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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
No. 4D19-3664

SHARRON TASHA FORD,

Appellant,
v.

CITY OF BOYNTON BEACH,
a Florida municipal corporation,

Appellee.
_____/

[PROPOSED][1] *AMICUS CURIAE* BRIEF BY THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC., THE FLORIDA JUSTICE INSTITUTE, THE RADIO TELEVISION DIGITAL NEWS ASSOCIATION, THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE SOUTH FLORIDA CHAPTER OF THE NATIONAL LAWYERS GUILD, CENTER FOR FREEDOM OF INFORMATION, SOCIETY OF ENVIRONMENTAL JOURNALISTS, FIRST LOOK MEDIA WORKS, INC., AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING AND REHEARING *EN BANC*

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[1] This [Proposed] Amicus Brief was attached to the Motion for Leave to File Amicus Brief that was timely filed yesterday and not docketed with a remark from the reviewing clerk: "Please file the motion and proposed brief in separate PDF documents."

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INTRODUCTION

This case involves significant First Amendment issues concerning the recording of police performing official duties in public places. Such recordings are an invaluable means of holding law enforcement officers accountable when they engage in misconduct and exonerating them when they behave lawfully and with restraint.

While the panel decision made no mention of the First Amendment, the Court introduced the issue by identifying as one of the factual bases for the probable cause finding this key paragraph of the opinion:

> When directed to provide her address, she was unable to do so. When directed to stop recording, she refused to do so. And when the officers calmly asked to speak with her, she accused them of escalating the situation. The plaintiff consistently and persistently failed to comply with the officers' direction and requests. In short, she obstructed their investigation and processing of her son's detention—a lawful execution of their duty.

Op. at 5.[2]

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[2] Whenever this Court interprets criminal statutes, it must consider the Constitution. *State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004) ("[T]he canons of statutory construction requir[e] us to interpret the statutes in a way as to avoid any potential constitutional quandaries….").

Because the Court found probable cause based on Ms. Ford's refusal to stop recording, a right the court called into question by its holding, we only seek to address an issue the majority introduced—whether officers have probable cause to arrest when a person directed to stop recording does not do so despite having a statutory and free speech right to record the officers.

ARGUMENT

I. Ordinary Citizens, Just Like Professional Journalists, Have a First Amendment Right to Record Police Officers in the Performance of Their Official Duties in Public Places

This Court's 2-to-1 panel opinion vests unbridled discretion and authority in police to order citizens and professional journalists to turn off their recorders. As will be demonstrated below, the opinion is inconsistent with the First Amendment.

Courts across the country, including the Eleventh Circuit, have held that ordinary citizens have a First Amendment right to record police officers in the performance of their official duties in public places, subject to reasonable time, manner, and place restrictions. *See Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82, 85 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fields v. City of*

Philadelphia, 862 F.3d 353, 359 (3d Cir. 2017); *see also Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); Tyler Finn, Note, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 Colum. L. Rev. 445, 447 (2019) ("[E]very federal appellate court to address the constitutional question has concluded that the First Amendment protects the right of citizens to document the police.").

This right is protected through both the First Amendment's Press Clause, when the citizen intends to publish the recording, *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 588 (7th Cir. 2012), and the Speech Clause, where the recording is viewed as expressive conduct or as an antecedent to speech, *id.* at 595–96.

In *Glik*, the Court observed:

> **It is of no significance that the present case… involves a private individual, and not a reporter, gathering information about public officials. 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**. *Houchins* [*v. KQED, Inc.*, 438 U.S. 1, 16 (1978)] (Stewart, J., concurring) (noting that the Constitution "assure[s] the public and the press equal access once government has opened its doors")[.]

655 F.3d at 83 (emphasis added).

As further noted in *Glik*:

> changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. **The proliferation of electronic devices with video-recording capability means that many 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.** Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.

Id. at 84 (emphasis added).

The Press Clause protects "all who exercise its freedoms," not just professional journalists. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 802 (1977) (Burger, C.J., concurring); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010) (rejecting the proposition that the Speech Clause gives "the institutional press" privileges beyond those of other speakers). As the Supreme Court held in *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972), "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who uses the latest photocomposition methods."

Citizens as nontraditional newsgatherers who record policy activity are no different from the lonely pamphleteer, and they are entitled to Speech and

Press Clause protection. The empowerment of nontraditional newsgatherers also helps "fill the gaps" created by the contraction of traditional media organizations—especially local newspapers—over the last twenty years. Indeed, some of the most essential newsgathering acts in recent years have involved citizens filming police brutality. *See, e.g.*, Audra D.S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. Times (May 26, 2020), https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html.

II. Recording of Public Law Enforcement Activity Is a Critical Tool for Police Accountability and Transparency

Such recordings are also an invaluable means of holding law enforcement officers accountable when they engage in misconduct and exonerating them when they behave lawfully and with restraint. Video "creates an independent record of what took place in a particular incident, free from accusations of bias, [incorrect testimony], or faulty memory. It is no accident that some of the most high-profile cases of police misconduct have involved video and audio records." *Filming and Photographing the Police*, ACLU, https://www.aclu.org/issues/free-speech/photographers-rights/ filming-and-photographing-police [https://perma.cc/

U5Z6-WQZE]; *see also* International Association of Chiefs of Police, *Public Recording of Police*, https:// www.theiacp.org/prop.

Most importantly, video recordings, as opposed to witness accounts, do not erode over time. *See* Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 Fed. Cts. L. Rev. 1, 10 (2007) (describing the rapid decline in reliability of memory over time); *see also* Richard P. Conti, The Psychology of False Confessions, 2 J. Credibility Assessment &Witness Psychol. 14, 22–23 (1999) (describing the effect that misleading post-event information can have on recounting the original information). Eyewitness testimony is fickle and, all too often, shockingly inaccurate. *See Commonwealth v. Martin*, 850 N.E.2d 555, 570 (Mass. 2006) (Cordy, J., dissenting) (revealing seventy-seven percent of wrongful convictions were due to mistaken eyewitness testimony).

Furthermore, "[b]ystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture. Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public." *Fields*, 862 F.3d at 359. In addition to a video's evidentiary value, video recording can assist law enforcement, ranging from Justice

Department investigations of civil rights violations to exonerations of police officers accused of wrongdoing. *See* Robinson Meyer, *The Courage of Bystanders Who Press 'Record'*, Atlantic (Apr. 8, 2015), https://www.theatlantic.com/technology/archive/2015/04/the-courage-of-bystanders-who-press-record/389979/[https://perma.cc/9NW9-6HF2]. In other words, bystander videos not only protect citizens from inappropriate police activity, but also protect police from allegations of misconduct. *See* Maya Wiley, *Body Cameras Help Everyone--Including the Police*, TIME (May 9, 2017), http://time.com/4771417/jordan-edwards-body-cameras-police/[https://perma.cc/794Z- WFCG].

Notably, the United States Department of Justice ("DOJ") submissions[3] in federal litigation relating to the right to observe and document the activities, including the arrest activities, of uniformed police performing police duties in public places, reflect that the right to observe and

[3] *See, e.g.*, Statement of Interest of the United States dated January 10, 2012, ECF No. 24 in *Sharp v. Baltimore City Police Dept.*, Civil No. 1:11-cv-02888-BEL (D. Md.), and May 12, 2012 letter filed by United States Department of Justice - Civil Rights Division - Special Litigation Section in *Sharp* (the "*Sharp* Letter"); Statement of Interest of the United States dated March 4, 2013, ECF No. 15 in *Garcia v. Montgomery County, Maryland, et al.*, 8:13-cv-03592-JFM (D. Md.) (the "*Garcia* SOI"), attached hereto as Appendices 1 and 2.

document those activities are so fundamental that the United States felt compelled to inform the courts in those cases of its "position on the basic elements of a constitutionally adequate policy on individuals' right to record police activity," insisting that any resolution of the injunctive relief claims at issue in the *Sharp* case, for example,

> 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.

Sharp Letter at 1; *see also id.* at 2 (recommending that appropriate policies "should affirmatively set forth the contours of individuals' First Amendment right to observe and record police officers"); *id.* at 5–7 (recognizing that "[t]he right to record police activity is limited only by 'reasonable time, place, and manner restrictions' ") (citations omitted).

And in the *Garcia* SOI, the DOJ urged the Court to "find that both the First and Fourth Amendments protect an individual who peacefully photographs police activity on a public street" and, in recognition of its "strong interest in ensuring that individuals' constitutional rights are

protected when they observe and document police carrying out their duties in a public setting," expressed its

> concern[] that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights. The United States believes that courts should view such charges skeptically to ensure that individuals' First Amendment rights are protected. **Core First Amendment conduct, such as recording a police officer performing duties on a public street, cannot be the sole basis for such charges.** Third, the First Amendment rights to record police officers performing public duties extends to both the public and members of the media, and the Court should not make a distinction between the public's and the media's rights to record here.

Garcia SOI at 1–2 (emphasis added).

III. Rude Speech Did Not Interfere with the Performance of a Legal Duty

Outside of this case, Florida appellate courts as well as the U.S. Supreme Court have strictly limited the circumstances in which words alone create probable cause to arrest for obstruction and interference. Notably, the panel majority overlooked *City of Houston v. Hill*, 482 U.S. 451 (1987), which recognized that "**the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers**," *id.* at 463 (emphasis added), and that "**[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking**

arrest is one of the principal characteristics by which we distinguish a free nation from a police state," *id*. at 462–63 (emphasis added).

Even assuming Ms. Ford was rude, the video shows she did not physically confront the officers by invading their personal space, by interposing herself between them and her son, or by threatening them in any way; indeed, she maintained appropriate distance until police officers approached her. She never sought to incite violence or otherwise to prevent the officers from completing the arrest of her son. The only sense in which, per the majority, she was "confrontational" was in her refusal to stop recording and in her vocal disagreement with the treatment of her son, none of which gives rise to probable cause to arrest and all of which is protected by the First Amendment.[4]

CONCLUSION

If allowed to stand, the panel majority's opinion will license law enforcement officers to order citizens to stop recording the officers' public discharge of their duties and to arrest all who refuse to comply for

[4] "A police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it." *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999).

obstruction without violence. Like Ms. Ford, those individuals can hope and expect that sensible prosecutors will decline to charge, and sensible judges and juries will decline to convict, but they will nevertheless suffer the considerable consequences of an unlawful arrest, ranging from humiliation, degrading confinement, the cost of bail and defense counsel to the potential loss of employment and disruption to familial bonds, all captured by the popular culture saying, "you can beat the rap, but you can't beat the ride." This Court should put an end to the practice by:

1. Granting rehearing or rehearing en banc;
2. Ruling that defendants lacked probable cause to arrest Ms. Ford;
3. Holding that recording police officers in the public discharge of their duties cannot create probable cause to arrest for wiretapping or for resisting without violence irrespective of whether ordered to stop recording; and
4. Holding that arguably rude speech unaccompanied by threats, incitement, or physical interference cannot give rise to probable cause to arrest for resisting or obstructing without violence.

Respectfully submitted,

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I HEREBY CERTIFY that on the 21st day of May 2021, I electronically filed the foregoing with the Clerk of Court by using the Florida E-portal, which will send an electronic service copy and notice to:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

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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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MANNIE GARCIA, Plaintiff, v. MONTGOMERY COUNTY, MARYLAND, *et al.*, Defendants.	)	Civil No. 8:12-cv-03592-JFM

STATEMENT OF INTEREST OF THE UNITED STATES

The United States addressed the central questions raised in this case – whether individuals have a First Amendment right to record police officers in the public discharge of their duties, and whether officers violate individuals' Fourth and Fourteenth Amendment rights when they seize such recordings without a warrant or due process – in a Statement of Interest filed in *Sharp v. Baltimore City Police Dept., et al.*, No. 1:11-cv-02888 (D. Md.), attached here as Exhibit A.[1] Here, as there, the United States urges the Court to answer both of those questions in the affirmative.

This case raises questions that the United States did not address directly in *Sharp*, the answers to which are critical to ensuring that the constitutional rights at issue in that case are upheld. First, the United States urges the Court to find that both the First and Fourth Amendments protect an individual who peacefully photographs police activity on a public street, if officers arrest the individual and seize the camera of that individual for that activity. Second, the United States is concerned that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment

[1] Statement of Interest of the United States, *Sharp v. Baltimore City Police Dept., et al.*, No. 1:11-cv-02888 (D. Md. Jan. 10, 2012), ECF No. 24.

rights. The United States believes that courts should view such charges skeptically to ensure that individuals' First Amendment rights are protected. Core First Amendment conduct, such as recording a police officer performing duties on a public street, cannot be the sole basis for such charges. Third, the First Amendment right to record police officers performing public duties extends to both the public and members of the media, and the Court should not make a distinction between the public's and the media's rights to record here. The derogation of these rights erodes public confidence in our police departments, decreases the accountability of our governmental officers, and conflicts with the liberties that the Constitution was designed to uphold.

The United States is charged with enforcing three 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 individuals' 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 two 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 individuals' constitutional rights are protected when they observe and document 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

According to the Complaint, on June 6, 2011, Mr. Garcia observed Montgomery County Police Department ("MCPD") officers arresting two men and became concerned that the actions of the officers were inappropriate and might involve excessive force.[2] Compl. at 4-5, ECF No. 1. He was on a public street when he observed the arrest. *Id*. As a journalist, Mr. Garcia took out his camera and began photographing the incident, initially from at least 30 feet away, and then from nearly 100 feet away after an officer flashed him with a spotlight. *Id*. at 5. He did not interfere with the police activity. *Id*. Other than clearly and audibly identifying himself as a member of the press, Mr. Garcia did not speak to the officers. *Id*.

One of the officers was visibly upset that Mr. Garcia was recording and shouted that Mr. Garcia was under arrest. *Id*. The officer placed Mr. Garcia in a choke hold and dragged him to the police cruiser. *Id*. The officer placed Mr. Garcia in handcuffs, seized his camera, and threw Mr. Garcia to the ground, injuring him. *Id*. at 5-6. Mr. Garcia did not resist his arrest. *Id.* at 6. While in the police car, Mr. Garcia observed the officer remove the battery and video card from his camera. *Id*. Mr. Garcia was charged with disorderly conduct. *Id*. at 7. Although his possessions were returned to him when he was released, his video card was never returned. *Id*. Following a bench trial in December 2011, Mr. Garcia was acquitted of the disorderly conduct charge. *Id*. at 8.

On December 7, 2012, Mr. Garcia filed a Complaint against Montgomery County, the Chief of MCPD, an MCPD Lieutenant, and three MCPD officers alleging violations of state law and rights protected by the First and Fourth Amendments to the Constitution. On February 1, 2013, the official

[2] 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, 678 (2009).

capacity defendants ("Defendants") filed a Motion to Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure.

ARGUMENT

The First, Fourth, and Fourteenth Amendments protect Mr. Garcia from the actions taken by MCPD officers in response to Mr. Garcia's recording of their actions, at least on the facts alleged in the Complaint. As the United States argued in *Sharp*, recording police officers in the public discharge of their duties is protected First Amendment activity, and officers violate individuals' Fourth and Fourteenth Amendment rights when they seize such recordings without a warrant or due process, except in exigent circumstances not present here.

Because recording police officers in the public discharge of their duties is protected speech, when a person is arrested for recording police officers in a public place, both the First and Fourth Amendments are implicated. Arrests involving such activity should receive the highest level of scrutiny, particularly if the charges involved are highly discretionary, such as disorderly conduct or loitering. And the protections afforded by the First and Fourth Amendments in this context extend not only to members of the press, but also to the general public. Because Defendants' Motion to Dismiss does not adequately recognize these constitutional protections, the Motion to Dismiss should be denied.[3]

I. The First Amendment Protects Photographing Police Activity That Occurs in Public

It is now settled law that the First Amendment protects individuals who photograph or otherwise record officers engaging in police activity in a public place. Here, Mr. Garcia alleges that he was

[3] The Defendants make numerous arguments in their Motion to Dismiss, many of which do not implicate the United States' interests. In this Statement of Interest, the United States addresses only those arguments that pertain to its enforcement responsibilities under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, the Omnibus Crime Control and Safe Streets Act of 1968, and Title VI of the Civil Rights Act of 1964.

peacefully photographing what he perceived to be police officers using excessive force on a public street. If true, and we must assume that it is for the purposes of a motion to dismiss, this conduct is unquestionably protected by the First Amendment. Both the location of Mr. Garcia's photography, a public street, and the content of his photography, speech alleging government misconduct, lie at the center of the First Amendment. By forcibly arresting Mr. Garcia and seizing his camera, Defendants stopped Mr. Garcia from photographing a matter of public interest and prevented him from distributing those photographs to the public. Yet, Defendants argue that the First Amendment does not protect individuals from such police action and the only "real alleged Constitutional violation" lies under the Fourth Amendment.[4] Defendants further allege that the officer's "alleged seizure of the memory card is not a First Amendment violation." *Id*. These arguments underestimate the breadth of the First Amendment's protections.

A. The First Amendment Is Implicated When a Person Is Arrested for Recording Public Police Activity

Contrary to Defendants' assertions, the First Amendment is implicated when police arrest and seize the camera of a person recording police activity in a public place. As alleged in the Complaint, Mr. Garcia recorded officers in a public place. He photographed officers engaged in their duties on a public street, "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Public streets "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citation omitted); *accord Warren v. Fairfax Cnty.*, 196 F.3d 186, 191 (4th Cir. 1999) ("[A] court can generally

[4] *See* Defendants' Amended Motion to Dismiss/Partially Dismiss Counts I, II, III, IV, V, VI and VII of Plaintiff's Complaint and For Other Relief (hereinafter "Def.'s Mot. Dismiss"), ECF No. 11 at 21.

treat a street, sidewalk, or park as a traditional public forum without making a 'particularized inquiry.'"). Accordingly, "members of the public retain strong free speech rights when they venture into public streets and parks," and "government entities are strictly limited in their ability to regulate private speech in such traditional public fora." [5] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (citation omitted).

The First Amendment is implicated by Mr. Garcia's arrest not only because of where Mr. Garcia was recording, but also because of the nature of the speech he was engaged in. The type of speech at issue here – alleged government misconduct – "has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *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 protection offered by the First Amendment is not diminished when that speech is communicated through a camera lens or recording device. *See Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cr. 2012) ("Audio and audiovisual recording are media of expression . . . included within the free speech and free press guaranty of the First and Fourteenth Amendments.") (citation omitted); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (recognizing First Amendment right to "videotape police carrying out their duties."); *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a First Amendment right to record police conduct); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (same). While the right to record police activity is generally subject to reasonable time, manner, and place restraints, *see, e.g.*, *Kelly v. Borough*

[5] This statement does not address First Amendment rights in non-public and limited public forums. *See Am. Civil Liberties Union v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005) ("[A] non-public forum is one that has not traditionally been open to the public, where opening it to expressive conduct would somehow interfere with the objective use and purpose to which the property has been dedicated.") (citation omitted); *id*. (A limited public forum "is one that is not traditionally public, but the government has purposefully opened to the public, or some segment of the public, for expressive activity.").

of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010), the conduct that Mr. Garcia engaged in – "peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties," is conduct "not reasonably subject to limitation." *Glik*, 655 F.3d at 84.

Accordingly, Defendants' position that the officers' arrest of Mr. Garcia and seizure of his camera only implicates the Fourth Amendment is untenable. The reach of the First Amendment's protection extends beyond the right to gather information critical of public officials – it also prohibits government officials from "punish[ing] the dissemination of information relating to alleged governmental misconduct." *Gentile*, 501 *U.S.* at 1034-35 (Kennedy, J.). When police officers seize materials in order to suppress the distribution of information critical of their actions, "the seizure clearly contravene[s] the most elemental tenets of First Amendment law." *Rossignol v. Voorhaar*, 316 F.3d 516, 521 (4th Cir. 2003) (deputies violated First Amendment by suppressing distribution of newspaper critical of Sheriff's department). For decades, the Supreme Court has recognized that government action intended to prevent the dissemination of information critical of public officials, including police officers, constitutes an invalid prior restraint on the exercise of First Amendment rights. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931) (finding that statute prohibiting the publication of articles critical of law enforcement officers was an unlawful prior restraint on First Amendment rights); *Rossignol*, 316 F.3d at 522 (By "intentionally suppress[ing] the dissemination of plaintiffs' political ideas on the basis of their viewpoint . . . before the critical commentary ever reached the eyes of readers," Defendants' "conduct met the classic definition of a prior restraint."). That MCPD officers seized a camera and video card and not a publication does not diminish the significance of the First Amendment violation. "Seizure of [a] camera and film is at least as effective a prior restraint—if not more so—as . . . an injunction against publication." *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 637 (D. Minn. 1972);

see also Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) ("[T]o the extent that the troopers were restraining Robinson from making any future videotapes and from publicizing or publishing what he had filmed, the defendants' conduct clearly amounted to an unlawful prior restraint upon his protected speech."). For these reasons, Mr. Garcia's claims under the First Amendment should not be dismissed.

B. Mr. Garcia May Bring Claims Under Both the First and Fourth Amendments

To the extent that Defendants argue that Mr. Garcia must choose between two applicable constitutional provisions, this position is inaccurate. The Supreme Court "has never held that one specific 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); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another."). Where a "wrong[] affect[s] more than a single right," courts are not charged with "identifying . . . the claim's 'dominant' character," but instead "must examine each constitutional provision in turn." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 70 (1992). Because the facts alleged in Mr. Garcia's Complaint involve potential violations of both the First and Fourth Amendments, he may bring claims under both, and he need not choose between the protections afforded by them.

II. Discretionary Charges May Not Be Used To Chill Protected Speech Activity

Because recording public police activity is protected by the First Amendment, courts have viewed and should view discretionary charges brought against individuals engaged in protected speech with considerable skepticism. Several cases that have arisen recently regarding the recording of public police activity have involved discretionary charges such as disorderly conduct, loitering, disturbing the

peace, and resisting arrest, being brought against the person engaged in the recording. *See, e.g., Glik*, 655 F.3d at 80 ("[T]he Boston Municipal Court disposed of the remaining two charges for disturbance of the peace and violation of the wiretap statute. With regard to the former, the court noted that the fact that the 'officers were unhappy they were being recorded during an arrest . . . does not make a lawful exercise of a First Amendment right a crime.'"); *Datz v. Milton*, No. 2:12-cv-01770 (E.D.N.Y.) (Plaintiff was charged with obstructing government administration); *Montgomery v. City of Philadelphia*, No. 2:2013-cv-00256 (E.D. Pa.) (Plaintiff was charged with disorderly conduct); *see also* Justin Fenton, *In Federal Hill, Citizens Allowed to Record Police – But Then There's Loitering*, The Baltimore Sun, Feb. 11, 2012 (officer instructing a citizen-recorder that he would face loitering charges if he failed to move away from the scene of an arrest). Use of such charges against individuals recording public police activity chills protected First Amendment speech.

Here, the Complaint alleges that Mr. Garcia was arrested for disorderly conduct solely because he photographed what he believed to be officers engaging in excessive force. If true, this arrest violates both the First and Fourth Amendments. Courts have routinely rejected officers' attempts to criminalize protected speech through the use of charges that rely heavily on the discretion of the arresting officer on both First and Fourth Amendment grounds. *See Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (reversing disorderly conduct conviction where petitioner "nonprovocatively voic[ed] his objection to what he obviously felt was a highly questionable detention by a police officer"); *Swartz v. Insogna*, 704 F.3d 105, 110-11 (2d Cir. 2013) (no probable cause for disorderly conduct arrest where plaintiff's statements and gesture critical of the police were protected speech); *Wilson v. Kittoe*, 337 F.3d 392, 401 (4th Cir. 2003) ("While it may be inconvenient to a police officer for a neighbor to stand nearby and watch from his driveway as the officer works, inconvenience cannot, taken alone, justify an arrest under

the Obstruction Statute."); *Payne v. Pauley*, 337 F.3d 767, 777 (7th Cir. 2003) (finding that "arguing with a police officer, even if done loudly, or with profane or offensive language, will not in and of itself constitute disorderly conduct"); *Johnson v. Campbell*, 332 F.3d 199, 213 (3d Cir. 2003) (disorderly conduct arrest not supported by probable cause where plaintiff's "words [to officer] were unpleasant, insulting, and possibly unwise" but were protected by the First Amendment); *Gainor v. Rogers*, 973 F.2d 1379, 1387-88 (8th Cir. 1992) (disorderly conduct arrest not supported by probable cause where plaintiff was "merely exercising his First Amendment rights" when he expressed a religious message and challenged police officers' actions); *see also Cox v. City of Charleston, SC*, 416 F.3d 281, 286 (4th Cir. 2005) (finding disorderedly conduct statute violated First Amendment where individuals' "expression does nothing to disturb the peace, block the sidewalk, or interfere with traffic," yet "the Ordinance renders it criminal").

These decisions are based, in part, on the premise that "[p]olice officers must be more thick skinned than the ordinary citizen and must exercise restraint in dealing with the public" and "must not conceive that every threatening or insulting word, gesture, or motion amounts to disorderly conduct." *Payne v. Pauley*, 337 F.3d at 777 (citation omitted). *See also City of Houston, Tex. v. Hill*, 482 U.S. 451, 462 (1987) (citing *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring) ("[A] properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen.")). Indeed, police officers have a duty to ensure that the First Amendment is upheld and protected speech is not curtailed.

To be sure, individuals may not use the guise of engaging in protected First Amendment speech in an effort to interfere with police activity. *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). But there are no facts alleged in the Complaint that suggest that Mr. Garcia interfered with the MCPD officers during the course of their arrest of the other individuals. He merely recorded their activity from a considerable distance, and backed even further away when he thought the officers may be bothered by his presence. In doing so, Mr. Garcia's actions were entirely consistent with the guidelines the United States provided to Baltimore City Police Department in *Sharp*. *See* Letter from Jonathan M. Smith to Mark H. Grimes and Mary E. Borja ("BPD Letter") at 5-7 (May 14, 2012) (describing how officers should instruct individuals to a less-intrusive place where they can continue recording) (attached here as Exhibit B). There are no facts alleged in the Complaint that suggest that Mr. Garcia was arrested for anything other than recording the MCPD officers making an arrest, which is protected under both the First and Fourth Amendments.

III. Members of the Public and the Media Are Both Entitled to Protection Under the First Amendment

The First Amendment protections afforded members of the public and press when recording public police activity are coextensive. As the Supreme Court established more than thirty years ago, "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). Although Mr. Garcia alleges facts here that show that he is a member of the press, this makes no difference to the analysis under the First Amendment. *See* BPD Letter at 10-11.

In his Complaint, Mr. Garcia alludes to his status as a photojournalist and credentialed member of the news media. Compl. at 5. He alleges that MCPD's policy on Police/Media Relations should have governed how MCPD handled the incident, and thus the officers on the scene should have treated Mr. Garcia "as 'invited guest,' as the policy requires." Compl. at 8. While Mr. Garcia's status as a journalist and the existence of MCPD's media relations policy may be applicable to Mr. Garcia's claim that Montgomery County has a custom or practice of preventing members of the media from recording police activity and fails to train MCPD officers on its media policy, it is not relevant to the constitutional analysis. As the First Circuit stated in upholding a private individual's right to record the police, "[t]he First Amendment right to gather news is . . . 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." *Glik*, 655 F.3d at 83 (citing *Houchins v. KQED, Inc.*, 438 U.S. 11, 16 (1978) (Stewart, J., concurring)). "[T]he news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* at 84; *see also Alvarez*, 679 F.3d at 597-98 (noting that the Supreme Court "declined to fashion a special journalists' privilege" in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) and holding that audio recordings of police officers by private individuals are entitled to First Amendment protections).

Courts have long held that recordings made by private citizens of police conduct or other items of public interest are entitled to First Amendment protection. *See, e.g.*, *Glik*, 655 F.3d at 84-85 (finding First Amendment right to record "clearly established"); *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439; *Blackston v. Alabama*, 30 F.3d 117, 120-21 (11th Cir. 1994); *Lambert v. Polk Cnty.*, 723 F. Supp. 128, 133 (S.D. Iowa 1989). Similarly, the Supreme Court has established that journalists are not entitled to greater First Amendment protections than private individuals. *See,e.g.*, *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 608-09 (1978) ("The First Amendment generally grants the press no right to information

about a trial superior to that of the general public."); *Branzburg*, 408 U.S. at 684 ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.") (citing cases). Thus, this Court should make clear that Mr. Garcia's status as a credentialed journalist does not influence its analysis of his First Amendment right to document police activity occurring in public.

CONCLUSION

For the reasons set forth herein, the Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,

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