

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-11746

Non-Argument Calendar

WILLIAM O. FULLER,
MARTIN A. PINILLA, II,

Plaintiffs-Appellees,

versus

JOE CAROLLO,

Defendant-Appellant,

JOHN DOES 1-10, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:18-cv-24190-RS

Before WILLIAM PRYOR, Chief Judge, WILSON, and ANDERSON, Circuit Judges.

PER CURIAM:

Joe Carollo, a City Commissioner, appeals a second time a denial of immunity from a complaint filed by William O. Fuller and Martin A. Pinilla, businessmen from the Little Havana neighborhood of Miami, who allege that Carollo repeatedly harassed them in retaliation for their political support of his election opponent in violation of the First Amendment. *See* 42 U.S.C. § 1983. After briefing and oral argument, we dismissed Carollo's first appeal for lack of jurisdiction because it challenged a nonfinal order that granted the businessmen leave to amend their complaint. *Fuller v. Carollo*, 977 F.3d 1012 (11th Cir. 2020). Fuller and Pinilla amended their complaint, and the district court granted a partial dismissal based on legislative immunity and denied a dismissal based on qualified immunity. We affirm.

I. BACKGROUND

At this stage, we accept the allegations in the amended complaint as true and construe them in the light most favorable to the

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plaintiffs. *See Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010). We need not rehash all the details of the proceedings that led to their first appeal. We limit our review to the allegations in the amended complaint that relate to Carollo's arguments for legislative and qualified immunity.

In 2017, Carollo was a candidate for city commissioner for the district 3 that includes Little Havana. Before the general election, he sought Fuller's political support and the two men appeared to have a good relationship. Carollo advanced to a runoff election against Alfie Leon.

After early voting for the runoff began, Leon held political rallies at a property Fuller owned that was adjacent to an early voting center. Carollo's campaign chief of staff, Steve Miro, noticed Pinilla at the rallies and notified Carollo. On the last day of early voting, Miro saw Pinilla at a rally, called Fuller, and demanded that he shut down the event. Carollo and Miro then used contacts in city government to shut down the rally. Carollo defeated Leon in the runoff election in November.

Less than a week later, at Carollo's direction, dozens of police, fire, building, and other officers raided Sanguich de Miami, a restaurant where Fuller and Pinilla were investors and landlords. Weeks later, Carollo introduced and voted for Ordinance 13733, which ended the temporary-use permits used to operate Sanguich. When Sanguich attempted to reopen, city officials twice shut it down acting on direct orders from Carollo and his associates. Carollo also targeted Sanguich at the Gay 8 Festival where it operated

as a tent vendor. Carollo and Miro voiced concerns about Sanguich selling contaminated food to a city fire inspector, who then performed an intrusive surprise inspection. Carollo did not target any other vendor at the festival. Sanguich eventually relocated to a property not owned by Fuller and Pinilla and resumed operations without interference.

A month after the runoff election, Carollo also attempted to shut down Fuller and Pinilla's office Christmas party. Carollo had Maria Lugo, a campaign advisor and former city employee, demand that the director of code enforcement shut down the event for lacking a special events permit. When an enforcement officer reported that the event did not violate the code, her supervisor (a friend of Lugo) instructed her to remain outside the event until it ended. Carollo also complained to the assistant city manager, who instructed the director to attend the party in person. The director later confirmed to Fuller that Carollo's actions were politically motivated.

Three months after the runoff, Carollo shut down the one-year anniversary party of Union Beer Store after visiting the property with several police officers and code enforcement officer. Fuller and Pinilla were landlords for and partners in Union Beer.

That same month, Carollo also started harassing the Ball & Chain nightclub, which Fuller and two friends owned. Carollo and several associates visited the club's valet parking lot and photographed cars on the pretense of performing an "official investigation" of the operation. Later, Carollo visited residents of a nearby

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building to solicit noise complaints against the club. Carollo also conducted a “park-and-walk” with city employees, including the acting director of code enforcement, to meet with a resident Carollo had prepped to make a noise complaint against the club. Carollo arranged the park-and-walk without the knowledge of the city manager. Carollo later texted a parking complaint to the city manager, who in turn directed three code officers and a police officer to force club employees to move their cars from the club’s parking lot. The general manager of the club later discovered Carollo and a member of the code enforcement board behind the club attempting to solicit more noise complaints from neighbors.

Carollo also used his official authority to harass Fuller in other ways. For example, Carollo issued orders shutting down Domino Plaza, the customary site of the monthly Viernes Culturales festival hosted by an organization led by Fuller. And, after Carollo raised concerns about Fuller-owned properties during a meeting of the city commission, the city attorney sent an email to local administrators requesting a review of records of and the inspection of properties discussed at the meeting, most of which were owned by Fuller or his associates or were related to Fuller’s businesses.

Fuller and Pinilla filed a complaint in the district court alleging that Carollo retaliated against them in violation of the First Amendment. *See* 42 U.S.C. § 1983. Carollo moved to dismiss based on qualified immunity and legislative immunity. A magistrate judge issued a report and recommendation that the district court

grant Carollo's motion in part and deny it in part. The district court adopted that report and recommendation. And it granted Fuller and Pinilla leave to amend their complaint consistent with the report and recommendation. We dismissed Carollo's appeal of that order for lack of jurisdiction. *Fuller*, 977 F.3d 1012

After remand, Fuller and Pinilla filed a second amended complaint against Carollo. The amended complaint repeated many of the allegations made in the amended complaint.

Carollo moved to dismiss the amended complaint, which the district court granted in part and denied in part. Fed. R. Civ. P. 12(b)(6). The district court ruled that Carollo enjoyed legislative immunity as to "the passage of Ordinance 13733," but that he lacked legislative or qualified immunity for the "multiple actions directed solely at [Fuller and Pinilla] or directed at others who did business with [them]" and where his conduct "involve[d] code enforcement, something the Eleventh Circuit has stated is administrative, not legislative."

II. STANDARD OF REVIEW

We review *de novo* the denial of a motion to dismiss based on immunity from suit. *See Crymes v. DeKalb Cty., Ga.*, 923 F.2d 1482, 1485 (11th Cir. 1991) (legislative immunity); *Keating*, 598 F.3d at 762 (qualified immunity).

III. DISCUSSION

We divide our discussion in two parts. First, we discuss Carollo’s argument for legislative immunity. Second, we discuss Carollo’s argument for qualified immunity.

A. The District Court Did Not Err by Partially Denying Carollo Legislative Immunity.

“Absolute legislative immunity extends only to actions taken within the sphere of legitimate legislative activity.” *Brown v. Crawford Cty., Ga.*, 960 F.2d 1002, 1011 (11th Cir. 1992) (internal quotation marks omitted). So, “[i]t is the official function that determines the degree of immunity required, not the status of the acting officer.” *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982) (alteration adopted) (quoting *Marrero v. City of Hialeah*, 625 F.2d 499, 508 (5th Cir. 1980)). To enjoy absolute immunity, the legislator must engage in “[a] legislative act [that] involves policy-making rather than [the] mere administrative application of existing policies.” *Crymes*, 923 F.2d at 1485. The act of “rulemaking . . . [is] legislative.” *Id.* But the enforcement of laws against “specific individuals, rather than the general population, . . . [are] more apt to be administrative” and excluded from protection under the doctrine of legislative immunity. *Id.*

The district court did not err in partially denying Carollo’s argument for legislative immunity. Fuller and Pinilla’s amended complaint alleges that Carollo exceeded the bounds of his legislative responsibilities by repeatedly harassing their businesses.

Carollo's alleged enforcement actions were not legislative functions for which he was entitled to absolute immunity. Carollo argues that legislative immunity applies to "matters arising out of his Commission votes," but the district court ruled that he was immune from suit for actions related to the passage of Ordinance 13733. Carollo also argues that he is immune from suit for "introducing legislation to abolish the use of special masters," but Fuller and Pinilla deleted that allegation from their amended complaint. Carollo identifies no legislative function he allegedly performed for which the district court denied him absolute immunity.

B. Carollo's Argument for Qualified Immunity Fails.

Carollo's argument for qualified immunity also fails. Carollo argues that the district court erred in determining that his actions fell outside "the allowable duties and functions of a City legislative policymaker." But the district court *agreed* that Carollo was acting in his discretionary capacity as a city commissioner. Carollo also argues that an investigative report attached to the complaint "rendered the[] First Amendment retaliation claims implausible," but the district court declined to consider the hearsay in that report. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1294 (11th Cir. 2012). Carollo does not challenge that reasoning. And Carollo identifies no legal error in the ruling that the complaint against him alleges that he violated settled law prohibiting officials from retaliating against constituents who engage in political activities protected by the First Amendment.

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IV. CONCLUSION

We **AFFIRM** the partial denial of Carollo's motion to dismiss.