Filming Law Enforcement

International Municipal Lawyer's Association
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Houston v. Hill

- Second, contrary to the city's contention, ***HN3*** the First Amendment protects **a** significant amount of verbal criticism and challenge directed at police **officers**. "Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce **a** clear and present danger of **a** serious substantive evil that rises far above **public** inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949). In *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974), for example, the appellant was found to have yelled obscenities and threats at **an officer** who had asked appellant's husband to produce his driver's license. Appellant was convicted under **a** municipal ordinance that made it **a** crime "'for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" *Id*., at 132

- Houston v. Hill, 482 U.S. 451, 461 (U.S. 1987)

First Amendment Retaliation

- Official reprisal for protected speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right," *Crawford-El* v. *Britton,* 523 U.S. 574, 588, n. 10, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), and the 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, *id.,* at 592, 118 S. Ct. 1584, 140 L. Ed. 2d 759; see also *Perry* v. *Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (noting that the government may not punish **a** person or deprive him of **a** benefit on the basis of his "constitutionally protected speech").

- Hartman v. Moore, 547 U.S. 250, 256 (U.S. 2006)

First Amendment Retailiation Generally

- To establish **a** claim of retaliation, outside the employment context, for exercising the right to associate guaranteed under the First Amendment, **a** plaintiff must establish three elements: (i) the plaintiff was engaged in constitutionally protected activity; (ii) the defendant's actions caused the plaintiff to suffer **an** injury that would chill **a** person of ordinary firmness from continuing to engage in that activity; and (iii) the plaintiff's exercise of the constitutionally protected activity **[109]** substantially motivated the defendant's adverse action. See Perez v. Ellington, 421 F.3d at 1131-32 (quoting Worrell v. Henry, 219 F.3d at 1212).

- Mocek v. City of Albuquerque, 2013 U.S. Dist. LEXIS 10676, 108-109 (D.N.M. Jan. 14, 2013)

Glik

- The **filming** of government officials engaged in their duties in **a public place**, including police **officers** performing their responsibilities, fits comfortably within these principles. ***HN5*** Gathering information about government officials in **a** form that can readily be disseminated to others serves **a** cardinal First Amendment interest in protecting and promoting "the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966).

- Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. Mass. 2011)

Glik Cont'd

- To be sure, the right to **film** is not without limitations. It may be subject to reasonable time, **place**, and manner restrictions. See Smith, 212 F.3d at 1333. We have no occasion to explore those limitations here, however. On the facts alleged in the complaint, Glik's exercise of his First Amendment rights fell well within the bounds of the Constitution's protections. Glik **filmed** the defendant police **officers** in the Boston Common, the oldest city park in the United States and the apotheosis of **a public** forum. ***HN9*** In such traditional **public** spaces, the rights of the state to limit the exercise of First Amendment activity are "sharply circumscribed." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

- Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. Mass. 2011)

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- Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. Mass. 2011)

Applying Glik-when is it Dangerous Some facts from the District Court

- On March 25, 2010, at approximately 11:30 PM, Sergeant Joseph Kelley of the Weare Police Department observed a car traveling past him at a high rate of speed. Using radar equipment, he determined that the vehicle was traveling at 47 mph in a 30 mph zone. He initiated a traffic stop and the vehicle pulled over to the side of the road, near the Weare Middle School. A second vehicle, driven by **Gericke**, pulled in directly behind Sergeant Kelley's police cruiser and stopped. Given the lateness of the hour, the darkness, and the presence of four unknown people at the scene (two drivers and two passengers), Kelley understandably found **Gericke**'s presence to be a distraction, requiring Kelley to divert his attention from the vehicle he had stopped. Traffic stops, particularly those conducted late at night, pose a risk of danger to police officers, and **Gericke**'s presence at least arguably added to that potentially dangerous situation.
- Sergeant Kelley approached **Gericke**'s vehicle and instructed her to leave. **Gericke** initially resisted, saying she was traveling with the people whom Kelley had stopped. **[6]** She questioned why he had detained them, and, when Sergeant Kelley informed her that they had been speeding, she interjected herself into the situation by questioning the validity of the stop. Eventually, however, she complied — she moved her car from directly behind Kelley's cruiser into an adjacent parking area, where she positioned it parallel to the cruiser, about 30 feet away.

- Gericke v. Begin, 2012 U.S. Dist. LEXIS 148007, 5-6 (D.N.H. 2012)

Gericke Cont'd

- Sergeant Kelley then turned his attention to the driver of the other car, Tyler Hanslin. Kelley reports that Hanslin was verbally abusive, also questioned the validity of the stop, and commented that it was "bullshit." Hanslin then made some unusual movements with his hands around the area of his belt, and Sergeant Kelley asked him if he had any weapons. Hanslin disclosed that he was carrying a firearm. Kelley instructed him to get out of the car, so he could perform a pat-down search. Hanslin complied, and Kelley removed a Glock 9 mm semi-automatic handgun from Hanslin's waistband.
- Meanwhile, **Gericke** had exited her car and was standing behind a small fence that separated her from Sergeant Kelley. She yelled to him that she was recording his actions and pointed what Kelley suspected was a camera at him. And, **[7]** although **Gericke** denies it, Kelley says she shouted words encouraging Hanslin not to cooperate. See, e.g., Affidavit of Sergeant Joseph Kelley (document no. 20-2) at para. 8 ("Ms. **Gericke** verbally was encouraging Mr. Hanslin not to comply with my motor vehicle stop and shouted 'remember our cause.'"). **Gericke** later explained that she believed Kelley's decision to stop Hanslin for speeding was "bizarre" and said she saw her own role as that of a witness to the unfolding events, who should document what was transpiring. **Gericke** Deposition (document no. 26-4) at 61, 65. Curiously, however, **Gericke** also testified that she knew her video camera was not working at the time. Nevertheless, she kept it pointed at Kelley. Id. at 68. Sergeant Kelley responded by telling **Gericke** to return to her car. She complied, but rolled the window down and "kept the camera trained on him." Id. at 64.

- Gericke v. Begin, 2012 U.S. Dist. LEXIS 148007, 6-7 (D.N.H. 2012)

Gericke Cont'd

- According to Sergeant Kelley, due to **Gericke**'s continuing involvement, what had begun as a routine traffic stop had, in his view, become a potentially dangerous situation. He was in the presence of four unknown people (at least one of whom had been carrying a firearm); Hanslin was being less than fully cooperative; **[8] Gericke** was shouting at him and protesting the stop; and it was late at night, and he was alone. Accordingly, he called for assistance. Three members of the Weare Police Department responded: Lieutenant James Carney, Sergeant Robert Peterson (not a defendant in this action), and Officer Brandon Montplaisir. Around the same time, a third civilian car arrived at the scene. The driver, William Rodriguez, exited the vehicle. The officers were, then, presented with a late night situation that involved three vehicles, six unknown people, one (known) firearm, and a number of people outside of their vehicles.

- Gericke v. Begin, 2012 U.S. Dist. LEXIS 148007, 7-8 (D.N.H. 2012)

1st Circuit Review of Gericke

- The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure -- for example, a command that bystanders disperse -- that would incidentally impact an individual's exercise of the First Amendment right to film. Such an order, even when directed at a person who is filming, may be appropriate for legitimate safety reasons. However, a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.
- Importantly, ***HN16*** an individual's exercise of her First Amendment right to film police activity carried out in public, including a traffic stop, necessarily remains unfettered unless and until a reasonable restriction is imposed or in place. This conclusion follows inescapably from the nature of the First Amendment right, which does not contemplate self-censorship by the person exercising the right.
- Under Gericke's version of the facts, no such restriction was imposed or in place.10 According to Gericke, she immediately complied with all police orders: she returned to her car with her camera when **[9]** Sergeant Kelley asked her to do so, he never ordered her to stop filming, and once she pulled into the parking lot, he never asked her to leave the scene. Therefore, under Gericke's version of the facts, her right to film remained unfettered, and a jury could supportably find that the officers violated her First Amendment right by filing the wiretapping charge without probable cause in retaliation for her attempted filming.

- Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. N.H. 2014)

Mocek v. City of Albuquerque

- The TSOs assert that "publicly-owned airports such as Albuquerque International Sunport are nonpublic fora." MTD Memo. at 11 (citing Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992)). The TSOs assert that restrictions on speech at **an** airport terminal "need only be reasonable."

- Mocek v. City of Albuquerque, 2013 U.S. Dist. LEXIS 10676, 27 (D.N.M. Jan. 14, 2013)

Mocek Cont'd

- The TSOs additionally assert that the line of cases addressing whether there is **a** clearly established right to videotape the police in **public** is distinguishable from the right which Mocek asserts was violated, because: (i) "airport security checkpoints are not **public** fora and First Amendment activity at such checkpoints is subject to reasonable restrictions;" **[36]** and (ii) "TSOs are not law enforcement officials and the Plaintiff conceded that the law enforcement authority exercised in his case that allegedly gave rise to the constitutional violations was performed by the police and not the TSOs."

- Mocek v. City of Albuquerque, 2013 U.S. Dist. LEXIS 10676, 35-36 (D.N.M. Jan. 14, 2013)

Kelly v. Borough of Carlisle (3rd Cir).

- Qualified immunity was properly granted on the First Amendment claim because **a** right to videotape police **officers** during **a** traffic stop was not clearly established. Municipal liability was not established because there was no showing of deliberate indifference.

- Kelly v. Borough of Carlisle, 622 F.3d 248, 251 (3d Cir. Pa. 2010)

Fields v. City of Phila., 2016 U.S. Dist. LEXIS 20840 (E.D. Pa. Feb. 19, 2016)

- The question today is whether citizens also enjoy a First Amendment right to photograph police absent any criticism or challenge to police conduct. The citizens urge us to find, for the first time in this Circuit, photographing police without any challenge or criticism is [3] expressive conduct protected by the First Amendment.

Cont’d

- We begin by reminding the parties we are not addressing whether the officers' conduct violated the Fourth Amendment which awaits the jury's credibility evaluation. We are also not addressing a First Amendment right to photograph or **film** police when citizens challenge police conduct. We focus only on the facts in this case.

Cont’d

- Applying this standard, we conclude Fields and **Geraci** cannot meet the burden of demonstrating their taking, or attempting to take, pictures with no further comments or conduct is "sufficiently imbued with elements of communication" to be deemed expressive conduct. Neither Fields nor **Geraci** direct us to facts showing at the time they took or wanted to take pictures, they asserted anything to anyone. There is also no evidence any of the officers understood them as communicating any idea or message.

11th Circuit

- Appellant private citizens brought an action under 42 U.S.C.S. § 1983 in the district court against appellee city and police chief, alleging a violation of their U.S. Const. amend. I right to videotape police actions. The district court granted summary judgment in favor of appellees, finding that appellants had no U.S. Const. amend. I right to videotape police actions in public. Appellants sought review and the court affirmed. The court disagreed with the trial court and found that appellant had a U.S. Const. amend. I right as private citizens to videotape public police action. However, the court found that appellants had failed to prove that the police conduct complained of deprived them of a right, privilege or immunity secured by the Constitution or laws of the United States.

- Smith v. City of Cumming, 212 F.3d 1332, 1332 (11th Cir. Ga. 2000)

11th Circuit

- As to the First Amendment claim under Section 1983, we agree with the Smiths that they had **a** First Amendment right, subject to reasonable time, manner and **place** restrictions, to photograph or videotape police conduct. ***HN1*** The First Amendment protects the right to gather information about what **public** officials do on **public** property, and specifically, **a** right to record matters of **public** interest.
- Although the Smiths have **a** right to videotape police activities, they have not shown that the Defendants' actions violated that right. We find no merit in the remaining arguments presented in this appeal. AFFIRMED.

- Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. Ga. 2000)

4th Circuit

- Here, the district court concluded that Szymecki's asserted First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct. We have thoroughly reviewed the record and the relevant legal authorities and we agree. Accordingly, we affirm the order of the district court.

- Szymecki v. Houck, 353 Fed. Appx. 852, 853 (4th Cir. Va. 2009 UNPUBLISHED)

Ohio-6th Circuit

- Despite the existence, as of the August 12, 2012, date of the events giving rise to this case, of four circuit court opinions agreeing that the First Amendment protected the right to film public police activities, the movants assert a putative circuit split on the issue. Accordingly, they argue that, in the absence of a definitive Sixth Circuit decision, the right to film was not, as to them that evening, clearly established. Thus, they contend, their actions in keeping Reed and Ornelas from filming them and other officers enjoyed the protection of qualified immunity.
- Finally, ***HN18*** while inapplicable to whether a right is clearly established, many district courts have also found a First Amendment right to openly record police activity. *See, e.g., Askins v. U.S. Dep't of Homeland Security*, 2013 U.S. Dist. LEXIS 53208, 2013 WL 1561546, *4 (S.D. Cal.) ("There is no doubt that citizens enjoy a First Amendment right to photograph police officers performing their responsibilities in public places"); *Pomykacz v. Borough of W. Wildwood*, 438 F. Supp. 2d 504, 513 n.14 (D.N.J. 2006) (finding that plaintiff's photography of police should be analyzed under First Amendment); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (holding that the First Amendment protected videotaping state troopers).
- Defendants are correct that ***HN19*** the filming of police officers is subject to reasonable time, place, and manner restrictions. *Id.* Here, however, the facts plausibly allege that Ornelas and Reed were not interfering with the duties of the on scene defendants. While the complaint does not state precisely how far Ornelas and Reed were standing from the police officers, there is no indication that they were in the way of the police. As the complaint alleges, they were at the back of Crawford's pickup truck while Crawford was at the hood. Considering there is no specific distance required to be at "a comfortable remove," a rational trier of fact could find that Ornelas and Reed were not interfering with the duties of the on scene defendants.
- Crawford v. Geiger, 996 F. Supp. 2d 603, 617 (N.D. Ohio 2014)

7th Circuit

- Eavesdropping statute application to recording law enforcement in public place-challenged
- Plaintiff civil liberties organization filed a pre-enforcement action asking for declaratory and injunctive relief barring the enforcement of the Illinois eavesdropping statute as applied to openly audio recording of police officers performing their official duties in public. The United States District Court for the Northern District of Illinois held that the First Amendment did not protect a right to audio record. The organization appealed.

- The organization and its employees had standing; they faced a credible threat of prosecution under the Illinois eavesdropping statute, 720 Ill. Comp. Stat. 5/14-1 et seq., and their amended complaint plainly alleged a First Amendment injury. The eavesdropping statute restricted a medium of expression commonly used for the preservation and communication of information and ideas, thus triggering First Amendment scrutiny. Defending the broad sweep of the statute, the State relied on the government's interest in protecting conversational privacy, but that interest was not implicated when police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events. Even under the more lenient intermediate standard of scrutiny applicable to content-neutral burdens on speech, this application of the statute very likely flunked. The Illinois eavesdropping statute restricted far more speech than necessary to protect legitimate privacy interests; as applied to the facts alleged, it likely violated the First Amendment's free-speech and free-press guarantees.
- **Outcome**
- The judgment was reversed. The case was remanded with instruction to grant a preliminary injunction enjoining enforcement of the eavesdropping statute.

- ACLU v. Alvarez, 679 F.3d 583, 586 (7th Cir. Ill. 2012)

Limits

Reasonable Time, Place, Manner

Newsgathering

- While newsgathering has some First Amendment protection, its protection does not necessarily include **a** right to access all news-worthy information. The Supreme Court has noted that, although "there is **an** undoubted right to gather news 'from any source by means within the law,'" that right is limited, by its terms, to the ability to gather information from sources legally that are legally available to the **public**. Houchins v. KQED, Inc., 438 U.S. 1, 10-12, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978)(quoting Branzburg v. Hayes, 408 U.S. 665, 681-82, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972)). "[T]he First Amendment does not guarantee the press **a** constitutional right of special access to information not available to the **public** generally."

- Mocek v. City of Albuquerque, 2013 U.S. Dist. LEXIS 10676, 110 (D.N.M. Jan. 14, 2013)

Sharpe v. Baltimore

- **UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND**
- CHRISTOPHER SHARP,)) Plaintiff,)
- v.
-) Civil No. 1:11-cv-02888-BEL
-) BALTIMORE CITY POLICE) DEPARTMENT, *et al*.,)) Defendants.) _____)
- **STATEMENT OF INTEREST OF THE UNITED STATES**
- This litigation presents constitutional questions of great moment in this digital age: whether private citizens have a First Amendment right to record police officers in the public discharge of their duties, and whether officers violate citizens' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process. The United States urges this Court to answer both of those questions in the affirmative. The right to record police officers while performing duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution. They are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily.
- The United States is charged with enforcing three civil federal civil rights statutes that prohibit state and local law enforcement agencies from engaging in conduct that deprives persons of their rights under the Constitution and laws of the United States. One of the provisions that the United States enforces is the police misconduct provision of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, which authorizes the Attorney General to file lawsuits seeking court orders to reform police departments engaging in a pattern or practice of violating citizens' federal rights. The United States also enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964. Together, these three provisions prohibit discrimination on the basis of race, color, sex, or national origin by police departments receiving federal funds. Because of these enforcement responsibilities, the United States has a strong interest in ensuring that citizens' rights under the First, Fourth, and Fourteenth Amendments are not diminished when they record police carrying out their duties in a public setting. Accordingly, the United States files this Statement of Interest pursuant to 28 U.S.C. § 517.

USDOJ v. East Haven CT.

- E. **First Amendment Right to Observe and Record Officer Conduct**
- EHPD shall ensure that onlookers or bystanders may witness, observe, record, andlor comment on officer conduct, including stops, detentions, searches, arrests, or uses of force in accordance with their rights, immunities, and privileges secured or protected by the Constitution or laws of the United States. Officers shall respect the right of civilians to observe, record, and/or verbally comment on or complain about the performance of police duties occurring in public, and EI-IPD shall ensure that officers understand that exercising this right serves important public purposes.

East Haven Cont'd

- Individuals observing stops, detentions, arrests and other incidents shall be permitted to remain in the proximity of the incident unless there is an actual and articulable law enforcement basis to move an individual, such as: an individual's presence would jeopardize the safety of the officer, the suspect, or others in the vicinity; the individual violates the law; or the individual incites others to violate the law.
- Individuals shall be permitted to record police officer enforcement activities by camera, video recorder, cell phone recorder, or other means, unless there is an actual and articulable law enforcement basis to deny permission.

East Haven Cont'd

- Officers shall not threaten, intimidate, or otherwise discourage an individual from remaining in the proximity of or recording police officer enforcement activities.
- Officers shall not detain, prolong the detention of, or arrest an individual for remaining in the proximity of, recording or verbally commenting on officer conduct directed at the individual or a third party, unless there is an actual and articulable law enforcement basis for the detention.
- Officers shall report to their supervisors whenever they believe they have been recorded by a member of the public.
- Officers shall not seize or otherwise coerce production of recorded sounds or images, without obtaining a warrant, or order an individual to destroy such recordings. Where an officer has a reasonable belief that a bystander or witness has captured a recording of critical evidence related to a felony, the officer may secure such evidence for no more than three hours while a legal subpoena, search warrant, or other valid order is obtained.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER SHARP,	)	
	)	
Plaintiff,	)	
v.	)	Civil No. 1:11-cv-02888-BEL
	)	
BALTIMORE CITY POLICE DEPARTMENT, *et al*.,	)	
	)	
Defendants.	)	
	)	

STATEMENT OF INTEREST OF THE UNITED STATES

This litigation presents constitutional questions of great moment in this digital age: whether private citizens have a First Amendment right to record police officers in the public discharge of their duties, and whether officers violate citizens' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process. The United States urges this Court to answer both of those questions in the affirmative. The right to record police officers while performing duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution. They are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily.

The United States is charged with enforcing three civil federal civil rights statutes that prohibit state and local law enforcement agencies from engaging in conduct that deprives persons of their rights under the Constitution and laws of the United States. One of the provisions that the United States enforces is the police misconduct provision of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, which authorizes the Attorney General to file lawsuits seeking court orders to

reform police departments engaging in a pattern or practice of violating citizens' federal rights. The United States also enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964. Together, these three provisions prohibit discrimination on the basis of race, color, sex, or national origin by police departments receiving federal funds. Because of these enforcement responsibilities, the United States has a strong interest in ensuring that citizens' rights under the First, Fourth, and Fourteenth Amendments are not diminished when they record police carrying out their duties in a public setting. Accordingly, the United States files this Statement of Interest pursuant to 28 U.S.C. § 517.

FACTUAL AND PROCEDURAL BACKGROUND

On May 15, 2010, while in the Clubhouse at the Pimlico Race Course, Plaintiff Christopher Sharp observed Baltimore City Police Department ("BPD") officers forcibly arresting his friend.[1] Compl. at 9, ECF. No. 2. Mr. Sharp used his cell phone camera to video and audio record the officers' conduct. *Id*. at 2. Several officers, in succession, approached Mr. Sharp and ordered him to surrender his camera phone. *Id*. at 10. After twice refusing to comply with officers' demands, Mr. Sharp surrendered his phone to an officer who indicated that he needed to review and possibly copy Mr. Sharp's recording as evidence. *Id*. This officer left the Clubhouse with Mr. Sharp's phone. *Id*. at

[1] The United States assumes the facts presented in the Plaintiff's Complaint are true for the purposes of this Statement of Interest. *See Ashcroft v. Iqbal*, 556 U.S. 662, ---, 129 S. Ct. 1937, 1950 (2009). Although not included in the Complaint, Defendants' Motion to Dismiss Complaint or for Summary Judgment indicates that Mr. Sharp's friend was arrested for "striking a citizen in the presence of a police officer, resisting arrest, [and] assault second degree-law enforcement." *See* Def. Motion to Dismiss Complaint or for Summary Judgment at 2 & n.1, ECF. No. 20.

11. When the officer returned with Mr. Sharp's cell phone, he ordered Mr. Sharp to leave the premises. *Id*. As Mr. Sharp left the Clubhouse, he discovered that officers had deleted all of the recordings on his cell phone, including the two recordings of his friend's arrest and at least twenty personal videos. *Id*. at 12. The personal videos included recordings of his young son at sports events and parties and other videos of great sentimental value. *Id*. Mr. Sharp's cell phone had also been reset so that it only permitted emergency calls. *Id*.

BPD initiated a roll call training on August 17, 2011, that informed BPD officers that "[i]t is lawful for a person to videotape activities by a law enforcement officer in a public place and in the course of a law enforcement officer's regular duty." *See* Def. Motion to Dismiss Complaint or for Summary Judgment ("Def. MTD") at 12, ECF. No. 20.[2] The training does not reference the First, Fourth, or Fourteenth Amendments. *See id.* at 12-15. In addition, BPD transmitted an electronic message department-wide regarding the Maryland Wiretapping Act; provided an additional training to sergeants; and promulgated a new General Order that "instructs all sworn members on the Departments' protocol for addressing the video recording police activity and/or the video recording of a suspected crime." Def. MTD Ex. 2 at 2.

On August 31, 2011, Mr. Sharp filed a Complaint in the Circuit Court for Baltimore City against BPD, Frederick H. Bealefeld, III, Commissioner of the Baltimore City Police Department, and Unknown Police Officers Nos. 1, 2, and 3, alleging violations of state law and rights protected by the First, Fourth, and Fourteenth Amendments to the U.S. Constitution. On October 11, 2011, the case was removed to the United States District Court for the District of Maryland. On November 30, 2011, BPD

[2] Although the parties have yet to engage in discovery to test the factual averments in Defendants' Motion to Dismiss Complaint or for Summary Judgment, the United States assumes the truth of Defendants' factual allegations for the purposes of this Statement of Interest. As explained infra, even assuming Defendants' factual averments are correct, this Court should not grant summary judgment.

and Frederick H. Bealefeld, III ("Defendants") filed a Motion to Dismiss Complaint or for Summary Judgment pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure.

ARGUMENT

The First, Fourth, and Fourteenth Amendments protect Mr. Sharp from the actions taken by BPD officers in response to Mr. Sharp's recording of their actions, at least on the facts alleged in the Complaint. Indeed, Defendants recognize that the First Amendment is implicated when a private citizen records officers in the public discharge of their duties, and they have begun to take steps to ensure that the First Amendment is upheld. Unfortunately, Defendants' remedial actions to date are insufficient to ensure that a violation of the First Amendment does not recur, nor have Defendants taken any remedial actions regarding the alleged violations of the Fourth and Fourteenth Amendments. Accordingly, Defendants' request for partial summary judgment should be denied.[3]

1. The First Amendment Protects the Recording of Police Officers Performing Their Duties in Public

a. Defendants Concede That Private Citizens May Record Public Police Activities

The First Amendment protects the rights of private citizens to record police officers during the public discharge of their duties. Mr. Sharp's recording of his friend's arrest by BPD officers is

[3] In their Motion to Dismiss, Defendants make two arguments: (1) Plaintiff failed to state a claim against BPD or the Commissioner because the Complaint does not include sufficient facts to establish municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); and (2) Plaintiff's claims are moot because there is no reasonable expectation that the violations alleged by Plaintiff will reoccur. Defendants' first argument is based on alleged factual and pleading deficiencies that do not implicate the United States' interests. Defendants's second argument, however, assumes *arguendo* that Defendants could be held liable for the actions of the individual police officers and asserts that Plaintiff's claims are nevertheless moot because of the remedial actions Defendants have taken. In addressing Defendants' second argument, the United States also assumes *arguendo* that Defendants could be held liable under *Monell*. As argued below, Defendants' remedial actions actions are insufficient to moot Plaintiffs' claims.

unquestionably protected by the First Amendment, and Defendants concede this point. *See* Def. MTD at 12-15. Federal courts have recognized that recording devices are a form of speech through which private citizens may gather and disseminate information of public concern, including the conduct of law enforcement officers. The First Circuit recently held in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), that "[b]asic First Amendment principles" and federal case law "unambiguously" establish that private citizens possess "a constitutionally protected right to videotape police carrying out their duties." *Id*. at 82. *See Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing the "First Amendment right to film matters of public interest"); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 542 (E.D. Pa. 2005) (finding "no doubt that the free speech clause of the Constitution protected" plaintiff who videotaped officers because "[v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence"). The right to record police activity is limited only by "reasonable time, place, and manner restrictions." *Glik*, 655 F.3d at 84; *see Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (noting "even insofar as it *is* clearly established, the right to record matters of public concern is not absolute; it is subject to reasonable time, place, and manner restrictions," and finding "insufficient case law to establish a right to videotape police officers during a traffic stop," an "inherently dangerous situation[ ]").

There is no binding precedent to the contrary. In *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009), the Fourth Circuit issued a one page, unpublished per curium opinion summarily concluding – without providing legal or factual support – that the "right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct." *Id.* at 853. The Fourth

Circuit's opinion in *Szymecki* is not a barrier to this Court making a reasoned judgment based on established constitutional principles. *See United States v. Stewart*, 595 F.3d 197, 199 n.1 (4th Cir. 2010) ("Unpublished opinions have no precedential value in our Circuit."); *see also Glik*, 655 F.3d at 85 ("[T]he absence of substantive discussion deprives *Szymecki* of any marginal persuasive value it might otherwise have had.").

Furthermore, the facts alleged here indicate that BPD officers confronted Mr. Sharp because he was taking video and audio recordings of his friend's arrest, ordered him to surrender his camera phone, and ultimately destroyed the recordings on Mr. Sharp's phone because the BPD officers did not want the recordings to be used to impugn their actions. "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991). The reach of the First Amendment's protection extends beyond the right to gather such information – it also prohibits government officials from "punish[ing] the dissemination of information relating to alleged governmental misconduct." *Id*. at 1035; *see Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (speech relating to alleged governmental misconduct "has traditionally been recognized as lying at the core of the First Amendment").

The right to engage in and disseminate speech relating to government misconduct is not diminished when the government actors are police officers. *See City of Houston, Tex. 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."); *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16 (1973) ("Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer."); *see also Jean v. Mass. State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (finding that activist's recording of police officers' "warrantless and potentially

unlawful search of a private residence is a matter of public concern"); *Wilson v. Kittoe*, 337 F.3d 392, 399 n.3 (4th Cir. 2003) ("Peaceful verbal criticism of an officer who is making an arrest cannot be targeted under a general obstruction of justice statute such as Virginia's without running afoul of the First Amendment . . . .").

The Fourth Circuit has explicitly held that suppressing information critical of the police violates the First Amendment. In *Rossignol v. Voorhaar*, 316 F.3d 516, 521 (4th Cir. 2003), the Fourth Circuit considered whether sheriff's deputies violated the First, Fourth, and Fourteenth Amendments when they suppressed the distribution of a newspaper critical of the Sheriff and his deputies. The Court held that "the seizure clearly contravened the most elemental tenets of First Amendment law." *Id.* at 521. When law enforcement officers target materials "for suppression and retaliation because they disagree[] with its viewpoint and intend[] to prevent its message from being disseminated," "[t]his by itself [i]s sufficient to violate the Constitution." *Id.* Moreover, by suppressing constitutionally protected speech, law enforcement officers violated "*both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas." *Id.* at 522. The same principles apply here. If, as Mr. Sharp alleges, BPD officers suppressed the dissemination of his recording of his friend's arrest, such an action would clearly violate the First Amendment.

b. Defendants' Remedial Actions Are Not Sufficient To Prevent Future Constitutional Violations

Defendants do not dispute that the First Amendment protects Mr. Sharp's recording of his friend's arrest. *See* Def. MTD at 12-15. Nor do Defendants address, and presumably therefore do not dispute, Mr. Sharp's First Amendment right to disseminate this recording. Instead, Defendants argue

that they have taken sufficient steps to address the alleged violation of the First Amendment, rendering Mr. Sharp's claims moot. *See id.*

Specifically, Defendants allege that, BPD has voluntarily developed training protocols for its officers and sergeants and promulgated a new policy in order to clarify the rights of individuals who engage in protected First Amendment activities. *See* Def. MTD at 12-13. Defendants contend that these steps are sufficient to establish that Mr. Sharp's First Amendment claims for injunctive relief are now moot.[4] While the United States appreciates that Defendants now recognize that measures should be taken to address the alleged First Amendment violations, the remedial actions taken thus far – BPD's promulgation of a new General Order and provision of training – are not sufficient to prevent future constitutional violations.

Federal courts have a "duty . . . to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952). Under such circumstances, "[a] controversy may remain to be settled" yet "[t]he defendant is free to return to his old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953). Consistent with this principle, "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (This "general rule . . . traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."). In order to overcome the general rule, a

[4] Defendants also appear to claim that Mr. Sharp's Fourth and Fourteenth Amendment claims are now moot, *see* Def. MTD at 13, although they do not address either of these claims substantively in their Motion. *See* infra Note 6.

defendant must establish that – due to his voluntary cessation of the challenged conduct – "there is no reasonable expectation that the wrong will be repeated." *W. T. Grant Co.*, 345 U.S. at 632-33.

Although Defendants have taken some remedial actions, these measures do not adequately ensure that violations will not recur. *See Friends of the Earth, Inc.*, 528 U.S. at 193 (Defendants have the "formidable burden" of establishing that it's "absolutely clear" that their voluntary actions can reasonably be expected to prevent future constitutional violations."). In the months following the initiation of Mr. Sharp's civil suit, Defendants developed and implemented a roll call training, transmitted an electronic message on the same topic, and provided an additional training to sergeants. Def. MTD at 5-6. These training documents, however, do not explicitly acknowledge that private citizens' right to record the police derives from the First Amendment, nor do they provide clear and effective guidance to officers about the important First Amendment principles involved.[5] *See* Def. MTD at 12 (referring to roll call training on "Wire Tapping Law," an electronic message "on the same topic," training for sergeants on "the scope of the Maryland Wiretapping Act" and "an explanation of the right of citizens to record public police activities"); Def. MTD, Ex. 2-4. Defendants also place great emphasis on their recently promulgated General Order as evidence supporting their Motion to Dismiss, but the General Order was not attached to their Motion. Instead, Defendants ask this Court to conclude that BPD's General Order is sufficient to prevent future constitutional violations based on Defendants' assurances alone. As it currently stands, "nothing in the record indicates that Defendants' actions have resulted in permanent changes," prohibiting a finding that Mr. Sharp's claims for injunctive relief are

[5] Significantly, the training materials also make no reference to the Fourth or Fourteenth Amendments, so it is unclear how these materials could possibly moot Mr. Sharp's claims on these issues.

moot. *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697, 706 (D. Md. 2008) (finding Plaintiff's claims not moot because "there is nothing to prevent Defendants from returning to their prior practices").

In short, the First Amendment issues presented in this case are significant and are not adequately addressed by training that does not specifically describe officers' duties under the First Amendment. If BPD maintains a policy, practice or custom of advising officers to detain citizens who record the police while in the public discharge of their duties and to seize, search, and delete citizens' recordings as Plaintiff's contend, Compl. at 7, the remedial measures taken by the Defendants are not sufficient to prevent future constitutional violations. At minimum, Defendants should develop a comprehensive policy that specifically addresses individual's First Amendment right to observe and record officer conduct. This policy should be implemented through periodic training, and the effectiveness of the policy and training should be tested routinely through quality assurance mechanisms. Moreover, BPD should track allegations that an officer has interfered with a citizen's First Amendment right to observe and/or record the public performance of police duties. While Defendants have taken some measures to address Plaintiff's allegations, those measures do not demonstrate that First Amendment violations could not recur, and therefore summary judgment is inappropriate.

2. The Fourth Amendment Protects Private Property From Seizure or Search Without a Warrant or Probable Cause

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.[6] The Fourth

[6] While Defendants purport to have resolved Mr. Sharp's First Amendment claims through the provision of training and the development of a new General Order, Defendants' position on Mr. Sharp's Fourth and Fourteenth Amendment claims is less clear. To the extent the Defendants argue that their voluntary actions to prevent officers from retaliating against persons engaged in activity protected by the First Amendment also moots Mr. Sharp's Fourth and Fourteenth Amendment claims, Defendants fail to recognize the independent import of these claims. The Supreme Court "has never held that one specific

Amendment "traditionally has been deemed to protect" private citizens' "personal effect[s]." *Soldal*, 506 U.S. at 65 (*citing Cardwell v. Lewis*, 417 U.S. 583, 591 (1974)); *Altman v. City of High Point, N.C.*, 330 F.3d 194, 202 (4th Cir. 2003) ("[T]he [Supreme] Court has treated the term 'effects' as being synonymous with personal property."). The interests animating the Fourth Amendment's prohibition against unreasonable searches and seizures are heightened when the property at issue is also protected by the First Amendment. The Supreme Court has held that Fourth Amendment limitations on law enforcement officers' authority to seize individuals' property must be "scrupulously observed" when the item seized contains information protected by the First Amendment and "the basis for the seizure is disapproval of the message contained therein." *Walter v. United States*, 447 U.S. 649, 655 (1980). This requirement that government officials closely adhere to the strictures of the warrant requirement when the item to be seized is protected by the First Amendment recognizes that the "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Walter*, 447 U.S. at 655 n.6; *see also New York v. P.J. Video, Inc.*, 475 U.S. 868, 873 (1986) ("We have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures.").

Indeed, the seizure of material protected by the First Amendment is a form of prior restraint – a long disfavored practice only permitted in limited circumstances not present here. The Supreme Court has recognized that "seizing films to destroy them or to block their distribution or exhibition is a very

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constitutional clause gives way to another equally specific clause when their domains overlap." *Presley v. City of Charlottesville*, 464 F.3d 480, 485 (4th Cir. 2006); *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right . . . [w]here such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn.").

different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding." *Heller v. New York*, 413 U.S. 483, 490 (1973). When material falls "arguably within First Amendment protection," and officers' warrantless seizure of that material "br[ings] to an abrupt halt an orderly and presumptively legitimate distribution or exhibition" of that material, the Fourth Amendment is violated. *Roaden v. Kentucky*, 413 U.S. 496, 503 (1973) ("Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards."). Such a seizure, which prohibits the dissemination of constitutionally protected information "presents essentially the same restraint on expression as the seizure of all the books in a bookstore." *Id.* at 504. As described above, Defendants' seizure and destruction of Mr. Sharp's videos appears to have been based on the content of those videos and prevented their dissemination. These First Amendment concerns "require[] that the Fourth Amendment be applied with 'scrupulous exactitude.'" *Maryland v. Macon*, 472 U.S. 463, 468 (1985).

In this case, Mr. Sharp alleges that Defendants seized his cell phone and searched it without a warrant. An officer's warrantless search or seizure of a private citizen's personal property is per se unreasonable unless the search or seizure "falls within 'certain carefully defined classes of cases' that permit warrantless searches." *United States v. Perez*, 393 F.3d 457, 460 (4th Cir. 2004) (*citing Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528-29 (1967)); *Altman*, 330 F.3d at 205 ("A seizure of personal property conducted without a warrant is presumptively unreasonable."). Warrantless seizures are only permitted if an officer has probable cause to believe that the property "holds contraband or evidence of a crime" and "the exigencies of the circumstances demand it or some other

recognized exception to the warrant requirement is present."[7] *United States v. Place*, 462 U.S. 696, 701 (1983). Even then, officers may not search the property without first obtaining a warrant. *Id*. at 701 & n.3. In determining whether the seizure and search were reasonable under the circumstances, courts "balance the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion," to determine if an officer's conduct violated the Fourth Amendment. *Perez*, 393 F.3d at 460 (*citing Place*, 462 U.S. at 703).

It is well established that individuals have a property interest in their cell phones that is protected by the Fourth Amendment. A government official's intrusion into a private citizen's personal effects constitutes a Fourth Amendment seizure if the individual has a "possessory interest" in the property and the official engages in "some meaningful interference" with that interest. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Similarly, a government official's search of property violates the Fourth Amendment if officials infringe upon an "an expectation of privacy that society is prepared to consider reasonable." *Id*. Private citizens have both a possessory interest in their cell phones and a recognized expectation of privacy in the contents of their cell phones. *See United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007) (recognizing defendants' possessory interest in seized cell phone and privacy interest in text messages and call records, but finding search permissible as search incident to arrest);

[7] The exception for warrantless searches incident to an arrest does not apply in this case. Courts have recognized that it may be necessary for a law enforcement officer to conduct a warrantless search of the contents of a suspect's cell phone incident to a lawful arrest if the phone contains evidence that may otherwise be destroyed. *See, e.g*., *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009) ("[O]fficers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest" where there is a "manifest need . . . to preserve evidence."). The "search incident to arrest" exception to the warrant requirement "has been traditionally justified by the need to search for weapons, instruments of escape, and evidence of crime." *United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991); *see also Knowles v. Iowa*, 525 U.S. 113, 116 (1998). The parties agree that Mr. Sharp was not arrested and that officers destroyed Mr. Sharp's recordings instead of copying them as evidence for a criminal prosecution.

United States v. Young, 278 F. App'x 242, 245-46 (4th Cir. 2008) (per curiam) (recognizing defendant's "[p]rivacy rights in the phone" from which officer retrieved text messages); *United States v. Wurie*, 612 F. Supp. 2d 104, 109 (D. Mass. 2009) ("It seems indisputable that a person has a subjective expectation of privacy in the contents of his or her cell phone."). An individual's personal cell phone "contain[s] a wealth of private information, including emails, text messages, call histories, address books, and subscriber numbers" and is akin to "a personal computer that is carried on one's person." *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) (finding that defendant "had a reasonable expectation of privacy regarding this information"). Accordingly, Mr. Sharp has a protectable interest in his cell phone and its contents under the Fourth Amendment.

In this case, the Complaint does not include any allegations indicating that exigent circumstances existed that would permit the BPD officers to seize Mr. Sharp's phone without a warrant, and Defendants have not suggested that any existed in their Motion. *See Place*, 462 U.S. at 701. Moreoever, it is unclear whether, when Mr. Sharp surrendered his phone to officers, he did so "voluntarily" and not as "the result of duress or coercion, express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973); *United States v. Hylton*, 349 F.3d 781, 785 (4th Cir. 2003) (An individual's "valid consent" is "[o]ne well-recognized exception" to the warrant requirement). *See* Def. MTD at 5. Nor is it clear whether Mr. Sharp voluntarily consented to a search of his phone's contents. These ambiguities alone suggest that this case is inappropriate for summary judgment.

Even if Mr. Sharp did consent to the surrender of his phone and some type of search of its contents, "a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable searches.'" *Jacobsen*, 466 U.S. at 124. Law enforcement officers violate

the Fourth Amendment if their search exceeds the scope of a person's consent. *See United States v. Neely*, 564 F.3d 346, 353 (4th Cir. 2009) ("Because Officer Tran's search exceeded the scope of Neely's consent and cannot be justified under *Terry*, we find that the search of the interior of Neely's car was in violation of his Fourth Amendment rights."). Federal courts have recognized the uncontroversial principle that, by consenting to an initial search of private property, private citizens do not thereby consent to the destruction of that property. *See, e.g., United States v. Strickland*, 902 F.2d 937, 941-42 (11th Cir. 1990) (explaining that the scope of a search pursuant to a general statement of consent "is not limitless" and that "a police officer could not reasonably interpret a general statement of consent to search an individual's vehicle to include the intentional infliction of damage to the vehicle or the property contained within it"). Here, Defendants deleted Mr. Sharp's videos from his cell phone, allegedly without consent. If these allegations are true, Defendants violated Mr. Sharp's Fourth Amendment rights.

3. The Fourteenth Amendment Prohibits the Seizure and Destruction of Property Without Due Process

The Fourteenth Amendment prohibits state and local officials from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Here, Mr. Sharp alleges that Defendants seized and destroyed his cell phone videos without notice or an opportunity to be heard and that this was pursuant to a policy, practice, or custom of Defendants. Compl. at 18. If these allegations are accurate, BPD officers violated the Fourteenth Amendment when they deprived Mr. Sharp of personal property without providing him with notice or an opportunity to object to the deletion of the recordings in his cell phone, and Defendants have not put forward any evidence that they have taken remedial measures to address this violation.

A private citizen's "constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). By mandating that individuals be afforded an opportunity to be heard, the due process clause "operates to protect the 'use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property.'" *See Helton v. Hunt*, 330 F.3d 242, 247 (4th Cir. 2003) (finding that statute permitting law enforcement officers to seize and destroy video gaming machines "with no process at all" violated due process) (*citing Fuentes*, 407 U.S. 67 at 81); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause . . . .").

Mr. Sharp has alleged sufficient facts in his Complaint to suggest a violation of the Fourteenth Amendment. A plaintiff alleging a due process violation must establish that "(1) they had property or a property interest (2) of which the defendant deprived them (3) without due process of law." *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005); *see also Zinermon v. Burch*, 494 U.S. 113, 126 (1990) ("[T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate."). Private citizens have property interests in their personal effects, including cell phones and the contents of their cell phones. *See* supra Part 2; *see also Matthias v. Bingley*, 906 F.2d 1047, 1051 (5th Cir. 1990) ("Of course, the plaintiffs' personal belongings disposed by the City in this case fall[] under the rubric 'property' governed by the Due Process Clause."). Mr. Sharp alleges, and Defendant does not dispute, that officers permanently deleted the recordings on Mr. Sharp's cell phone – including numerous videos of his young son at sports events and other personal videos – without first providing him with "notice

reasonably calculated" to apprise him of "the pendency of the action" and "afford [him] an opportunity to present [his] objections."[8] *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Such notice is "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality." *Id*.

"The right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Mathews*, 424 U.S. at 333 (internal citations omitted). BPD officers appear to have violated the core requirements of procedural due process when – without providing notice or an opportunity to be heard – they allegedly – and irrevocably – deprived Mr. Sharp of the recordings on his cell phone. *See also Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 823 (5th Cir. 2007) (The notice defendant provided to the plaintiff "was insufficient to satisfy due process because [plaintiff] did not receive the notice until after his personal property was allegedly discarded . . . . [D]iscarding [plaintiff's] personal property in this manner violated his procedural due process rights."). If the facts alleged in Mr. Sharp's Complaint are true, they make out a violation of the Fourteenth Amendment. Defendants have not submitted any evidence suggesting that they have remedied the alleged violations, so summary judgment on this claim should be denied.

[8] The facts, as alleged, indicate that – *after* Plaintiff had unwittingly surrendered his phone to an officer – another officer informed him that "they'll probably just erase it and give it back." Compl. at 11.

CONCLUSION

For the reasons set forth herein, the Court should deny Defendants' request for summary judgment in their Motion to Dismiss or for Summary Judgment.

Respectfully submitted,

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Re: *Christopher Sharp v. Baltimore City Police Department, et. al.*

Dear Counsel:

Judge Paul W. Grimm scheduled a settlement conference in *Christopher Sharp v. Baltimore City Police Department, et. al*. for May 30, 2012. While we take no position on Mr. Sharp's claim for damages against the individual defendants, it is the United States' position that any resolution to Mr. Sharp's claims for injunctive relief should include policy and training requirements that are consistent with the important First, Fourth and Fourteenth Amendment rights at stake when individuals record police officers in the public discharge of their duties. These rights, subject to narrowly-defined restrictions, engender public confidence in our police departments, promote public access to information necessary to hold our governmental officers accountable, and ensure public and officer safety.

The guidance in this letter is designed to assist the parties during the upcoming settlement conference. It specifically addresses the circumstances in this case and Baltimore City Police Department's General Order J-16 ("Video Recording of Police Activity"), but also reflects the United States' position on the basic elements of a constitutionally adequate policy on individuals' right to record police activity.

1. Background

In his complaint, Mr. Sharp alleged that on May 15, 2010, Baltimore City Police Department ("BPD") officers seized, searched and deleted the contents of his cell phone after he used it to record officers forcibly arresting his friend. Compl. at 9-12, ECF. No. 2. Mr. Sharp further alleged that BPD maintains a policy, practice or custom of advising officers to detain citizens who record the police while in the public discharge of their duties and to seize, search, and delete individuals' recordings. *Id*. at 7. On November 30, 2011, BPD and Frederick H.

Bealefeld, III filed a Motion to Dismiss Complaint of for Summary Judgment. According to the Motion to Dismiss, BPD promulgated a general order on recording police activity on November 8, 2011. BPD did not file this policy as an exhibit to its Motion to Dismiss. Instead, BPD filed a declaration providing a brief summary of its contents.

On January 10, 2012, the United States filed a Statement of Interest in this matter. In that statement, the United States urged the Court to find that private individuals have a First Amendment right to record police officers in the public discharge of their duties, and that officers violate individuals' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process. The United States also opined that, based on the limited information on the record regarding BPD's development of new policies and training on individuals' right to record the police, BPD failed to meet its burden of establishing that it had taken sufficient action to prevent future constitutional violations. On February 10, 2012, BPD provided the Court, Mr. Sharp and the United States with a courtesy copy of General Order J-16. The same day, BPD released General Order J-16 to the public.[1] Following a hearing on February 13, 2012, Judge Legg denied BPD's motion.

Constitutionally adequate policies must be designed to effectively guide officer conduct, accurately reflect the contours of individuals' rights under the First, Fourth and Fourteenth Amendments, and diminish the likelihood of future constitutional violations. BPD's general order does not meet these requirements in some areas. In other areas, BPD's general order does adequately protect individuals' constitutional rights. We discuss those areas below, as well as others in which BPD should amend the general order to ensure that individual's constitutional rights are protected.

2. Guidance on the Right to Record Police Activity.

A. Policies should affirmatively set forth the First Amendment right to record police activity.

Policies should affirmatively set forth the contours of individuals' First Amendment right to observe and record police officers engaged in the public discharge of their duties. Recording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.[2] *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) ("[b]asic

[1] Peter Hermann, *Baltimore Police Told Not to Stop People Taking Photos or Video of Their Actions*, The Baltimore Sun, February 11, 2012.

[2] There is no binding precedent to the contrary. In *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009), the Fourth Circuit issued a one page, unpublished per curium opinion summarily concluding – without providing legal or factual support – that the "right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct." *Id.* at 853; *see also McCormick* v. *City of Lawrence*, 130 F. App'x 987 (10th Cir. 2005). In the Fourth Circuit, "[u]npublished opinions have no precedential value." *United States v. Stewart*, 595 F.3d 197, 199 n.1 (4th Cir. 2010); *see also Glik*, 655 F.3d at 85 ("[T]he absence of substantive discussion deprives *Szymecki* of any marginal persuasive value it might otherwise have had.").

First Amendment principles" and federal case law "unambiguously" establish that private individuals possess "a constitutionally protected right to videotape police carrying out their duties."); *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the "First Amendment right . . . to photograph or videotape police conduct."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing the "First Amendment right to film matters of public interest"). The First Amendment right to record police activity is limited only by "reasonable time, place, and manner restrictions." *Glik*, 655 F.3d at 84; *Smith*, 212 F.3d at 1333.

While courts have only recently begun to refine the contours of the right to record police officers, the justification for this right is firmly rooted in long-standing First Amendment principles. The right to "[g]ather[] information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The application of this right to the conduct of law enforcement officers is critically important because officers are "granted substantial discretion that may be used to deprive individuals of their liberties." *Id*.; *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035-36 (1991) ("Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption."). The "extensive public scrutiny and criticism" of police and other criminal justice system officials serves to "guard[] against the miscarriage of justice," *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)), a harm that undermines public confidence in the administration of government. When police departments take affirmative steps to protect individuals' First Amendment rights, departments "not only aid[] in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally." *Glik*, 655 F.3d at 82-83.

Policies should explain the nature of the constitutional right at stake and provide officers with practical guidance on how they can effectively discharge their duties without violating that right. For example, policies should affirmatively state that individuals have a First Amendment right to record police officers and include examples of the places where individuals can lawfully record police activity and the types of activity that can be recorded.[3] While this area of the law

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[3] Police duties discharged in public settings may include a range of activities, including detentions, searches, arrests or uses of force. In *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), the Third Circuit considered whether there was sufficient case law "establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police conduct during the stop would violate the First Amendment." *Id*. at 262. The Court determined that, because there were no cases specifically addressing the right to record traffic stops and the relevant Third Circuit decisions were inconsistent, there was insufficient case law to support a finding that the right to record traffic stops was clearly established. *Id*. Because the right was not clearly established, the officer involved was entitled to qualified immunity. *Id.* at 262-63. The Third Circuit expressly did not reach the question of whether the First Amendment protects the recording of police activity during a traffic stop, because it did not need to reach that question to decide that the officer should receive qualified immunity. *Id.* In other contexts, the Supreme Court has noted that, when faced with a close call, "the First Amendment requires [courts] to err on the side of protecting political speech rather than suppressing it." *FEC v. Wisconsin Right to*

is still developing, existing case law is instructive. In *Glik*, an individual engaged in protected activity when he recorded officers allegedly engaging in excessive force in a public park, "the apotheosis of a public forum." *Glik*, 655 F.3d at 84. Individuals have a right to record in all traditionally public spaces, including sidewalks, streets and locations of public protests.

Courts have also extended First Amendment protection to recordings taken on private property, including an individual filming police activity from his or her home or other private property where an individual has a right to be present. *See Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007) (activist's posting of a video of "a warrantless and potentially unlawful search of a private residence" on her website was entitled to First Amendment protection); *Pomykacz v. Borough of West Wildwood*, 438 F.Supp.2d 504, 513 (D. N.J. 2006) (individual was engaging in political activism protected by the First Amendment when she photographed police officer while officer was in police headquarters and in municipal building); *Robinson v. Fetterman*, 378 F.Supp.2d 534, 541 (E.D. Pa. 2005) (individual who videotaped state troopers from private property with the owner's permission was engaged in constitutionally protected speech). The 1991 videotaped assault of Rodney King at the hands of law enforcement officers exemplifies this principle. A private individual awakened by sirens recorded police officers assaulting King from the balcony of his apartment. This videotape provided key evidence of officer misconduct and led to widespread reform. Congress enacted 42 U.S.C. §14141 in response to this incident. Section 14141 granted the U.S. Attorney General the right to seek declaratory or injunctive relief against law enforcement agencies engaged in a pattern or practice of violating the Constitution or federal law.

BPD's General Order J-16 should affirmatively set forth that individuals have a First Amendment right to record officers in the public discharge of their duties. At numerous points throughout General Order J-16, BPD refers to "Constitutional rights" that form the basis for the policy. For example, General Order J-16 begins with a statement acknowledging that the purpose of the policy is to "to ensure the protection and preservation of every person's Constitutional rights," *id.* at 1, and later refers to bystanders' "absolute right to photograph and/or video record the enforcement actions of any Police Officer." *Id.* at 2. Yet, General Order J-16 never explicitly acknowledges that this right derives from the First Amendment. Particularly given the numerous publicized reports over the past several years alleging that BPD officers violated individuals' First Amendment rights, BPD should include a specific recitation of the First Amendment rights at issue in General Order J-16.

Other areas of General Order J-16 also require further clarification. For example, General Order J-16 states that officers may not prohibit a person's ability to observe, photograph, and/or make a video recording of police activity that occurs "in the public domain," General Order J-16 at 1, but never defines this term. BPD should clarify that the right to record public officials is not limited to streets and sidewalks – it includes areas where individuals have a legal right to be present, including an individual's home or business, and common areas of public and private facilities and buildings.

Life, Inc., 551 U.S. 449, 457 (2007). *See also Bertot v. School Dist. No. 1, Albany County, Wyo.*, 613 F.2d 245, 252 (10th Cir. 1979) ("We prefer that governmental officials acting in sensitive First Amendment areas err, when they do err, on the side of protecting those interests.").

B. Policies should describe the range of prohibited responses to individuals observing or recording the police.

Because recording police officers in the public discharge of their duties is protected by the First Amendment, policies should prohibit interference with recording of police activities except in narrowly circumscribed situations. More particularly, policies should instruct officers that, except under limited circumstances, officers must not search or seize a camera or recording device without a warrant. In addition, policies should prohibit more subtle actions that may nonetheless infringe upon individuals' First Amendment rights. Officers should be advised not to threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or recording devices.

Policies should prohibit officers from destroying recording devices or cameras and deleting recordings or photographs under any circumstances. In addition to violating the First Amendment, police officers violate the core requirements of the Fourteenth Amendment procedural due process clause when they irrevocably deprived individuals of their recordings without first providing notice and an opportunity to object. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society."); *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 823 (5th Cir. 2007) (The notice defendant provided to the plaintiff "was insufficient to satisfy due process because [plaintiff] did not receive the notice until after his personal property was allegedly discarded . . . . [D]iscarding [plaintiff's] personal property in this manner violated his procedural due process rights.").

BPD's General Order J-16 addresses the search and seizure of cameras or recording devices. However, the policy does not prohibit more subtle officer actions that nonetheless may infringe upon individuals' First Amendment rights. BPD should instruct officers not to threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or other recording devices.

The order also prohibits officers from damaging or erasing the contents of a device without first obtaining a warrant, General Order J-16 at 2. This is not merely a Fourth Amendment question, however. Under the First Amendment, there are no circumstances under which the contents of a camera or recording device should be deleted or destroyed. BPD's general order should include clear language prohibiting the deletion or destruction of recordings under any circumstances.

C. Policies should clearly describe when an individual's actions amount to interference with police duties.

The right to record police activity is limited only by "reasonable time, place, and manner restrictions." *Glik*, 655 F.3d at 8; *Smith*, 212 F.3d at 1333. If a general order permits individuals to record the police unless their actions interfere with police activity, the order should define what it means for an individual to interfere with police activity and, when possible, provide specific examples in order to effectively guide officer conduct and prevent infringement on activities protected by the First Amendment.

A person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, or incite others to violate the law. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (words "likely to cause a fight" are not afforded First Amendment protection); *see also Louisiana ex rel. Gremillion v. National Ass'n for the Advancement of Colored People*, 366 U.S. 293, 297 (1961) ("criminal conduct . . . cannot have shelter in the First Amendment"). Courts have held that speech is not protected by the First Amendment if it amounts to actual obstruction of a police officer's investigation – for example, by tampering with a witness or persistently engaging an officer who is in the midst of his or her duties. *See Colten v. Commonwealth of Kentucky*, 407 U.S. 104 (1972) (individual's speech not protected by the First Amendment where individual persistently tried to engage an officer in conversation while the officer was issuing a summons to a third party on a congested roadside and refused to depart the scene after at least eight requests from officers); *King v. Ambs*, 519 F.3d 607 (6th Cir. 2008) (individual was not engaged in protected speech when he repeatedly instructed a witness being questioned by a police officer not to respond to questions).

However, an individual's recording of police activity from a safe distance without any attendant action intended to obstruct the activity or threaten the safety of others does not amount to interference. Nor does an individual's conduct amount to interference if he or she expresses criticism of the police or the police activity being observed. *See City of Houston, Tex. 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."); *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16 (1973) ("Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer.") Even foul expressions of disapproval towards police officers are protected under the First Amendment.[4] *See, e.g.*, *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (individual who was "making obscene gestures" and "yell[ed] profanities" at an officer engaged in conduct that "fell squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech—such as stopping or hassling the speaker—is categorically prohibited by the Constitution.").

Time, place, and manner restrictions on First Amendment speech must "leave open ample alternative channels for communication of the information," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). BPD's general order specifically suggests that, if a bystander's actions are

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[4] The Supreme Court has carved out an exception for "'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572. However, the Court has indicated that the fighting words exception "might require a narrower application in cases involving words addressed to a police officer, because 'a properly trained officer may reasonably be expected to exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'" *Hill*, 482 U.S. at 462. *See also Johnson v. Campbell*, 332 F.3d 199 (3d Cir. 2003) (detainee's words "son of a bitch" to police officer were not fighting words); *Posr v. Court Officer Shield #207*, 180 F.3d 409 (2d Cir. 1999) (individual's statement to officer "one day you're gonna get yours," spoken while in retreat, were not fighting words); *Buffkins v. City of Omaha, Douglas County*, 922 F.2d 465, 472 (8th Cir. 1991) (finding no evidence that individual caused "an incitement to immediate lawless action" by calling officer "asshole").

"approaching the level of a criminal offense," supervisors should "recommend a less-intrusive location to the bystander from which he/she may continue to observe, photograph, or video record the police activity." *Id*. at 5. This is effective language to guide supervisor's conduct. However, BPD's general order does not permit or recommend that "members" – presumably officers – provide this information to bystanders before effectuating an arrest. BPD should revise its general order to provide "members" with the same authority.

General Order J-16 must set forth with specificity the narrow circumstances in which a recording individual's interference with police activity could subject the individual to arrest. Recent publicized interactions between citizen-recorders and BPD officers highlight the need for clear guidance on this issue. *See* Peter Hermann, *Police Allow Bystanders to Tape Arrest, But at What Risk?*, The Baltimore Sun, April 3, 2012 (president of the city police union stating that officers "are confused right now" about how to appropriately respond to individuals recording police conduct); *see also*, *Fox45 Top News Stories Video*, Fox45 WBFF Baltimore, March 22, 2012 (covering the suspension of a BPD officer who confiscated a cell phone from an individual recording police from a family member's property)[5]; Justin Fenton, *In Federal Hill, Citizens Allowed to Record Police – But Then There's Loitering*, The Baltimore Sun, February 11, 2012 (BPD officer instructing a citizen-recorder that he would face loitering charges if he failed to move away from the scene of an arrest).

Under "General Information," General Order J-16 at 2, the policy states that bystanders have an absolute right to record police activity as long as the bystanders' actions do not fall into one of six exceptions. One exception is that bystanders may not "Interfere with or violate any section of the law, ordinance, code, or criminal or traffic article." While bystanders clearly may not violate the law, it is less clear under what circumstances an individual's actions would "interfere" with a law or ordinance. This language encourages officers to use their discretion in inappropriate, and possibly unlawful, ways. Instead, General Order J-16 should encourage officers to provide ways in which individuals can continue to exercise their First Amendment rights as officers perform their duties, rather than encourage officers to look for potential violations of the law in order to restrict the individual's recording.

D. Policies should provide clear guidance on supervisory review.

First line supervision is a critical component of constitutional policing. Policies should include guidance on when an officer should call a supervisor to the scene and what a supervisor's responsibilities are once he or she arrives at the scene. A supervisor's presence at the scene should be required before an officer takes any significant action involving citizen-recorders or recording devices, including a warrantless search or seizure of a camera or recording device or an arrest.[6]

[5] Available at: http://www.foxbaltimore.com/newsroom/top_stories/videos/wbff_vid_12767.shtml.

[6] Supervisors should be present at the scene to approve any arrest for conduct related to the use of cameras or recording devices. For example, an arrest for quality of life offenses, including "hindering" or "loitering," may be based upon the individuals' alleged interference with police duties while using a recording device. *See, e.g.*, Justin Fenton, *In Federal Hill, Citizens Allowed to Record Police – But Then There's Loitering*, The Baltimore Sun, February 11, 2012 (BPD

BPD should clarify the role of supervisors. A supervisor's presence at the scene should be required before an officer takes any significant action involving cameras or recording devices, including a warrantless search or seizure. If feasible, supervisors should be present prior to an individual's arrest related to the use of a recording device. At a minimum, supervisors must be present to approve such arrests before an individual is transported to a holding facility. BPD's general order does not include mandatory language requiring supervisors to be present during these occurrences, but rather advises supervisors to be present "if possible." General Order J-16 at 4.

Moreover, BPD's general order includes inconsistent language regarding when a member should contact a supervisor. On page 4, officers are instructed to notify a supervisor *after* an individual has been arrested. Later on the same page, under the supervisor's responsibilities, the supervisor is advised to go to any scene where the actions of a bystander are "approaching the level of a criminal offense." BPD should reconcile this inconsistency and require, at a minimum, a supervisor's presence at the scene to approve all arrests or any other significant action by a member.

E. Policies should describe when it is permissible to seize recordings and recording devices.

Policies on individuals' right to record and observe police should provide officers with clear guidance on the limited circumstances under which it may be permissible to seize recordings and recording devices. An officer's response to an individual's recording often implicates both the First and Fourth Amendment, so it's particularly important that a general order is consistent with basic search and seizure principles. A general order should provide officers with guidance on how to lawfully seek an individual's consent to review photographs or recordings and the types of circumstances that do—and do not—provide exigent circumstances to seize recording devices, the permissible length of such a seizure, and the prohibition against warrantless searches once a device has been seized. Moreover, this guidance must reflect the special protection afforded to First Amendment materials.

Policies should include language to ensure that consent is not coerced, implicitly or explicitly. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) ("[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."). In assessing whether an individual's consent to search was freely and voluntarily given, Courts may consider "the characteristics of the accused . . . as well as the conditions under which the consent to search was given (such as the officer's conduct; the number of officers present; and the duration, location, and time of the encounter)." *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996). BPD's explanation of the process for obtaining consent includes clear guidelines regarding what steps an officer should take once an individual provides an officer with consent to review a recording. However, BPD's general order should include language to ensure that consent is not coerced, implicitly or explicitly.

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officer instructing a citizen-recorder that he would face loitering charges if he failed to move away from the scene of an arrest).

Warrantless seizures are only permitted if an officer has probable cause to believe that the property "holds contraband or evidence of a crime" and "the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." *United States v. Place*, 462 U.S. 696, 701 (1983). Any such seizure must be a "temporary restraint[] where needed to preserve evidence until police c[an] obtain a warrant." *Illinois v. McArthur*, 531 U.S. 326, 334 (2001). Seizures must be limited to a reasonable period of time. For example, in *Illinois v. McArthur*, the Supreme court upheld a police officer's warrantless seizure of a premises, in part, because police had good reason to fear that evidence would be destroyed and the restraint only lasted for two hours – "no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant." *Id*. at 332. Once seized, officers may not search the contents of the property without first obtaining the warrant. *Place*, 462 U.S. at 701 & n.3. In the context of the seizure of recording devices, this means that officers may not search for or review an individual's recordings absent a warrant.

Police departments must also recognize that the seizure of a camera that may contain evidence of a crime is significantly different from the seizure of other evidence because such seizure implicates the First, as well as the Fourth, Amendment. The Supreme Court has afforded heightened protection to recordings containing material protected by the First Amendment. An individual's recording may contain both footage of a crime relevant to a police investigation and evidence of police misconduct. The latter falls squarely within the protection of First Amendment. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."). The warrantless seizure of such material is a form of prior restraint, a long disfavored practice. *Roaden v. Kentucky*, 413 U.S. 496, 503 (1973) (when an officer "br[ings] to an abrupt halt an orderly and presumptively legitimate distribution or exhibition" of material protected by the First Amendment, such action is "plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards."). *See also Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (Where sheriff's deputies suppressed newspapers critical of the sheriff "before the critical commentary ever reached the eyes of readers, their conduct met the classic definition of a prior restraint."). An officer's warrantless seizure of an individual's recording of police activity is no different. *See Robinson v. Fetterman*, 378 F.Supp.2d 534, 541 (E.D. Penn 2005) (By restraining an individual from "publicizing or publishing what he has filmed," officer's "conduct clearly amounts to an unlawful prior restraint upon [] protected speech."); *see Channel 10, Inc. v. Gunnarson*, 337 F.Supp. 634, 637 (D.Minn. 1972) ("it is clear to this court that the seizure and holding of the camera and undeveloped film was an unlawful 'prior restraint' whether or not the film was ever reviewed.").

The warrantless seizure of material protected by the First Amendment "calls for a higher hurdle in the evaluation of reasonableness" under the Fourth Amendment. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973). Police departments should limit the circumstances under which cameras and recording devices can be seized and the length of the permissible seizure. BPD's general order does not convey that the warrantless seizure of recording material is different than the warrantless seizure of many other types of evidence, in that it implicates the First, as well as the Fourth, Amendment. General Order J-16 should make it clear to officers that, in the ordinary course of events, there will not be facts justifying the seizure of cameras or recording devices. Moreover, General Order J-16 does not define "temporary" seizure. BPD should clarify how long and under what circumstances an officer may seize a recording device, even temporarily,

and how the recordings on the device must be maintained after seizure. A policy permitting officers, with supervisory approval, to seize a film for no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant if that film contains critical evidence of a felony crime would diminish the likelihood of constitutional violations.

F. Police departments should not place a higher burden on individuals to exercise their right to record police activity than they place on members of the press.

The Supreme Court has established that "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978). Indeed, numerous courts have held that a private individual's right to record is coextensive with that of the press. A private individual does not need "press credentials" to record police officers engaged in the public discharge of their duties. *See e.g.*, *Glik*, 655 F.3d at 83 ("The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press."); *Lambert v. Polk County, Iowa*, 723 F.Supp. 128, 133 (S.D. Iowa 1989) ("It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events—all of us . . . have that right."). The First Amendment "attempt[s] to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" including the "promulgation of information and ideas by persons who do not themselves have access to publishing facilities-who wish to exercise their freedom of speech even though they are not members of the press." *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

This principal is particularly important in the current age where widespread access to recording devices and online media have provided private individuals with the capacity to gather and disseminate newsworthy information with an ease that rivals that of the traditional news media. *See Glik*, 655 F.3d at 84 ("[M]any of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.").

BPD's general order appropriately does not place a higher burden on individuals to exercise their right to record police activity than in places on members of the press. Policies should not establish different guidelines for media and non-media individuals. BPD's general order includes language that accomplishes this goal:

> "Members of the press and members of the general public enjoy the same rights in any area accessible to the general public." *Id.* at 4.
>
> "No individual is required to display 'press credentials' in order to exercise his/her right to observe, photograph, or video record police activity taking place in an area accessible to, or within view of, the general public." *Id.*

These two provisions effectively convey that officers should not place a higher burden on individuals to exercise their right to record police activity than in places on members of the press.

3. Conclusion

Comprehensive policies and effective training are critical to ensuring that individuals' First, Fourth and Fourteenth Amendment rights are protected when they record police officers in the public discharge of their duties. If the parties determine that settlement of this matter is feasible, we encourage the parties to reach an agreement that is consistent with the guidance provided above. Please note that this letter is a public document and will be posted on the Civil Rights Division's website. If you have any questions, please feel free to contact us.

Sincerely,

Jonathan M. Smith by SEO

JONATHAN M. SMITH
Chief
Special Litigation Section