Kushner that he was “all fired up” and “sweating,” and that he “need[ed] to relax.” (*Id.* at 01:30-1:50.) Once outside, Officer Buhta readjusted the handcuffs before placing Kushner in the squad car. (*Id.* at 02:35-03:25.) Officer Tyra then drove him to the Hennepin County Jail for booking. (Herber Decl. II, Ex. U (Tyra Dep., at 50-51).) In his booking documentation, Kushner denied being injured in the previous 24 hours and declined to see a nurse. (*Id.*, Ex. J [Doc. No. 119-7] (Booking Record, at 4-5).) He testified that the handcuffs did leave red marks on one of his wrists, but also that they were gone the next day. (Herber Decl. II, Ex. E (Kushner Dep., at 126-28, 130-31).)

Two other people were arrested at the Halbertal lecture. Officer Buhta arrested one woman while the police were trying to move the crowd of chanting protesters farther away from room 25. (Herber Decl., Ex. A (Police Report, at 4-5).) In the police report, he states that he asked the woman to move down the hallway and that she said she would not leave, and placed her hands behind her back as if ready to be handcuffed. (*Id.* at 4.) Officer Buhta arrested her. (*Id.*) The other person arrested was a woman who ran past police into room

25, yelling. (*Id.*) Officer Buhta and Officer Lange followed this woman and arrested her. (*Id.* at 4-5, 8.)

#### **D. Events Following Kushner's Arrest**

Kushner was charged with trespassing and disorderly conduct. (*Id.* at 3.) Later, the City Attorney considered adding a charge for obstruction of the legal process, based on statements in the police report that indicated that Kushner had been “struggling” with the officers and exhibited “noncompliance” behavior. (Herber Decl. II, Ex. M [Doc. No. 119-10] (Becker Dep., at 49-51).) In addition to the police report, the City Attorney’s office got information about Kushner’s arrest by speaking with Officer Buhta. (*See id.*, Ex. R [Doc. No. 119-15] (Becker Memo November 5, 2015), Ex. V [Doc. No. 119-19] (Becker Memo January 27, 2016).) According to her records, Officer Buhta told City Attorney Sarah Becker that Kushner “was a pain, was yelling and screaming in the auditorium,” and that Officer Temple was “injured as a result of being kicked” by Kushner. (*Id.*, Ex. R (Becker Memo November 5, 2015).) It is unclear from the record whether Kushner was ever actually charged with obstruction of the legal process, and the City Attorney dismissed all charges against Kushner on April 8, 2016. (*Id.* at 85-86.) The City Attorney made a statement about the dismissal, saying that it was dismissing the charges to focus the office’s resources “on higher priority matters.” (*Id.*, Ex. L [Doc. No. 119-9] (Draft Statement Email Exchange, at 1).)

Kushner was also issued a Trespass Warning, signed by Officer Tyra. (Herber Decl. II, Ex. D [Doc. No. 119-1] (Trespass Warning).) The Trespass Warning stated, “the University of Minnesota (U of M) hereby revokes any permission or license that you may



have had to enter upon . . . Mondal [sic] Hall and all West Bank Buildings,” from November 3, 2015 until November 3, 2016. (*Id.*) Kushner testified that this Trespass Order prevented him from attending a meeting of the National Lawyers Guild in the law school, though he was able to attend part of the meeting via telephone. (*Id.*, Ex. E (Kushner Dep., at 183-84).) He also testified that he was prevented from meeting with a potential witness at the law school, forcing him to choose a suboptimal meeting place; that he was prevented from using the University of Minnesota law library, at which licensed attorneys have borrowing privileges; and that he could not ride his bike across the pedestrian bridge that connects the West and East Banks of the University campus. (*Id.* at 185-88; Kushner Decl. ¶ 13.)

Kushner’s attorney sent letters demanding that the University rescind the Trespass Order, on November 4, 2015 and April 12, 2016. (Herber Decl. II, Ex. K [Doc. No. 119-8] (November 4 Letter), Ex. N [Doc. No. 119-11] (April 12 Letter).) After the April 12 letter, the University requested any additional documents that Kushner wished to submit to enable review of the Trespass Order. (*Id.*, Ex. O [Doc. No. 119-12] (Trespass Review Email Exchange, at 4-5).) Kushner’s attorney sent some materials, and specified that he would need to know the identity of parties reviewing the Trespass Warning and “mak[e] appropriate arrangements” in order to submit “video and audio recordings related to the incident.” (*Id.* at 4.) It became clear that the University wanted copies of these recordings in order to include them in the review process, and that Kushner was unwilling to produce copies. (*Id.* at 2-3.) Communication stalled between the parties then, and resumed in

September of 2016, when the University agreed to limit the Trespass Order to the law school building, Mondale Hall. (*Id.*, Ex. P [Doc. No. 119-13] (September 7 Letter, at 1).)

Kushner's attorney notified the University that Kushner may be invited to speak at an event at the law school in September of 2016, and asked that the Trespass Warning be rescinded. (*Id.* at 2.) The University offered to give conditional consent for Kushner to speak at the law school, and also to provide conditional consent for events at the law school for the remaining two months of the Trespass Warning. (*Id.* at 3.) Kushner's attorney rejected the offer. (*Id.*, Ex. Q [Doc. No. 119-14] (September 8 Letter).) About a week later, on September 15, 2016, the University terminated the Trespass Warning, which was set to expire on November 3, 2016. (Sept. 15 Letter to Magistrate Judge [Doc. No. 30].)

#### **E. Procedural Background**

Kushner filed this Complaint on August 5, 2016. (Compl.) The Complaint makes eight claims of § 1983 violations of Kushner's constitutional rights and six claims of tort violations, for a total of fourteen claims.

Kushner's Complaint sets forth the following claims: (1) that all Defendants interfered with his First Amendment right to monitor and record the activities of government officials; (2) that all Defendants retaliated against him for exercising his First Amendment rights by challenging Officer Buhta when he approached Ms. Zahid and by recording police behavior; (3) that Officers Buhta, Lange, Temple, and Tyra violated his Fourth Amendment rights to be free from unlawful seizure and arrest; (4) that Officers Buhta, Lange, and Temple subjected him to excessive force by throwing him over the half-wall outside room 25 and placing him in unnecessarily tight handcuffs; (5) that all

Defendants violated his Fourteenth Amendment right to equal protection by discriminating against him based on his political views or perceived political views, and based on his exercise of his First Amendment rights; (6) that Officers Buhta, Temple, and Lange violated his substantive due process rights by making false statements about him to support a criminal prosecution; (7) that Officers Buhta, Temple, and Tyra violated his procedural due process rights by issuing a Trespass Warning to him without any pre- or post-deprivation process; (8) that all Defendants conspired to violate his First, Fourth, and Fourteenth Amendment rights; (9) that Officers Buhta, Lange, Temple, and Tyra falsely imprisoned him; (10) that Officers Buhta, Lange, and Temple assaulted him; (11) that Officers Buhta, Lange, and Temple committed battery against him; (12) that Officers Buhta, Lange, and Temple defamed him; (13) that Officers Buhta, Lange, Temple, and Tyra engaged in malicious prosecution against him; and (14) that all Defendants were negligent toward him by breaching a duty of reasonable care. (*Id.* ¶¶ 99-112.)

On August 28, 2016, Kushner moved for a preliminary injunction to void the Trespass Order. (Pl.’s Mot. for a Prelim. Inj. [Doc. No. 13].) That motion became moot when the University terminated the Trespass Order. (September 28, 2016 Order [Doc. No. 35].) Now Defendants move jointly for summary judgment of all claims. (Defs.’ Mot. for Summ. J. [Doc. No. 115].) Defendants argue that Kushner’s claims are barred by qualified immunity and official immunity, and that Kushner cannot raise a genuine issue of material fact as to any claims that are not barred by immunity. (*See* Defs.’ Mem. of Law in Supp. of their Mot. for Summ. J. [Doc. No. 118] (“Defs.’ Mem.”).) Kushner concedes that his claims

against President Kaler and Officer Buhta in their official capacities are moot now that the Trespass Order has been lifted, so the Court will not consider those claims.

## II. DISCUSSION

### A. Summary Judgment Standard

Summary judgment is proper if, drawing all reasonable inferences in favor of the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1107 (8th Cir. 2016). ““Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action.”” *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotation omitted)).

The party moving for summary judgment bears the burden of showing that the material facts in the case are undisputed. *Id.* at 1042. However, a party opposing summary judgment ““may not rest upon the mere allegation or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial,’ and ‘must present affirmative evidence in order to defeat a properly supported motion for summary judgment.”” *Ingrassia v. Schafer*, 825 F.3d 891, 896 (8th Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986)). “[T]he nonmoving party must ‘do more than simply show that there is some metaphysical doubt as to the material facts.’” *Conseco Life Ins. Co. v. Williams*, 620 F.3d 902, 910 (8th Cir. 2010) (quoting

*Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). “[O]nly evidence that would be admissible at trial may be relied upon to counter a motion for summary judgment.” *Sokol & Assocs., Inc. v. Techsonic Indus., Inc.*, 495 F.3d 605, 611 n.4 (8th Cir. 2007).

## **B. Preliminary Issues**

The Court will begin by addressing several questions of law which are important to Kushner’s claims. First, the Court will consider whether Kushner had a right under the First Amendment to record interactions with the police at the lecture. Second, the Court will consider whether Officers Buhta and Lange had probable cause or arguable probable cause to arrest Kushner for trespassing. Finally, the Court will consider whether Kushner had a constitutionally-protected interest in access to the law school and the West Bank campus of the University.

### **1. First Amendment Right to Record**

Kushner claims that Defendants retaliated against him for exercising his right under the First Amendment to record interactions between the police and the public. (Compl. ¶ 100.) Defendants argue that that although “there appears to be a trend toward adopting such a right under some circumstances,” it is subject to limitations. (Defs.’ Mem., at 16.) Defendants further argue that room 25 of the law school was a limited public forum, so the University was permitted to impose reasonable and viewpoint-neutral speech restrictions. (*Id.* at 18-19.)

Numerous federal circuit courts of appeals have recognized a general First Amendment right to record police performing their duties in public, subject to certain

limitations. *Fields v. City of Phila.*, 862 F.3d 353, 355-56 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688-89 (5th Cir. 2017); *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). The Eighth Circuit has yet to address whether the First Amendment encompasses such a right. Those circuits who have recognized the right have noted that it “may be subject to reasonable time, place, and manner restrictions.” *Glik*, 655 F.3d at 84; *see, e.g., Turner*, 848 F.3d at 690; *Smith*, 212 F.3d at 1333.

The scope of a First Amendment speech right is informed by the nature of the location in which it is exercised. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983). “In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.” *Id.* at 45. The government may also create a designated public forum, or “a nonpublic forum the government intentionally opens to expressive activity for a limited purpose such as use by certain groups or use for discussion of certain subjects.” *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006). “A designated public forum can be classified as either ‘of a limited or unlimited character.’” *Id.* at 976 (quoting *Van Bergen v. Minnesota*, 59 F.3d 1541, 1553 n.8 (8th Cir. 1995)).

Kushner and Defendants agree that room 25 of the law school is a limited public forum. (Pl.’s Mem. in Opp’n to Defs.’ Mot. for Summ. J. [Doc. No. 125] (“Pl.’s Mem.”), at 22; Defs.’ Mem., at 18.) “When the State establishes a limited public forum, the State

is not required to and does not allow persons to engage in every kind of speech.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). “The State’s power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, . . . and the restriction must be ‘reasonable in light of the purpose served by the forum.’” *Id.* at 106-07 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

The law school’s rules of decorum—which prohibited unauthorized video-recording, demonstrations, and disruptive activity during the Halbertal lecture—are viewpoint neutral and reasonable in light of the purposes served by the limited public forum. *See id.* When hosting an event like the Halbertal lecture, the University has an interest in creating a respectful and attentive environment, that is, an environment of decorum. The limitations that it placed on protest activity, disruption, and the use of electronic devices during the lecture are all reasonable and consistent with that purpose. The restrictions as written in the rules of decorum are viewpoint neutral. Further, the University provided alternative channels for expression challenging the speaker, by reserving time at the end of the lecture for questions and by permitting the protest to continue in an area away from law school classes. (Herber Decl. II, Ex. G (Lokensgard Dep., at 47), Ex. F (Buhta Dep., at 77-78); Herber Decl., Ex. A (Police Report, at 5).) “The reasonableness of a restriction on access is supported when ‘substantial alternative channels’ remain open for the restricted communication.” *Victory Through Jesus Sports Ministry Found. v. Lee’s Summit R-7 Sch. Dist.*, 640 F.3d 329, 335 (8th Cir. 2011) (quoting *Perry*, 460 U.S. at 53)).

Kushner assumes that the purpose of the rule against video-recording is to preserve the University's intellectual property rights to the content of the lecture. (Herber Decl. II, Ex. E (Kushner Dep., at 66-67).) Thus, he argues, he should have been allowed to record the interactions between police and protesters because he was not recording the content of the lecture. (Pl.'s Mem., at 28.) But the rules of decorum also prohibit disruptive behavior, such as loud whispering or reading the newspaper. (Herber Decl. II, Ex. H (Event Procedures, at 1-2).) Using a cell phone to video-record the speaker at a lecture may be disruptive in the same way that reading a newspaper is. And as Defendants argued at the motion hearing, allowing an exception for video-recording that does not capture the content of the lecture would make the rule against video-recording very difficult to enforce.

Because room 25 was a limited public forum and the University's prohibition on video-recording was a reasonable and viewpoint neutral restriction, Kushner did not have the right to record interactions between police and protesters at the Halbertal lecture.

## **2. Probable Cause to Arrest**

Defendants assert that Officers Buhta and Lange had probable cause to arrest Kushner for trespass at the time they removed him from the lecture. (Defs.' Mem., at 19-22.) Kushner argues that there was no probable cause to arrest him, because Lokensgard said that he could stay if he turned over his phone, and he had willingly gotten up to leave. (Pl.'s Mem., at 30-31.)

“A warrantless arrest is consistent with the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least



‘arguable probable cause.’” *Ulrich v. Pope Cty.*, 715 F.3d 1054, 1059 (8th Cir. 2013) (quotations omitted). Probable cause is a question of law that is determined at the moment the arrest is made. *Hosea v. City of St. Paul*, 867 F.3d 949, 955 (8th Cir. 2017). An officer has probable cause to make an arrest if the totality of the circumstances at the time of an arrest would allow a reasonable officer to believe the suspect had or was committing a crime. *Borgman v. Kedley*, 646 F.3d 518, 523 (8th Cir. 2011). In formulating probable cause, officers necessarily receive “substantial latitude in interpreting and drawing inferences from factual circumstances.” *United States v. Washington*, 109 F.3d 459, 465 (8th Cir. 1997) (quotations omitted). “Arguable probable cause exists even where an officer mistakenly arrests a suspect believing it is based in probable cause if the mistake is objectively reasonable.” *Ulrich*, 715 F.3d at 1059 (quotations omitted).

Under Minnesota law, a person is guilty of the misdemeanor of trespass “if the person intentionally . . . trespasses on the property of another and, without claim of right, refuses to depart from the premises on demand of the lawful possessor.” Minn. Stat. § 609.605, subdiv. 1(b)(3). “The Minnesota Court of Appeals has explained that a refusal to depart is a necessary element of Minnesota’s trespass statute,” but the refusal to depart “does not have to be verbal or protracted.” *Peterson v. Kopp*, 754 F.3d 594, 598-99 (8th Cir. 2014) (citing *State v. Zimmer*, 478 N.W.2d 764, 768 (Minn. Ct. App. 1991); *State v. Quinnell*, 151 N.W.2d 598, 602 (Minn. 1967)).

From Officer Buhta’s perspective, and based on the totality of the circumstances, it was reasonable to believe that Kushner was trespassing. Officer Buhta observed, from

across the room, that Kushner was arguing with Officer Lange. (Herber Decl. II, Ex. F (Buhta Dep., at 89).) He was concerned with removing disruptive attendees from the lecture, so he approached and asked Kushner to leave. (*Id.* at 86, 92.) Lokensgard, Officer Lange, and Officer Buhta all testified that Kushner argued with them about his rights to record and to be present at the lecture, and Kushner does not deny that he challenged requests from Lokensgard and Officer Buhta to put his phone away or to leave. (*Id.* at 99-100; *Id.*, Ex. G (Lokensgard Dep., at 64); *Id.*, Ex. D (Kushner Dep., at 94-97); Herber Decl., Ex. A (Police Report, at 7).)

Officer Buhta, as an officer of the UMPD, could communicate the demand of the lawful possessor for Kushner to leave the premises. *See Quinnell*, 151 N.W.2d at 602-03. Under Minnesota's trespass law, Kushner was trespassing once he refused to comply with Officer Buhta demand that he leave. *See* Minn. Stat. § 609.605, subdiv. 1(b)(3). And it is undisputed that Officer Buhta asked Kushner to leave more than once. (Herber Decl. II, Ex. D (Kushner Dep., at 101-02).) The fact that Office Buhta had to ask Kushner to leave more than once provides a strong foundation for probable cause. In addition, Kushner admits that he was initially resistant when Lokensgard told him to turn off his phone, and that he questioned Officer Buhta about why he had to leave. (*Id.* at 94-97.) A reasonable officer observing this exchange could conclude that Kushner had refused a lawful demand to leave the premises.

Kushner argues that he was not trespassing because he voluntarily got up to leave. Even accepting this as true, Kushner still failed to get up to leave until he had been asked to leave more than once. Further, Kushner can be heard in the Lecture Recording,

insisting that he did not do anything wrong while a female voice repeatedly tells him to get up. (Herber Decl., Ex. C (Lecture Recording, Part 1, at 16:55-17:15).) And this exchange occurred in the context of a disruptive and somewhat chaotic protest, where Officer Buhta was justifiably concerned with getting Kushner out of the lecture hall quickly so he could deal with other protesters and avoid escalation of the conflict in the room. (Herber Decl. II, Ex. F (Buhta Dep., at 86, 102).) In these circumstances, a reasonable officer would be justified in arresting Kushner because he refused to leave promptly, or because he remained for a time to argue that he had no obligation to leave. *Compare Kopp*, 754 F.3d at 597, 599 (holding that arresting officer had “at least arguable probable cause” for arrest when the plaintiff stated that he was leaving after an order to depart, but remained seated, took out his cell phone, and asked for arresting officer’s badge number), *with Gerskovich v. Iocco*, No. 15-cv-7280, 2017 WL 3236445, at \*3-4 (S.D.N.Y. July 17, 2017) (denying summary judgment on the issue of probable cause when parties presented conflicting evidence as to whether the plaintiff was ever explicitly told to leave the premises).

Kushner also argues that he could not be considered to be violating the trespass statute because he had a “claim of right” to be at the lecture, based on his invitation to the event. (Pl.’s Mem., at 32-33.) But the rules of decorum clearly stated that the University would remove individuals who were disruptive or who otherwise violated the rules. (Herber Decl. II, Ex. H (Event Procedures, at 1-2).) Kushner violated the rules of decorum by making unauthorized video recordings, and a reasonable officer could conclude that he was disruptive when he began to argue with Lokensgard or Officer Buhta.

The undisputed facts on the record demonstrate that Officers Buhta and Lange had probable cause to arrest Kushner for trespass.

### 3. Due Process Interest in Access to University Campus

Kushner claims that Defendants violated his Fourth Amendment procedural due process rights when they issued a Trespass Order prohibiting Kushner from accessing the West Bank of the University without providing any pre- or post-deprivation process. (Compl. ¶ 105.) Defendants argue that this claim must fail because Kushner, as an alumni visitor, had no constitutionally protected liberty or property interest in access to campus. (Defs.' Mem., at 31-33.)

“The prevailing authority . . . is that members of the general public have neither a liberty nor property interest in being present on a university campus, and, absent any such interest, are not entitled to the procedural due process protections of the Fourteenth Amendment.” *Holbach v. Jenkins*, No. 4:09-cv-026, 2009 WL 2382756, at \*6 (D. N.D. July 30, 2009), *aff'd*, 336 F. App'x 703 (8th Cir. 2010) (per curiam); *accord Moore v. Ricotta*, 29 F. App'x 774, 775 (2d Cir. 2002); *People v. Leonard*, 465 N.E.2d 831, 834-35 (N.Y. 1984). Courts have also applied this rule to alumni of the university in question. *See Souders v. Lucero*, 196 F.3d 1040, 1045-46 (9th Cir. 1999); *Uzoukwu v. Prince George's Cmty. Coll. Bd. of Trs.*, No. 12-cv-3228, 2013 WL 4442289, at \*7 (D. Md. Aug. 15, 2013).

The Court agrees with the Ninth Circuit's statement in *Souders*, that “[w]hatever right [Kushner] has to be on campus must be balanced against the right of the University to exclude him,” and that his ability to access the University of Minnesota campus is not

a constitutionally-protected liberty or property interest. *Souders*, 196 F.3d at 1045. Kushner cannot claim a violation of his procedural due process based upon his exclusion from the West Bank of the University campus.

### **C. § 1983 Claims**

Having addressed the key questions of law that underlie Kushner’s claims, the Court now considers whether Defendants are entitled to summary judgment on Kushner’s claims under § 1983.

#### **1. Qualified Immunity**

Qualified immunity protects government officers from § 1983 liability “unless the official’s conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known.” *Brown v. City of Golden Valley*, 574 F.3d 491, 495 (8th Cir. 2009). Courts perform a two-part analysis to determine if qualified immunity applies by determining: (1) whether the facts show the violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the alleged misconduct.<sup>4</sup> *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see Brown*, 574 F.3d at 496. “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202. Qualified

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<sup>4</sup> Courts may address the prongs of the qualified immunity analysis in whatever order they deem appropriate based on the circumstances of the case. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

immunity is a question of law for the Court, not an issue for the jury. *See Littrell v. Franklin*, 388 F.3d 578, 584 (8th Cir. 2004).

## 2. First Amendment Claims

Kushner claims that Defendants interfered with his right to record interactions between the UMPD and protesters, and that he was retaliated against for exercising that right. (Compl. ¶¶ 99-100.) As the Court determined above, Kushner did not have a First Amendment right to record at the Halbertal lecture, so these claims fail. *See supra* Part II.B.1.

Kushner also claims that Defendants interfered with his right to challenge the actions of public officials, and that he was retaliated against for exercising that right. (*Id.*) Kushner argues that he exercised his First Amendment rights when he verbally challenged Officer Buhta for telling Maryam Zahid to leave the lecture. (Pl.’s Mem., at 23.) He claims that his removal from the lecture was motivated by that protected activity, and that it violated his rights. (*Id.*, at 23-26.)

Kushner pleads this alleged interference as a separate claim from his claim of retaliatory arrest, but does not specify any conduct that interfered with his right to challenge Officer Buhta, aside from Defendants “physically removing him and arresting him to prevent him from monitoring their activity and questioning their actions.” (Compl. ¶ 99.) Because Kushner’s interference claim on this issue is duplicative of his retaliatory arrest claim, the Court will treat them as one.

“[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including

criminal prosecutions, for speaking out.” *Hartman v. Moore*, 547 U.S. 250, 256 (2006). The right to challenge the actions of government officials is clearly established. *See City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (“[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”).

To sustain a First Amendment retaliatory arrest claim under § 1983, a plaintiff must show that: (1) he engaged in a protected activity, (2) a government official acted against him in a way that would “chill a person of ordinary firmness from continuing in the activity,” (3) the government’s adverse act was motivated at least in part by the plaintiff engaging in the protected activity, and (4) the government official lacked at least arguable probable cause to arrest the plaintiff. *Kopp*, 754 F.3d at 602.

Here, the Court has determined that Officers Buhta and Lange had probable cause to arrest Kushner for trespass. Thus, he cannot prove a violation of his First Amendment rights. *Id.* The Court will grant summary judgment to Defendants on Kushner’s First Amendment interference and retaliation claims.

### **3. Excessive Force Claim**

Kushner claims that Officers Buhta, Lange, and Temple subjected him to excessive force during his arrest, in violation of the Fourth Amendment prohibition against unreasonable seizures. *See* U.S. Const. amend. IV; *see also Lollie v. Johnson*, 159 F. Supp. 3d 945, 958 (D. Minn. 2016) (“Excessive force claims brought pursuant to 42 U.S.C. § 1983 are analyzed as seizures under the Fourth Amendment, meaning a reasonableness standard applies.”). The use of force is excessive under the Fourth Amendment if it is not “objectively reasonable under the particular circumstances.” *Greiner v. City of Champlin*,

27 F.3d 1346, 1354 (8th Cir. 1994). In analyzing the “circumstances” at play in any given case, courts consider such factors as “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham v. Connor*, 490 U.S. 386, 396 (1989).

The reasonableness of an officer’s use of force is assessed “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* Thus, force that later seems excessive may not be unconstitutionally so when examined in the light of an officer’s need to make “split-second judgments” in a “tense, uncertain, and rapidly evolving” situation. *Id.* at 396-97. Considerations of perspective and the fluidity of the encounter are lessened, however, when the facts suggest that rapid decisions are unneeded. *See Brown*, 574 F.3d at 497.

An excessive force claim may be successful even if the plaintiff suffered only a *de minimis* injury. *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011). But “[t]he degree of injury is certainly relevant insofar as it tends to show the amount and type of force used.” *Id.* The Eighth Circuit has held that plaintiffs must show more than *de minimis* injury, however, when alleging excessive force based upon the use of handcuffs. *Id.* at 907; *see also Crumley v. City of St. Paul*, 324 F.3d 1003, 1007-08 (8th Cir. 2003).

Kushner argues that Officers Buhta, Lange, and Temple acted unreasonably when they pushed him up against the half-wall outside room 25, causing him to fall, and when Officer Buhta tightened his handcuffs too tightly. (Pl.’s Mem., at 35-36.) Defendants assert that any force used by arresting officers was reasonable, in light of Kushner’s failure to



cooperate with officers during the arrest and the chaotic atmosphere of the protest. (Defs.' Mem., at 26-27.)

The Court agrees with Defendants that the force used by Officers Buhta, Lange, and Temple was reasonable as a matter of law. The parties disagree as to whether the officers pushed Kushner over the half-wall, but assuming for the purposes of summary judgment that they did, Officer Buhta testified that it was desirable to limit Kushner's mobility in order to secure and handcuff him. (Herber Decl. II, Ex. F (Buhta Dep., at 113-14).) Pushing Kushner against the half-wall was an objectively reasonable way to accomplish that. While it was unfortunate that Kushner fell forward over the half-wall, which the video shows stood at an awkward height relative to his body, it was not unreasonable for the officers to try to use the half-wall to stabilize him during the handcuffing.

As to the alleged excessive force based on Officer Buhta's handcuffing, Kushner demonstrates no injury from the handcuffs, aside from his statement that the handcuffs left red marks that went away within a day. (*Id.*, Ex. E (Kushner Dep., at 126-27, 130-31).) In his booking documentation, Kushner declined medical attention and did not record any injuries. (*Id.*, Ex. J (Booking Record, at 4-5).) The Eighth Circuit has explicitly required proof of more-than-*de minimis* injury for a claim of excessive force in handcuffing. *See Chambers*, 641 F.3d at 907; *Crumley*, 324 F.3d at 1007-08. Because he cannot show that he suffered an injury beyond the *de minimis* temporary red marks, Kushner's claim of excessive force based upon his handcuffing fails as a matter of law. *See Crumley*, 324 F.3d at 1008 (rejecting the plaintiff's claim that she was subjected to excessive force when her

handcuffs caused one of her hands to bleed; noting that the plaintiff presented no evidence of “long-term or permanent physical injury” from the handcuffs).

#### **4. Equal Protection Claim**

Kushner claims that he was treated differently from others similarly situated at the lecture, and that this violated his rights under the Equal Protection Clause of the Fourteenth Amendment. (Compl. ¶ 103.) He argues that he was not the only lecture attendee who recorded video on his phone, but that he was treated differently because of his perceived political views. (Pl.’s Mem., at 36.) Defendants argue that Kushner has not demonstrated that he was treated differently or that any differential treatment was intentional discrimination. (Defs.’ Mem., at 28-30.)

The Supreme Court has recognized equal protection claims for a “class of one,” where the plaintiff has not alleged membership in a suspect class but alleges that he or she has been “intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); *see also Robbins v. Becker*, 794 F.3d 988, 995 (8th Cir. 2015).

Kushner has failed to raise a genuine issue of material fact that he was intentionally treated differently, or that this differential treatment lacked a rational basis. Kushner points to the fact that at least one person who recorded video at the lecture—a student at Augsburg College and a member of a pro-Israel student group—was not asked to put away his phone or to leave. (*See Kushner Decl.*, ¶ 12.) Kushner asserts that he

was treated differently based on perceived political association after he advocated for Ms. Zahid, who appeared to be Middle Eastern in descent. (Pl.’s Mem., at 36.)

But Kushner provides no evidence that Lokensgard, the person enforcing the rule against video-recording and the person who initially instructed Kushner to stop recording, was in any way motivated by Kushner’s perceived political association. There is no evidence in the record that suggests that Lokensgard observed Kushner challenging Officer Buhta when he asked Ms. Zahid to leave, or that she was aware of any attendees’ pro- or anti-Israel sentiments. She asked several protest attendees to put away their phones, and testified that she looked for people who were clearly recording or who were being disruptive. (Herber Decl. II, Ex. G (Lokensgard Dep., at 55-57).) Lokensgard stated that she approached five people who had their phones out and appeared to be recording, and that she tried “to be fair and equal with everyone.” (*Id.* at 60.) Even drawing all reasonable inferences in Kushner’s favor, no reasonable jury could conclude that Kushner was intentionally treated differently based on his political views.

## **5. Due Process Claims**

Kushner claims that Officers Buhta, Temple, and Tyra violated his procedural due process rights by issuing a Trespass Warning without any pre- or post-deprivation due process. (Compl. ¶ 105.) “To make out a claim for a violation of procedural due process, the plaintiff has the burden of showing that ‘(1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest.’” *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 965-66 (8th Cir.

2015) (quoting *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012)). The Court has already determined that Kushner did not have a constitutionally-protected liberty or property interest in access to the University of Minnesota campus, even as an alumnus. *See supra* Part II.B.3. Thus, his procedural due process claim fails as a matter of law.

Kushner also claims that Officers Buhta, Temple, and Lange violated his substantive due process rights by “creating and using false evidence against him to obtain and pursue criminal charges.” (Compl. ¶ 104.) Kushner argues that Officer Buhta, Temple, and Lange made false statements in the police report, representing that Kushner was “yelling and screaming inside and outside the classroom, interfering with police officers, kicking Temple, refusing to leave the room, and resisting police officers when being escorted out of the room and handcuffed,” which led to “false charges and wrongful prosecution.” (Pl.’s Mem., at 37.) Defendants argue that Kushner’s substantive due process claim should be dismissed because the officers’ alleged wrongful conduct was not sufficiently serious to meet the standard for a substantive due process violation. (Defs.’ Reply Mem. of Law in Supp. of Their Mot. for Summ. J. [Doc. No. 135] (“Defs.’ Reply”), at 6-7.)

“To establish a violation of substantive due process rights by an executive official, a plaintiff must show (1) that the official violated one or more fundamental constitutional rights, and (2) that the conduct of the executive official was shocking to the ‘contemporary conscience.’” *Flowers v. City of Minneapolis*, 478 F.3d 869, 873 (8th Cir. 2007) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). Kushner

cites *Moran v. Clarke*, 296 F.3d 638 (8th Cir. 2002), in which the Eighth Circuit held that falsification of evidence could support a substantive due process claim. In *Moran*, the court noted that the plaintiff's evidence "can be read to show acts designed to falsely formulate a pretense of probable cause," and that this conduct was within the "universe of executive abuses that shock the conscience and violate the decencies of a civilized society." *Id.* at 647.

Here, the statements that Kushner says violated his substantive due process rights do not shock the conscience and were not used to create a pretense of probable cause. Officers' representations that Kushner was yelling and screaming, being disruptive, refusing to leave the room, and resisting police officers as they attempted to remove and handcuff him, are supported by some witness testimony and are generally the kind of subjective observations about which reasonable minds could differ. Additionally, Kushner admits that his foot came in contact with Officer Temple when he fell over the half-wall, so it is not shocking that Officer Buhta stated that Kushner had kicked Officer Temple. Further, the Court has already held that the UMPD officers had probable cause to arrest Kushner, which reduces the likelihood that the police might falsify evidence to justify the arrest. *See id.* ("Instead of simply allowing a weakly supported prosecution to proceed, Moran correctly asserts that the evidence can be read to show acts designed to falsely formulate a pretense of probable cause.").

## **6. Remaining § 1983 Claims**

Kushner claims that his arrest was unlawful under the Fourth Amendment. (Compl. ¶ 101.) A warrantless arrest is lawful if supported by probable cause. *Ulrich*,

715 F.3d at 1059. The Court has already determined that Officers Buhta and Lange had probable cause to arrest Kushner for trespass, so the Court will grant summary judgment to Defendants on this claim. *See supra* Part II.B.2.

Kushner also claims that Defendants conspired to violate his constitutional rights. (Compl. ¶ 106.) A § 1983 conspiracy claim must rest upon an actual deprivation of a constitutional right or privilege. *Riddle v. Riepe*, 866 F.3d 943, 948-49 (8th Cir. 2017). Kushner's other § 1983 claims fail as a matter of law, so he cannot prove an underlying constitutional deprivation to support his § 1983 conspiracy claim.

#### **D. State Law Claims**

In the absence of any viable federal claims, the Court has the discretion to decline supplemental jurisdiction over remaining state claims. *See* 28 U.S.C. § 1367(c)(3); *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010). The Court does not choose to exercise supplemental jurisdiction over Kushner's state law claims.

Even if the Court were to consider these claims, the doctrine of official immunity is applicable to Kushner's state law claims. Official immunity "protects from personal liability a public official charged by law with duties that call for the exercise of judgment or discretion unless the official is guilty of a wilful [sic] or malicious wrong." *Rico v. State*, 472 N.W.2d 100, 106-07 (Minn. 1991). The doctrine applies to Defendants, because they exercised discretion in deciding who to remove from the Halbertal lecture, when, and how. *See Kelly v. City of Minneapolis*, 598 N.W.2d 657, 665 (Minn. 1999). Intentionally doing a wrongful act without legal justification or the willful violation of a known right will divest an officer of official immunity. *See Rico*, 472 N.W.2d at 107.

“Whether or not an officer acted maliciously or willfully is usually a question of fact to be resolved by a jury.” *Johnson v. Morris*, 453 N.W.2d 31, 42 (Minn. 1990).

Kushner claims that Officers Buhta, Lange, Temple, and Tyra falsely imprisoned him and subjected him to malicious prosecution. (Compl. ¶¶ 107, 111.) Under Minnesota law, a malicious prosecution claim requires a lack of probable cause. *See Young v. Klass*, 776 F. Supp. 2d 916, 922 (D. Minn. 2011) (citing *Cox v. Lauritsen*, 147 N.W. 1093, 1094 (1914)). Similarly, the tort of false imprisonment requires an unlawful arrest, that is, one not based on at least arguable probable cause. *See Adewhale v. Whalen*, 21 F. Supp. 2d 1006, 1016 (D. Minn. 1998). Because the Court has determined that there was probable cause for Kushner’s arrest, both of these claims fail as a matter of law.

Kushner claims that Officers Buhta, Lange, and Temple assaulted and battered him during his arrest. (Compl. ¶¶ 108-09.) In Minnesota, battery is defined as intentional, unpermitted, offensive contact with another. *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn. 1980). However, police officers may use reasonable force to conduct lawful arrests. Minn. Stat. § 609.06, subdiv. 1(1)(a). “For the use of force to be unreasonable, the Plaintiff bears the burden of proving that force was excessive or unreasonable.” *Tillis v. City of Minneapolis*, No. 12-cv-324, 2013 WL 6062187, at \*10 (D. Minn. Nov. 18, 2013). An assault is an “unlawful threat to do bodily harm to another with present ability to carry the threat into effect.” *Dahlin v. Fraser*, 288 N.W. 851, 852 (Minn. 1939). “The display of force must be such as to cause plaintiff reasonable apprehension of immediate bodily harm.” *Id.*

Although the question of malice ordinarily goes to the jury, the Court sees no evidence upon which a jury could find willfulness or malice here. The Court has already determined that the force Officers Buhta, Lange, and Temple used to arrest Kushner was reasonable in light of the circumstances. *See supra* Part II.C.3. Thus, they acted with a legal justification and were not malicious in their conduct during the arrest. *See Rico*, 472 N.W.2d at 107.

Kushner claims that Officers Buhta, Lange, and Temple defamed him in the police report and in statements to the prosecutor of Kushner's case. (Compl. ¶ 110.) In Minnesota, absolute immunity protects public officials from civil defamation liability, even for intentionally false statements, in circumstances “where the public service . . . requires it.” *Redwood Cty. Tel. Co. v. Luttmann*, 567 N.W.2d 717, 720 (Minn. App. 1997) (quoting *Johnson v. Dirkswager*, 315 N.W.2d 215, 220 (Minn. 1982)). In *Carradine v. State*, the Minnesota Supreme Court held that absolute immunity applied to statements made in police reports, and to “any other intradepartmental statements [the defendant] made in the course of his duties.” 511 N.W.2d 733, 736-37 & n.2 (Minn. 1994). The court emphasized that preparing the report is a key part of an arresting officer's job, and that officers performing the necessary duties of their jobs should not be deterred from preparing a detailed report to aid any prosecution or trial. *Id.* at 736.

Here, most of the allegedly defamatory statements are contained in the police report, and are thus subject to absolute immunity. (Herber Decl., Ex. A (Police Report).) Kushner argues that Officer Buhta's statements to City Attorney Becker were defamatory, and that these statements were made in “informal conversations” not entitled



to immunity. (Pl.’s Mem., at 42.) The Court disagrees. City Attorney Becker testified that she recorded Officer Buhta’s statements in her case notes as a record for her investigation. (Herber Decl. II, Ex. M (Becker Dep., at 22-23, 27-31).) Freedom of communication between an arresting officer and prosecutor about the details of the case is necessary “to aid in the effective functioning of government.” *Carradine*, 511 N.W.2d at 735. Thus, Kushner’s defamation claims are barred by absolute immunity.

Finally, Kushner claims that Defendants were generally negligent and “breached their duty to exercise a reasonable standard of care in dealing with Plaintiff Jordan Kushner.” (Compl. ¶ 112.) “Only when officials act outside the scope of their charged authority can they be deemed to have waived [official] immunity and be held personally liable for their negligence.” *Dokman v. Cty. of Hennepin*, 637 N.W.2d 286, 296 (Minn. Ct. App. 2001) (citing *Janklow v. Minn. Bd. of Exam’rs*, 552 N.W.2d 711, 715 (Minn. 1996)). The Court finds no evidence in the record that would allow a reasonable jury to find that Defendants acted outside the scope of their authority, or that they are liable for negligence. The Court will grant summary judgment to Defendants on this claim.

### **III. CONCLUSION**

The Court holds the Kushner did not have a First Amendment right to record video at the Halbertal lecture, that Officers Buhta and Lange had probable cause to arrest him for trespassing, and that he did not have a constitutionally-protected right to be on the University of Minnesota campus. The Court further holds that the officers’ use of force was reasonable as a matter of law. In light of these conclusions and the evidence in the

record, viewing the evidence in the light most favorable to Kushner, the Court concludes that Defendants are entitled to summary judgment on all claims.

**IV. ORDER**

Based on the submissions and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment [Doc. No. 115] is **GRANTED** and Plaintiff's Complaint [Doc. No. 1] is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 18, 2018

s/Susan Richard Nelson  
SUSAN RICHARD NELSON  
United States District Judge