UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 16-1650 & 16-1651

RICHARD FIELDS,
Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, *et ano*,
Defendants-Appellees.

AMANDA GERACI,
Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, *et al*.,
Defendants-Appellees.

On Appeal From the Memorandum and Order Granting Partial Summary Judgment Dated February 19, 2016, at E.D. Pa. Nos. 14-cv-4424 & 14-cv-5264

BRIEF OF APPELLANTS

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JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343 to hear these cases asserting claims for violations of federal civil rights. By order dated February 19, 2016, the district court granted summary judgment for all defendants on Plaintiffs' First Amendment claims. On March 15, 2016, the parties stipulated to the dismissal of all of the remaining claims pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). *Fields* ECF No. 56; *Geraci* ECF No. 54. The district court granted those motions on March 15, 2016. *Fields* ECF No. 57; *Geraci* ECF No. 55. Plaintiffs filed Notices of Appeal on March 21, 2016. JA1–4. On March 24, 2016, the Clerk of Court ordered the two cases consolidated on appeal for all purposes. This Court has jurisdiction over this appeal from the district court's order granting summary judgment to defendants pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

(1) Did Plaintiffs Richard Fields and Amanda Geraci engage in conduct protected by the First Amendment by recording (or attempting to record) the police performing their duties in public?

Suggested Answer: Yes.

The district court ruled on this issue in its opinion granting summary judgment. *See* JA7 (Memorandum at 1).

STATEMENT OF RELATED CASES

These consolidated cases have not been before this Court previously, and Plaintiff-Appellants are not aware of any related cases.

STATEMENT OF THE CASE

In September 2013, Plaintiff Richard Fields was 19 years old, in his sophomore year at Temple University studying actuarial science. JA56–57 (Fields Dep. 5:15–6:4). On the night of September 13, 2013, Mr. Fields stopped on a public sidewalk in his neighborhood and took a photograph with his iPhone of dozens of police officers breaking up a house party across the street. *See* JA8 (Memorandum at 2); JA59, 61 (Fields Dep. 8:13–20, 10:16–21); JA100 (photo taken by Plaintiff Fields). Mr. Fields later testified at his deposition that he thought the scene featuring a "mob" of police officers would make "a great picture."[1] The nearest police officer was about 15 feet away from where Mr. Fields stood on the sidewalk while he took the photo. JA8 (Memorandum at 2); JA60 (Fields Dep. 9:13–16). Defendant Officer Sisca noticed Mr. Fields taking the

[1] JA59 (Fields Dep. 8:13–20) ("We left the apartment to go to another friend's house down the street. On the way, there was a house that was having a party with a lot of police officers outside. . . There was maybe 20 police officers. And I thought to myself what a scene, and I took a picture from the other side of the street."); JA62 (Fields Dep. 11:8–15) ("there [were] a lot of police officers, and I just thought that would make a great picture . . . It was pretty cool, it was like a mob of them, so I was, like, just take a picture.").

photo, and said to Mr. Fields, "Do you like taking pictures of grown men?" JA8 (Memorandum at 2); JA60 (Fields Dep. 9:5–11). Officer Sisca approached Mr. Fields on the sidewalk and ordered him to leave. JA8 (Memorandum at 2); JA60, 64, 66–67 (Fields Dep. 9:5–13, 13:8–17, 15:8–16:24). When Mr. Fields refused, Officer Sisca arrested him, confiscated his phone, and detained him in a police van. *See* JA9 (Memorandum at 3); JA60, 68 (Fields Dep. 9:16–22, 17:1–24). While Mr. Fields was detained, Officer Sisca searched the phone, opening several video recording and photography apps on the phone that had not been open before. JA9 (Memorandum at 3); JA72–73 (Fields Dep. 21:12–18, 22:13–17).

After releasing Mr. Fields, Officer Sisca issued him a citation for "Obstructing Highway and Other Public Passages" under 18 Pa. C.S. § 5507. *See* JA9 (Memorandum at 3); JA71 (Fields Dep. 20:5–14); JA1291 (citation). Officer Sisca wrote on the citation that he had observed Mr. Fields "standing in the area of a police invest[igation] videotapping [sic] w phone." JA1291. Officer Sisca did not appear for the court hearing on the citation, and the charges were withdrawn. JA9 (Memorandum at 3); JA74–75 (Fields Dep. 23:22–24:3); JA1556 (court summary).

Plaintiff Amanda Geraci is a member of the "Up Against the Law" legal collective, a Philadelphia organization dedicated to educating members of the general public about their legal rights with respect to the government, including

during interactions with the police. JA32–32, 39 (Geraci Dep. 11:5–16, 14:2–16, 44:4–7). For years, Ms. Geraci has regularly served as a "legal observer," which is someone trained to observe and record any interactions between protestors and police during public demonstrations, without interfering with police officers' performance of their duties. JA9 (Memorandum at 3); JA31, 33 (Geraci Dep. 10:2–11:4, 12:9–13:8, 21:13–21). Civil affairs officers in the Philadelphia Police Department—who are assigned to observe political demonstrations—recognize Ms. Geraci from her regular presence at protests. JA9 (Memorandum at 3); JA36 (Geraci Dep. 30:4–21).

In the early morning on September 21, 2012, Ms. Geraci was serving as a legal observer at an anti-fracking protest at the Pennsylvania Convention Center. JA9 (Memorandum at 3). Ms. Geraci was wearing a pink bandana identifying her as a legal observer and carrying her camera, a Canon Power Shot G9, on a strap on her body so she could record any interactions between the police and protestors. JA9 (Memorandum at 3); JA36 (Geraci Dep. 30:19); JA38–39 (Geraci Dep. 41:4–42:3). After Ms. Geraci had been observing the demonstration for approximately half an hour, the police arrested a protestor near the front doors of the Convention Center. JA10 (Memorandum at 4); JA36 (Geraci Dep. 32:17–22, 33:16–18). As police quickly moved the arrestee inside the Convention Center, Ms. Geraci moved towards a pillar by the windows of the Center so that she could better observe and

record the arrest through the glass without interfering with the arrest. JA10 (Memorandum at 4); JA37 (Geraci Dep. 34:12–19, 35:1–5); JA1539–42 (photos showing layout of Convention Center). However, Defendant Officer Brown, a police officer in the civil affairs unit, abruptly and aggressively pushed Ms. Geraci up against a pillar and pinned her there for one to three minutes, preventing Ms. Geraci from observing or recording the arrest. JA10 (Memorandum at 4); JA37 (Geraci Dep. 34:20–24); JA1540–42 (photos of restraint); JA1195 (witness statement). Ms. Geraci was not arrested or cited. JA10 (Memorandum at 4); JA38 (Geraci Dep. 39:21–24).

Mr. Fields and Ms. Geraci filed suit against the individual officers involved and the City of Philadelphia, alleging that their rights were violated under both the First and Fourth Amendments. They alleged, further, that these incidents resulted from a custom and practice of the Philadelphia Police Department (PPD) officers retaliating against citizens who attempt to record their actions—in spite of official PPD policy prohibiting retaliation for recording police activity and acknowledging that civilians have a First Amendment right to record the police. *See* JA1185–86 (Memorandum 11-01); JA1187–94 (Directive 145). They also alleged that these incidents were due to the City's failure to train, supervise, and discipline these officers. JA9–10 (Memorandum at 3–4). Their cases were consolidated before

Judge Kearney for the purposes of discovery and summary judgment. *Fields* ECF No. 20; *Geraci* ECF No. 20.

After discovery, defendants moved for partial summary judgment, asking the court to grant the individual officers qualified immunity on the First Amendment claims and to dismiss the First Amendment claims against the City for failure to establish a sufficient basis for municipal liability. *Fields* ECF No. 24; *Geraci* ECF No. 24. The district court granted defendants' motion, entering judgment for all defendants on the First Amendment claims. JA5–6. The City never argued that Plaintiffs had not engaged in conduct protected by the First Amendment. The court, however, held that because Mr. Fields and Ms. Geraci expressed no intent to criticize or challenge the police—through either conduct or words before or simultaneous with the recording, their actions in recording the police were not protected by the First Amendment. JA7, 11–13 (Memorandum at 1, 5–7). The court did not address either the issue of qualified immunity or the sufficiency of Plaintiffs' evidence of municipal liability. Plaintiffs subsequently voluntarily dismissed the remaining claims in order to immediately pursue this appeal limited exclusively to the First Amendment issues. *Fields* ECF No. 57; *Geraci* ECF No. 55.

SUMMARY OF ARGUMENT

In recent years, as digital recording devices have become ubiquitous and social media platforms have enabled nearly instantaneous self-publication of news-worthy content, civilian recordings of police interactions have become a chief means by which the public learns about how police exercise their authority. A robust consensus of authority has recognized that the First Amendment protects civilians' right to record police officers performing their duties in public. No court of appeals has denied First Amendment protection to the recording of police activity in the last two decades. The district court erred in holding, in the face of this consensus, that recording the police is entirely unprotected by the First Amendment unless the civilian contemporaneously expresses an intent to criticize the police.

The widely-recognized constitutional protection for recording the police stems from well-established First Amendment principles.

To begin, the "speech" protected by the U.S. Constitution includes images (such as photographs and videos), not just words. And the First Amendment protects the process of creating speech in addition to the speech itself. Thus, the government cannot constitutionally prohibit the "conduct" of type-setting or

applying print to paper,[2] nor can it levy special taxes on the purchase of ink.[3] Nor, in today's world, may it prohibit civilians from recording images in public for their own use or for subsequent publication.

In addition, the First Amendment offers protection for information-gathering—by journalists and civilians alike—about public officials performing their duties. The ability to appraise and discuss the performance of government officials is vital to democratic self-governance and is at the core of what the First Amendment is intended to protect—whether one is criticizing, lauding, or simply observing the officials' performance. When the government officials in question are police officers entrusted with broad authority to stop, question, arrest, imprison, and use physical—even deadly—force in order to maintain public safety, the ability to document and evaluate their performance is a particularly important tool for holding a powerful arm of the government accountable.

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[2] *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010) ("Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation. Thus, we have not drawn a hard line between the essays John Peter Zenger published and the act of setting the type . . ."); *accord ACLU of Illinois v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012).

[3] *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 583 (1983) (striking down "use tax" on paper and ink products used by newspapers under the First Amendment).

The district court erred in overlooking these established principles and rejecting the sound reasoning of the numerous other federal courts that have recognized the First Amendment right to record police. By focusing instead on whether Plaintiffs' actions while recording the police conveyed a particularized message critical of the government, the district court's ruling undermines an essential element of the liberty protected by the First Amendment and jeopardizes a vital tool for police accountability. It is incorrect as a matter of law and should be reversed.

This Court should squarely address the question left open in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), and recognize the First Amendment's protection for civilian recordings of police officers performing their duties in public. There are no alternative grounds for affirming the district court's grant of summary judgment that would allow the Court to avoid deciding this constitutional issue. First, a ruling on the merits of the First Amendment question is necessary to resolve Plaintiffs' municipal liability claim. The evidence Plaintiffs have amassed more than suffices to raise a triable issue of fact as to whether the City is liable for the violations of Plaintiffs' First Amendment rights. Second, the individual officer defendants are not entitled to qualified immunity because, by the time of Ms. Geraci's restraint in September 2012 and Mr. Fields' arrest in September 2013—five and six years, respectively, after the arrest at issue in

Kelly—any reasonable officer would understand that the First Amendment prohibited retaliation against civilians for recording.

INTRODUCTION

Our nation gives police officers enormous power. Police officers have the authority to deprive civilians of their liberty and even their lives. They are granted substantial discretion about when and how to do so.[4] When police officers make choices about how to exercise their power, the stakes are high.

The ability to record police interactions is an increasingly important tool for holding the police accountable for how—and against whom—they exert their authority. In 1991, when George Holliday used a handheld camcorder to record the Los Angeles Police Department beating Rodney King and submitted the video to the local news, the recording exposed police abuse in a powerful and inarguably graphic way for millions of Americans.[5] Twenty-five years later, with the proliferation of smartphones with video recording capabilities and social media

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[4] *See Tennessee v. Garner*, 471 U.S. 1, 10–12 (1985) (describing police authority to use deadly force against unarmed civilians); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (law enforcement officials "are granted substantial discretion that may be misused to deprive individuals of their liberties").

[5] *See* KTLA TV 5: Rodney King 20th Anniversary, Vimeo (Mar. 3, 2011), https://vimeo.com/20594580.

platforms for sharing and publishing videos,[6] Mr. Holliday would not have had to rely on the editorial discretion of the established press to disseminate the video; he could self-publish it instantly online. In 1991, the existence of video footage of police abuse was unusual; today viral videos of police uses of force captured and shared by bystanders are commonplace.[7] Recordings reflecting the disproportionate use of police power against communities of color have fueled

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[6] *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) ("cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."). According to one report, by the spring of 2015, 64% of Americans owned a smartphone, compared with only 35% in the spring of 2011. Aaron Smith, Pew Research Center, *U.S. Smartphone Use in 2015*, at 2 (2015), http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/. Of those smartphone users, 67% reported that they use their phone to share pictures, videos, or commentary about events happening in their community, with 35% doing so frequently. *Id.* at 6.

[7] *E.g.*, *Gaymon v. Borough of Collingdale*, 150 F. Supp. 3d 457, 468 n.9 (E.D. Pa. 2015) ("Police abuse captured by the cameras of bystanding videographers, followed by public broadcast of the footage, has become a regular feature of our public life and the underpinning of effective demands for redress.") (quoting Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 350 (2011)); Jocelyn Simonson, *Copwatching*, 104 Cal. L. Rev. 391, 408 (Apr. 2016) ("Today, given the widespread use of smartphones, civilian recording of police officers is ubiquitous.").

demands for policing reform.[8] In response to the increasing scrutiny of police as a result of such videos, some jurisdictions have attempted to make such recording illegal,[9] while in other places—such as Philadelphia—the police have retaliated against civilians who record them with spurious criminal charges and even violence.[10]

Well-established First Amendment jurisprudence makes it clear that the First Amendment protects civilians' right to record police officers performing their

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[8] Damien Cave, Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. Times (updated Oct. 4, 2016), http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html?_r=0 (compiling bystander videos of police use of force against people of color); Bijan Stephen, *How Black Lives Matter Uses Social Media to Fight the Power*, Wired, Nov. 2015, https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/.

[9] H.B. 2918, 84th Legis., Reg. Sess. (Tex. 2015), http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB02918I.pdf (Texas bill to criminalize recording the police within 25 feet); S.B. 1054, 52d Leg., 2d Reg. Sess. (Ariz. 2016), http://www.azleg.gov/legtext/52leg/2r/bills/sb1054p.pdf (Arizona bill to criminalize video recording law enforcement activity within 20 feet).

[10] JA1528–38 (news articles); Frank Eltman, *Citizens Taking Video of Police See Themselves Facing Arrest*, San Diego Union Tribune (Aug. 29, 2015, 8:48 AM), http://www.sandiegouniontribune.com/news/2015/aug/29/citizens-taking-video-of-police-see-themselves/ (Mickey Osterreicher, general counsel of the National Press Photographers Association, stating that he hears of multiple incidents each week in which police harass, interfere with, or arrest citizens for recording the police).

duties in public. The right is so inarguable that Defendants did not contest its existence in the district court. Nor can they credibly do so now. The official policy of the Philadelphia Police Department has prohibited police interference with civilian recordings of police activities since September 2011 and has explicitly recognized the First Amendment's protection for this activity since November 2012.[11]

The district court erred by taking an unduly narrow view of the First Amendment principles at issue. The district court's conclusion that the First Amendment does not protect civilians' right to record the police performing their duties in public is incorrect as a matter of law, and should be reversed.

ARGUMENT

[11] JA1185 (PPD Memorandum 11-01) ("To remove any confusion as to the duties and responsibilities of sworn personnel when being photographed, videotaped or audibly recorded . . . All police personnel, while conducting official business or while acting in an official capacity in any public space, should reasonably anticipate and expect to be photographed, videotaped and/or be audibly recorded . . . As such, police personnel shall not interfere with any member of the general public . . . photographing, videotaping, or audibly recording police personnel[.]"); JA1187 (PPD Directive 145) ("Private individuals have a First Amendment right to observe and record police officers engaged in the public discharge of their duties."). Plaintiffs alleged and presented evidence sufficient to prove that, despite the City's written policy, PPD officers regularly retaliate against citizens who attempt to record their actions, and that PPD policymakers have failed to implement training, supervisory protocols, or discipline to prevent this type of officer misconduct.

I. STANDARD OF REVIEW

Plaintiffs appeal the district court's granting of summary judgment and this Court's review is "de novo." *Montone v. City of Jersey City*, 709 F.3d 181, 189 (3d Cir. 2013). "[A]pplying the same test that the District Court should have applied and viewing the facts in the light most favorable to [Plaintiffs]," *Schneyder v. Smith*, 653 F.3d 313, 318 (3d Cir. 2011), the grant of summary judgment may only be affirmed if "no genuine dispute exists as to any material fact, and [defendants are] entitled to judgment as a matter of law." *Montone*, 709 F.3d at 189 (citing Fed. R. Civ. P. 56(a)). This Court must draw "all reasonable inferences in favor of [Plaintiffs]" and "disregard evidence [favorable to defendants that] the jury is not required to believe." *Hill v. City of Scranton*, 411 F.3d 118, 129 n.16 (3d Cir. 2005) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149–51 (2000)). Review of the district court's determination of questions of law is "plenary." *Spence v. ESAB Grp., Inc.*, 623 F.3d 212, 216 (3d Cir. 2010). Because this is a First Amendment case, this Court has a "duty to engage in a searching, independent factual review of the full record," *United States v. Scarfo*, 263 F.3d 80, 91 (3d Cir. 2001), "in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *ACLU v. Mukasey*, 534 F.3d 181, 186 (3d Cir. 2008) (quoting *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)).

II. THE FIRST AMENDMENT PROTECTS CIVILIANS' RIGHT TO RECORD THE POLICE IN PUBLIC.

The district court correctly identified the standard for First Amendment retaliation claims, which require proof that:

> (1) [Plaintiffs] each engaged in constitutionally protected conduct; (2) defendant officials took adverse action sufficient to deter a person of ordinary firmness from exercising constitutional rights; and (3) the constitutionally protected conduct was a "substantial or motivating factor" in the decision to take adverse action against the plaintiff[s].

JA11 (Memorandum at 5 & n.26) (quoting *Rauser v. Horn*, 241 F.3d 330, 333–34 (3d Cir. 2001)); *see also Anderson v. Davila*, 125 F.3d 148, 160 (3d Cir. 1997) ("The Supreme Court has explicitly held that an individual has a viable claim against the government when he is able to prove that the government took action against him in retaliation for his exercise of First Amendment rights."). However, the district court erred in concluding that Plaintiffs' conduct was not protected by the First Amendment and that they thus could not make out a viable retaliation claim.

For two decades, federal courts have recognized that the First Amendment protects the right to record police officers performing their duties in public. Indeed, every federal court of appeals to address the issue on the merits has acknowledged the existence of this First Amendment right. *See, e.g.*, *Bowens v. Superintendent of Miami S. Beach Police Dep't*, 557 Fed. App'x 857, 863 (11th

Cir. 2014) ("Citizens have 'a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.'" (quoting *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000))); *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) ("the Constitution protects the right of individuals to videotape police officers performing their duties in public"); *Adkins v. Limtiaco*, 537 Fed. App'x 721, 722 (9th Cir. 2013) (holding that allegations that plaintiff was arrested in retaliation for taking photos of the police in public stated a claim for First Amendment retaliation); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599–600 (7th Cir. 2012) (holding that a statute that would prohibit recording police officers with a cell phone violated the First Amendment); *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011) (holding "unambiguous" the constitutional right to videotape police activity); *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (holding that filming public officials in a public area "was done in the exercise of [Plaintiff's] First Amendment Rights"); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (holding that recording of police conduct fell within the "First Amendment right to film matters of public interest"); *see also Schnell v. City of Chicago*, 407 F.2d 1084, 1085–86 (7th Cir. 1969) (reversing dismissal of action by news photographers who covered demonstrations at the 1968 Democratic National Convention in Chicago against the police for "interfering with plaintiffs' constitutional right to . . . photograph news events").

In circuits where the issue has not yet been decided by the courts of appeals, district courts have regularly recognized the First Amendment right to record the police.[12] No court of appeals has rejected on the merits the existence of a First Amendment right to record the police in public.

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[12] *E.g.*, *Crawford v. Geiger*, 131 F. Supp. 3d 703, 715 & n.5 (N.D. Ohio 2015) (surveying case law and holding that "there is a First Amendment right openly to film police officers carrying out their duties in public" and stating that the court is "firmly persuaded the First Amendment shields citizens against detention or arrest merely for making a photographic, video or sound recording, or immutable record of what those citizens lawfully see or hear of police activity within public view"); *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015) (holding that "[w]hile videotaping an event is not itself expressive activity," it is protected by the First Amendment because it can be "an essential step towards an expressive activity"); *Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492, 508 (D. Md. 2015) (holding that "video recording of police activity, if done peacefully and without interfering with the performance of police duties, is protected by the First Amendment."); *Buehler v. City of Austin*, No. A-13-CV-1100-ML, 2015 WL 737031, at *9 (W.D. Tex. Feb. 20, 2015) ("In light of the existing Fifth Circuit precedent and the robust consensus among circuit courts of appeals, the Court concludes that the right to photograph and videotape police officers as they perform their official duties was clearly established at the time of Buehler's arrests."); *Lambert v. Polk Cty.*, 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."); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (recognizing "constitutional right to have access to and to make use of the public streets, roads and highways . . . for the purpose of observing and recording in writing and photographically the events which occur therein"). *See also Gaymon v. Borough of Collingdale*, 150 F. Supp. 3d 457, 468 n.9 (E.D. Pa. 2015) (observing in dictum that "federal case law has overwhelmingly held that citizens do indeed have a right to record officers in

This Court has not yet decided the substantive question of whether the constitutional guarantee of free expression protects civilians' right to record police officers performing their duties in public. Mr. Fields' and Ms. Geraci's cases require that the Court squarely address the scope of the First Amendment's protection for recording the police. Although the individual defendants argued below that this right was not "clearly established" at the time of the incidents in these cases, Plaintiffs have adduced proof sufficient to sustain a claim for municipal liability, which cannot be disposed of through qualified immunity. *See Owen v. City of Indep.*, 445 U.S. 622, 656 (1980) (holding that municipalities are not entitled to qualified immunity and observing that "a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury").

In this Court's 2010 decision in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), the Court declined to address the existence of a First Amendment right to record police on the merits, holding instead that there was "insufficient case law" as of May 24, 2007 "establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that

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their official capacity so long as they do not interfere with an officer's ability to do his or her job").

seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment" and that the defendant was thus entitled to qualified immunity. *Id.* at 262. Some district courts in this Circuit and one panel of this Court, in a non-precedential opinion, have followed this Court's lead in *Kelly* and dismissed First Amendment claims against individual officers on qualified immunity grounds without reaching the merits of the First Amendment question.[13]

Prior to the *Kelly* decision, district courts in this circuit and a panel of this Court had recognized the First Amendment significance of civilians' right to record the police in the performance of their duties on public property. *Gilles v. Davis*, 427 F.3d 197, 212 n.12 (3d Cir. 2005) ("videotaping or photographing the police in the performance of their duties on public property may be a [First Amendment] protected activity") (citing *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) ("there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the [police officer] defendants"); *Pomykacz v. Borough of W. Wildwood*, 438 F. Supp. 2d 504, 507, 512–13 (D.N.J. 2006) (taking

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[13] *See True Blue Auctions v. Foster*, 528 Fed. App'x 190 (3d Cir. 2013); *Montgomery v. Killingsworth*, No. 13-256, 2015 WL 289934 (E.D. Pa. Jan. 22, 2015); *Fleck v. Trustees of Univ. of Pa.*, 995 F. Supp. 2d 390 (E.D. Pa. 2014); *Snyder v. Daugherty*, 899 F. Supp. 2d 391 (W.D. Pa 2012).

photos that were never developed, as part of effort to monitor government officials, was First Amendment protected activity). The *Kelly* court did not overrule these cases, but distinguished them on their facts in light of the particular danger associated with traffic stops. *Kelly*, 622 F.3d at 262 ("Our decision on the First Amendment question is further supported by the fact that none of the precedents upon which Kelly relies involved traffic stops, which the Supreme Court has recognized as inherently dangerous situations.").

Cases subsequent to *Kelly* have opined that *Kelly* is limited to its facts[14] and noted the doctrinal shift since *Kelly* was decided.[15] This Court should now join the

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[14] *E.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (describing *Kelly* as "finding the right to film not clearly established in the context of a traffic stop, characterized as an 'inherently dangerous situation'" and reasoning that "*Kelly* is clearly distinguishable on its facts; a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged."). *But see True Blue Auctions v. Foster*, 528 Fed. App'x 190, 192–93 (3d Cir. 2013) (declining to decide whether there was a meaningful distinction between traffic stops and police interactions on a public sidewalk).

[15] *E.g.*, *Gaymon v. Borough of Collingdale*, 150 F. Supp. 3d 457, 468 n.9 (E.D. Pa. 2015) ("federal case law has overwhelmingly held that citizens do indeed have a right to record officers in their official capacity so long as they do not interfere with an officer's ability to do his or her job."); *Montgomery v. Killingsworth*, No. 13-256, 2015 WL 289934, at *15 n.7 (E.D. Pa. Jan. 22, 2015) (relying on *Kelly* in granting qualified immunity but observing "what appears to be a growing trend in other circuits to recognize a First Amendment right to observe and record police activity").

robust consensus that has emerged since *Kelly* and hold that the First Amendment protects civilians' right to record police officers performing their duties in public.

A. The First Amendment Protects the Process and Tools of Speech Creation, Including the Act of Creating Photos, Videos, or Audio Recordings.

The First Amendment's protection is not limited to words. In today's world, images are so ubiquitous that they have been said to have "surpassed the word as the dominant mode of communication."[16] Today it is inarguable that photographs, videos, and audio recordings are protected by the First Amendment.[17] Digitally captured and shared recordings are as central a medium of communication today as was the written word at the time of the framing, or cinema in the 1950s. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("It cannot be doubted

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[16] Amy Adler, *The First Amendment and the Second Commandment*, 57 N.Y.L. Sch. L. Rev. 41, 42 (2012–2013).

[17] *See, e.g.*, *United States v. Stevens*, 130 S. Ct. 1577, 1590 (2010) (striking down criminal prohibition on possession or sale of certain depictions of animal cruelty under the First Amendment); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 826–27 (2000) (First Amendment protects "sexually explicit adult programming" and other "indecent" programming on television); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("Audio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas" and thus are protected speech).

that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."). As the Supreme Court explained in acknowledging First Amendment protection for violent video games:

> Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages . . . . [W]hatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication appears.

Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc.*, 343 U.S. at 503).

The First Amendment's protection extends to the process of creating protected works and to speech-facilitating conduct. As the Supreme Court observed in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.3 (1986), the First Amendment limits the government's ability to restrict activity "intimately related to expressive conduct protected under the First Amendment." *See also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 583 (1983) (striking down "use tax" on paper and ink products used by newspapers under the First Amendment); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 760 (1988) (holding that ordinance regulating the placement of newsracks on

public property implicated the First Amendment because it was "directed narrowly and specifically at . . . conduct commonly associated with expression: the circulation of newspapers"). The Supreme Court has explained:

> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . . Without those peripheral rights the specific rights would be less secure.

Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965).

It follows that the First Amendment protects recordings themselves, their distribution and display, and the act of making them. The Seventh Circuit put the point well in striking down a prohibition on audio recording police officers in public:

> The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected . . . . This is a straightforward application of the principle that "laws enacted to control or suppress speech may operate at different points in the speech process." . . . The Illinois eavesdropping statute regulates the use of a medium of expression; the Supreme Court has recognized that "regulation of a medium [of expression] inevitably affects communication itself.". . . Put differently, the eavesdropping statute operates at the front end of the speech process by restricting the use of a

> common, indeed ubiquitous, instrument of communication. Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording.

ACLU of Ill. v. Alvarez, 679 F.3d 583, 595–96 (7th Cir. 2012) (emphasis in original) (citing *Citizens United v. FEC*, 558 U.S. 310, 336 (2010); *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994)). There is "no fixed First Amendment line between the act of creating the speech and the speech itself[.]" *Id*. at 596. Thus, courts have "not attempted to disconnect the end product from the act of creation." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010).[18]

Digital technology has also eroded the distinction between image capture and image sharing. Today, millions of people carry cell phones with the ability to instantly upload photos to social media platforms and "livestream" video and audio, broadcasting recordings as they are being made.[19] Smartphone users can

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[18] *See also Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) ("The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it"); *Anderson*, 621 F.3d at 1061–62 (holding that the act of tattooing enjoys "full First Amendment protection" and rejecting any "distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded").

[19] Monica Anderson, Pew Research Center, *Technology Device Ownership: 2015*, at 1 (Oct. 29, 2015), http://www.pewinternet.org/2015/10/29/technology-

effortlessly and inexpensively record images for their own use as visual diaries, to share with friends and colleagues, and as the raw material of future communication.

These are all equally protected endeavors. Whether a person taking a photo or capturing video or audio recording ultimately shares or even reviews the recording themselves is irrelevant to whether the First Amendment protects the act of making the recording. *See Stanley v. Georgia*, 394 U.S. 557, 565, 568 (1969) (holding that First Amendment protects possession of obscene film for personal use, stating that "if the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch"); *Pomykacz v. Borough of W. Wildwood*, 438 F. Supp. 2d 504, 507, 512–13 (D.N.J. 2006) (holding that taking photos that were never developed, as part of effort to monitor government officials, was First Amendment protected activity).

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device-ownership-2015/ (reporting that 68% of American adults own a "smartphone"); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 337 (2011) ("As digital technology proliferates in camera phones, iPhones, and PDAs, almost any image we observe can be costlessly recorded, freely reproduced, and instantly transmitted worldwide."); *id.* at 341 ("Social networking sites . . . have combined with increasingly usable blogging technology to enable any holder of an image to make it instantly available to the world at large.").

Indeed, contrary to the district court's ruling (without citation to any authority),[20] a person's purpose in making a recording is irrelevant. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try . . . 'What is one man's amusement, teaches another's doctrine.'") (citation omitted); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (holding that the plaintiff "need not assert any particular reason for videotaping the troopers" in order to enjoy First Amendment protection). The trial court thus erred when it held that the creation of images requires some additional expressive conduct or political intent in order to be protected.

B. Recording Police Officers Falls Within the First Amendment Right to Gather and Share Information About Government Officials.

The right to record police officers performing their duties in public is also firmly rooted in the Constitution's protection for the collection and dissemination of information about the government.

A long line of Supreme Court jurisprudence emphasizes "the paramount public interest in a free flow of information to the people concerning public officials." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964); *see also Bartnicki v.*

[20] *See infra* nn.27–30.

Vopper, 532 U.S. 514, 534 (2001) (First Amendment protects dissemination of recordings and reflects "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]'") (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). A chief aim of the First Amendment is to protect the citizenry's ability to evaluate the government. It accomplishes this by protecting access to information about how the government functions and the ability to debate such issues, both of which are vital to the exercise of democratic self-governance.[21] Accordingly, the First Amendment's protection "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

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[21] *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) ("'[T]here is practically universal agreement that a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs[.]'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978) (of "highest importance" are the aims of "preventing corruption and sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government."); *Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599 (7th Cir. 2012) ("To the founding generation, the liberties of speech and press were intimately connected with popular sovereignty and the right of the people to see, examine, and be informed of their government.").

The free flow of information about government officials is especially important when the government officials in question are police officers. Preserving the public's means of documenting and evaluating how law enforcement officials wield the power that society has conferred on them is unquestionably consistent with the highest aims of the First Amendment. As one district judge observed last year:

> I am firmly persuaded the First Amendment shields citizens against detention or arrest merely for making a photographic, video or sound recording, or immutable record of what those citizens lawfully see or hear of police activity within public view. To allow the fog of denial and acquiescence to envelop and conceal police misconduct is, under a regimen where citizen recording of such misconduct could lead to arrest, to endorse the "Nacht und Nebel" mindset and methodology of the police state.

Crawford v. Geiger, 131 F. Supp. 3d 703, 715 n.5 (N.D. Ohio 2015).

Recordings are a "uniquely reliable and powerful" method of "preserving and disseminating news and information" about government officials' performance. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012). Recordings often carry persuasive power that mere descriptions lack. *See id.* at 606 (acknowledging the "difference in accuracy and immediacy that an audio recording provides as compared to notes or even silent videos or transcripts."). This is in part because recordings carry an air of accuracy and objectivity. *See id.* at 607 (the "self-authenticating character" of audio and audiovisual recordings

"makes it highly unlikely that other methods could be considered reasonably adequate substitutes."); *id.* at 614 (Posner, J., dissenting) (acknowledging that "a recording of a conversation provides a more accurate record of the conversation than the recollection of the conversants: more accurate, and also more truthful, since a party to that conversation, including a police officer, may lie about what he heard or said."). In addition, unlike a verbal description, an image's persuasive power does not depend on the eloquence or reputation of the person who recorded it. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 344 (2011); Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. Rev. Disc. 230, 251 (2016) (observing that the value of a recording does not depend on the identity of its source).

Thus, courts have, for decades, recognized that the First Amendment's protection for the free flow of information about public officials and news-gathering encompasses the right to record police interactions in public. *E.g.*, *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597–98 (7th Cir. 2012) (restriction on recording the police implicates "the principle that the First Amendment provides at least some degree of protection for gathering news and information, particularly news and information about the affairs of government.") (citing *Branzburg v.*

Hayes, 408 U.S. 665, 681 (1972)); *Glik v. Cunniffe*, 655 F.3d 78, 79–81 (1st Cir. 2011) ("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.'"); *Fordyce v. City of Seattle*, 55 F.3d 436, 438–39 (9th Cir. 1995) (holding that recording police conduct during a protest implicated "First Amendment right to gather news" and recognizing a "First Amendment right to film matters of public interest"); *Schnell v. City of Chicago*, 407 F.2d 1084, 1085–86 (7th Cir. 1969) (holding that news photographers who covered demonstrations at the 1968 Democratic National Convention in Chicago had a viable claim against the police for "interfering with plaintiffs' constitutional right to gather and report news, and to photograph news events"); *Crawford v. Geiger*, 131 F. Supp. 3d 703, 714–15 (N.D. Ohio 2015) (recognizing "a First Amendment right openly to film police officers carrying out their duties in public" stemming from the First Amendment's protections for news-gathering and the free discussion of governmental affairs); *Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492, 506–07 (D. Md. 2015) (recognizing a "First Amendment right to video record police officers in the routine public performance of their duties" arising out of both the First Amendment right to gather news and the First Amendment's "protection and promotion of 'the free discussion of governmental affairs'"); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D.

Pa. 2005) ("Robinson's right to free speech encompasses the right to receive information and ideas. . . Videotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case. In sum, there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the defendants[.]"); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (holding that "it seems clear that employees of the news media have a right to be in public places and on public property to gather information, photographically or otherwise"). As the Court of Appeals for the First Circuit explained:

> It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws "abridging the freedom of speech, or of the press," and encompasses a range of conduct related to the gathering and dissemination of information. . . . An important corollary to this interest in protecting the stock of public information is that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" . . . .The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles. 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."

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

The First Amendment's protection for information- and news-gathering does not necessarily guarantee public access to all places,[22] but it limits the government's ability to prohibit information-gathering in places where members of the public *are* allowed. *See, e.g.*, *Houchins v. KQED*, 438 U.S. 1, 11 (1978) (acknowledging that there is an "undoubted right to gather news 'from any source by means within the law'" but rejecting the existence of a First Amendment right of access to a county jail in order to inspect and record jail conditions). As the Supreme Court has explained, "the government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979)); *see also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'") (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979)).

The First Amendment's protection for disseminating information about public officials is not reserved for members of the established media; ordinary

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[22] *But see Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13 (1986) (recognizing First Amendment right of access to court proceedings); *accord Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 501–05 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980).

people enjoy this right, as well.[23] As the Department of Justice has observed, recognizing a First Amendment right to record the police that extends to civilians, and not just journalists, "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." JA1675 (Letter from U.S. Dep't of Justice, Civil Rights Div., to Mark H. Grimes, Baltimore Police Dep't, Re: *Christopher Sharp v. Baltimore City Police Dep't et al.* 10 (May 14, 2012)). *See also Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) ("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."). People who witness police use of force the most in their daily lives are often in the best position to obtain and share information about police

[23] *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); *Houchins v. KQED*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring) (noting that the First Amendment does not "guarantee the press any basic right of access superior to that of the public generally" but rather, "assure[s] the public and the press equal access once government has opened its doors").

interactions. In addition, people who have the least access to traditional media platforms are at the greatest risk of being silenced absent constitutional protection for less formal means of gathering and disseminating information. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (First Amendment protects 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.").[24]

Ensuring the public's ability to record the police, as with protections for other forms of information-gathering about public officials, may also "have a

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[24] The rise in police use of body worn cameras and dash cams reflects a growing recognition of the importance of video capture of police interactions, and also increases the importance of protecting the public's right to make their own recordings of those same police interactions from a different perspective. Not only does it prevent the government from monopolizing potentially powerful evidence, it also allows for a fuller picture of police interactions to emerge. *See, e.g.*, Timothy Williams, James Thomas, Samuel Jacoby, and Damien Cave, *Police Body Cameras: What Do You See?* N.Y. Times (updated Apr. 1, 2016) (examining difference in perspective between police body-worn cameras and bystander footage, and noting that "[w]hen video allows us to look through someone's eyes, we tend to adopt an interpretation that favors that person"), http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html; Jocelyn Simonson, *Copwatching*, 104 Cal. L. Rev. 391, 433–35 (Apr. 2016) (discussing the ambiguity of video and copwatching groups' use of bystander-captured footage to provide "more perspectives" in the conversation about policing reform).

salutary effect on the functioning of government more generally." *Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011) (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034–35 (1991); *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986)). The promise of transparency that flows from a recognized right to record can promote public confidence in the police.[25] Indeed, recordings of police abuses of authority are so rhetorically powerful that the mere act of recording—even if the person recording has no intention of reviewing or sharing the recording—can serve to *deter* police misconduct.[26]

C. The District Court Erred by Taking an Unduly Narrow View of the First Amendment's Scope.

The district court erred by limiting its First Amendment analysis to the question of whether Plaintiffs' acts of recording constituted "expressive conduct"

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[25] *See, e.g.*, JA1746 (Statement of Interest of the United States, *Sharp v. Baltimore*) (observing that the "right to record police officers while performing duties in a public place" is not only constitutionally protected, it also "promote[s] the accountability of our government officers, and instill[s] public confidence in the police officers who serve us daily.").

[26] *See, e.g.*, Naomi LaChance, The Intercept, *Lawmaker Who Pushed Bill to Protect People Filming Police Arrested for Filming Police* (Sept. 30, 2016), https://theintercept.com/2016/09/30/lawmaker-who-pushed-bill-to-protect-people-filming-police-arrested-for-filming-police/ (bystander who filmed police arrest after a traffic stop explained his actions by telling the arrestee: "I'm just making sure they don't kill you."); *see also* Simonson, *Copwatching*, 104 Cal. L. Rev. at 412–17 (describing copwatching's deterrence effect).

that involved an "intent to convey a particular message."[27] The district court repeatedly emphasized the fact that Plaintiffs had not articulated their intentions in recording the police.[28] This narrow framing and inquiry led the court to conclude, incorrectly, that Mr. Fields' and Ms. Geraci's acts of recording the police were not protected by the First Amendment.[29] This was error for several reasons.

First, expressive conduct need not convey a "particularized message" in order to be protected by the First Amendment. *See Troster v. Pa. Dep't of Corr.*, 65 F.3d 1086, 1090 (3d Cir. 1995) (acknowledging that the Supreme Court has "made clear that 'a narrow, succinctly articulable message is not a condition of

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[27] *E.g.*, JA11 (Memorandum at 5) (reasoning that "[Plaintiffs'] particular behavior [in recording the police] is only afforded First Amendment protection if we construe it as expressive conduct. . . 'Expressive conduct exists where "an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it."'") (quoting *Heffernan v. City of Paterson*, 777 F.3d 147, 152 (3d Cir. 2015)).

[28] *E.g.*, JA7 (Memorandum at 1) (Plaintiffs "never told the police why they were capturing images of the police interacting with people they did not know."); JA11 (Memorandum at 5) ("Neither uttered any words to the effect he or she sought to take pictures to oppose police activity."); JA17 (Memorandum at 11) ("Fields and Geraci do not suggest they intended to share their images immediately upon image capture.").

[29] JA12 (Memorandum at 6 & n.31) (holding that Plaintiffs' conduct was not "'sufficiently imbued with elements of communication' to be deemed expressive conduct").

constitutional protection"). As the Supreme Court observed, if the First Amendment's protections were confined to only expression that conveyed a "particularized message" as suggested in *Spence v. Washington*, 418 U.S. 405, 411 (1974), it "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). *See also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) ("*Hurley* eliminated the 'particularized message' aspect of the *Spence-Johnson* test.").

Second, neither the "particularized message" requirement, nor the more flexible "expressive conduct" inquiry adopted in *Troster* and *Tenafly Eruv Association*, is applicable where the conduct in question is part of the process of engaging in an inherently expressive activity. In *Hurley*, the Supreme Court "had no need to formulate a new test [for expressive conduct] because—unlike conduct that is not normally communicative—parades are inherently expressive." *Tenafly Eruv Ass'n*, 309 F.3d at 160. Likewise, photos, videos, and audio recordings are inherently expressive. *E.g.*, *Bartnicki*, 532 U.S. at 527 (holding that prohibition on disclosing illegally intercepted audio recordings is a regulation of "pure speech," not expressive conduct); *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (First Amendment protects photographs of United States currency, regardless of the

message conveyed by the photograph). In today's digital environment, an individual's act of capturing images and sounds—whether for one's own edification, for immediate sharing, or for subsequent review and publication—is part of an inherently expressive activity. *See supra* § II(A).

Third, a showing of "inherently expressive conduct" is a sufficient—but not a *necessary*—condition of constitutional protection. Mr. Fields' and Ms. Geraci's acts of recording the police are constitutionally protected not only because recording is part of the process of engaging in inherently expressive conduct but also because recording the police performing their duties in public falls soundly within the First Amendment's protection for the collection and dissemination of information about public officials. *See supra* §§ II(A), (B).

Fourth, the district court erred in holding that the act of recording not only had to convey a particularized message in order to enjoy constitutional protection, but also that the message conveyed had to be one of "criticism."[30] The court did

[30] JA7 (Memorandum at 1) (Plaintiffs "urge us to find . . . photographing police without any challenge or criticism is expressive conduct protected by the First Amendment."); JA8 (Memorandum at 2) (noting that court was "not addressing a First Amendment right to photograph or film police when citizens challenge police conduct" and that issue was "whether photographing or filming police . . . without challenging police is expressive conduct protected by the First Amendment."); JA9 (Memorandum at 3) (describing issue before the court as whether the First Amendment protects photographing the police "without criticizing or challenging police before or contemporaneous with the photo.");

not cite any authority for the notion that expressive conduct is protected only if it conveys a particular viewpoint, but distinguished four other decisions from the Eastern District of Pennsylvania on the ground that those cases all involved criticism of police officers.[31]

The First Amendment protects the expression of messages that are supportive of the government to the same extent as messages that are critical of the

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JA13 (Memorandum at 7) (Plaintiffs "essentially concede they spoke no words or conduct expressing criticism of the police before or during their image capture."); JA21 (Memorandum at 15) ("We have not found . . . any case . . . finding citizens have a First Amendment right to record police conduct without any stated purpose of being critical of the government."). As explained above, the district court's analysis constitutes reversible error even if portions of the opinion can be construed as suggesting that criticism of the government is not necessarily required for First Amendment protection as long as the plaintiff engaged in some other form of expressive conduct. *See, e.g.*, JA13–14 (Memorandum at 7–8) (court must inquire whether Plaintiffs' "activity is 'expressive' or otherwise 'critical' of the government"); JA16 (Memorandum at 10) ("Because Fields and Geraci do not adduce evidence their conduct may be construed as expression of a belief or criticism of police activity, . . . we do not find they exercised a constitutionally protected right[.]").

[31] JA16 (Memorandum at 10) (discussing *Montgomery v. Killingsworth*, No. 13-256, 2015 WL 289934 (E.D. Pa. Jan. 22, 2015); *Gaymon v. Borough of Collingdale*, 150 F. Supp. 3d 457 (E.D. Pa. 2015); *Fleck v. Trustees of Univ. of Pa.*, 995 F. Supp. 2d 390 (E.D. Pa. 2014); *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005)).

government.[32] Indeed, viewpoint-based distinctions among speech are subject to the strictest First Amendment scrutiny and are almost invariably deemed unconstitutional.[33] The district court's requirement of criticism would have the perverse effect of creating First Amendment protection for those who adopt an overtly confrontational attitude towards the police, while chilling the speech of those who wish to simply observe and record without prematurely forming an opinion about the scene that is unfolding before them.[34]

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[32] To be sure, many seminal First Amendment cases explicitly highlight the right to criticize the government, and there is little jurisprudence explicitly recognizing the right to praise the government. However, it should not be surprising that the case law deals more often with government attempts to silence critics than attempts to silence supporters.

[33] *See Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction.") (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)); *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290, 296 (3d Cir. 2011) ("Viewpoint discrimination is anathema to free expression and is impermissible in both public and nonpublic fora.") (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Perry*, 460 U.S. at 46).

[34] *See, e.g.*, JA18 (Memorandum at 12) ("Neither Fields nor Geraci assert they engaged in conduct 'critical' of the government . . . [e]ach engaged in activity they personally described as non-confrontational 'observing' and 'recording.'"); *id.* ("We do not find Geraci's attempt to get a better look and possibly film protected

The district court acknowledged that in other cases and scholarly works analyzing "this identical issue" of whether the First Amendment protects civilians' right to record the police, courts and commentators had relied on the alternative lines of First Amendment jurisprudence discussed above (*see supra* §§ II(A), (B)) to find a protected right.[35] The court below did not point to any flaw in the reasoning set forth in these authorities, but nonetheless declined to follow them. To overlook these First Amendment rationales was error.

There is quite simply no legal basis for the district court's conclusion that the act of recording the police is unprotected by the First Amendment. For the reasons explained above, this Court should reverse it.

III. THERE ARE NO AVAILABLE ALTERNATIVE GROUNDS FOR AFFIRMANCE.

A. The Right to Record Police Was Clearly Established at the Time of Ms. Geraci's Detention and Mr. Fields' Arrest.

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speech the same as expressing or criticizing police conduct. Geraci may have filmed a peaceful arrest of an otherwise unruly protestor.").

[35] JA17–18 (Memorandum at 11–12 & nn. 54–59) (discussing *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Adkins v. Limtiaco*, 537 Fed. App'x 721 (9th Cir. 2013); *Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492 (D. Md. 2015); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 377 (2011)).

The individual officer defendants will likely rely on this Court's decision in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), to argue, as they did in the trial court, that they are protected by qualified immunity and that the First Amendment protections for Plaintiffs' conduct were not "clearly established" at the time of Mr. Fields' arrest and Ms. Geraci's restraint. They are wrong.

1. Qualified Immunity Standard

Qualified immunity protects government officials from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted). In these cases, qualified immunity entails an inquiry into (1) whether the defendant officers' conduct violated Plaintiffs' First Amendment rights, and (2) if so, whether the First Amendment right at issue was clearly established at the time of the violation. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

For purposes of the inquiry into whether a right is "clearly established," the "salient question" is whether the defendant officers had "fair warning" that their conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). When no case law addresses the specific facts at issue, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* This is the case where the right at issue flows from well-

settled constitutional principles. *E.g.*, *Sterling v. Borough of Minersville*, 232 F.3d 190, 198 (3d Cir. 2000) ("Because the confidential and private nature of the information was obvious, and because the right to privacy is well-settled, the concomitant constitutional violation was apparent notwithstanding the fact that the very action in question had not previously been held to be unlawful.").

A right can be clearly established even absent binding authority from the Supreme Court or this Court recognizing the right. *E.g.*, *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 211–12 & n. 4 (3d Cir. 2001) ("[i]f the unlawfulness of the defendant's conduct would have been apparent to a reasonable official based on the current state of the law, it is not necessary that there be binding precedent from this circuit so advising."); *Kopec v. Tate*, 361 F.3d 772, 777–78 & n.6 (3d Cir. 2004) (finding right clearly established even though neither the Supreme Court nor the Third Circuit had ruled on the issue). This Court routinely considers decisions of other courts of appeals in analyzing whether the right is "clearly established." *Williams v. Bitner*, 455 F.3d 186, 192–93 (3d Cir. 2006) (citations omitted). *See also Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011) (acknowledging that the requisite clarity can be established by a "robust consensus" of persuasive authority from other circuits and courts); *accord L.R. v. Sch. Dist. of Phila.*, No. 14-4640, --- F.3d ---, 2016 WL 4608133, at *9 (3d Cir. Sept. 6, 2016) (holding that right was clearly established after "surveying both our case law and that of our sister

circuits" because "there are sufficiently analogous cases that should have placed a reasonable official . . . on notice that his actions were unlawful").

2. The First Amendment Right to Record Police in Public Was Clearly Established At the Time of the Incidents Involving Plaintiffs.

By the time Mr. Fields was arrested and Ms. Geraci was restrained, a "robust consensus" of persuasive authority put the defendant officers on notice that retaliating against civilians who record them violates the First Amendment. As of September 2012 and September 2013, every federal court of appeals to squarely address whether the First Amendment protects the right to record the police had explicitly acknowledged that it does, as had many district courts in the circuits where the issue remained undecided by the court of appeals.[36] In many of these decisions, the court also found the right to record police to be clearly established. *See Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011) (holding that First Amendment right to record police in public was clearly established as of October

[36] *See supra* 15–16 (collecting cases finding a First Amendment right to record the police performing their duties in public). Indeed, the right was so obvious that many courts did not need to spend a great deal of time analyzing its derivation before recognizing its existence. *See Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (noting that the "terseness" of some of the case law finding a First Amendment right to record the police in public reflects the "fundamental and virtually self-evident" nature of the right); *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (discussing cases in which the existence of the plaintiff's constitutional right is so manifest that it is clearly established by broad rules and general principles").

1, 2007); *Adkins v. Limtiaco*, 537 Fed. App'x 721, 722 (9th Cir. 2013) (holding that First Amendment right to take photographs of police was clearly established); *Higginbotham v. City of N.Y.*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015) (holding that plaintiff journalist's First Amendment right to photograph and record police activity in public was clearly established as of November 15, 2011); *Crago v. Leonard*, No. 13-cv-531, 2014 WL 3849954 (E.D. Cal. Aug. 5, 2014) (recognizing clearly established right to record police officers fulfilling their official duties as of December 7, 2012).

Furthermore, by November 2012, the First Amendment right to record the police had also been acknowledged and announced as policy by the Defendant City of Philadelphia in an official directive that built on a September 2011 memorandum to officers.[37] There is no question that, under these circumstances, the individual officer defendants in these cases had "fair warning" that preventing a civilian from recording them or retaliating against them for the recording was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

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[37] JA1185–86 (Memorandum 11-01); JA1187–94 (Directive 145); *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J., concurring) (observing that qualified immunity standard does not allow "the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know. Thus, the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes.") (emphasis in original).

This Court's 2010 decision in *Kelly v. Borough of Carlisle* does not change the analysis. That decision analyzed the state of the law at the time of Mr. Kelly's arrest in May 2007—more than five years before Ms. Geraci was restrained and more than six years before Mr. Fields was arrested in retaliation for recording. This Court held that, as of May 2007, "there was insufficient 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 during the stop would violate the First Amendment." *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010).

In the years between Mr. Kelly's May 2007 arrest and Ms. Geraci's September 2012 restraint and Mr. Fields' September 2013 arrest, both technology and law evolved significantly. Today, more than two-thirds of Americans own a "smartphone."[38] Ownership of these internet-enabled devices capable of capturing and transmitting photos and recordings has nearly doubled in the past 4 years alone.[39] And the law has responded accordingly. The additional precedent decided

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[38] Monica Anderson, Pew Research Center, *Technology Device Ownership: 2015*, at 7 (Oct. 29, 2015), http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/ (reporting that 68% of American adults own a "smartphone").

[39] *Id.* (reporting that only 35% of American adults owned a "smartphone" in mid-2011).

in the years since Mr. Kelly's arrest removed any lingering doubt as to the existence of the First Amendment right to record police.[40] The decisions of the Seventh Circuit in May 2012 and the First Circuit in 2011 do a particularly thorough job analyzing and clarifying the origins of the First Amendment right to record police, and trace it to well-established Supreme Court precedent. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *supra* 23–24, 31, 33 (discussing *Alvarez* and *Glik*). The First Circuit also held in *Glik* that the First Amendment right to record police performing their duties in public was clearly established as of October 2007, after the events at issue in *Kelly*. *Glik*, 655 F.3d at 79.[41]

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[40] The Fourth Circuit's non-binding decision in *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009), likewise should not affect this Court's qualified immunity analysis. In that unpublished per curiam opinion, the Fourth Circuit affirmed, without analysis, the district court's holding that there was no clearly established right to record police activity as of June 10, 2007—one month after Mr. Kelly's arrest. *Id.* at 853. And neither *Syzmecki*—nor *Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492, 508–09 (D. Md. 2015) nor *Crawford v. Geiger*, 131 F. Supp. 3d 703, 715 (N.D. Ohio 2015), which recognized a First Amendment right to record, but declined to treat it as clearly established—involved police acting in defiance of their own department's announced policies protecting and recognizing the First Amendment right to record police officers.

[41] In addition, in *Kelly*, this Court relied on the fact that the case arose in the context of an "inherently dangerous" car stop. *Kelly*, 622 F.3d at 262. Although the First Amendment principles at issue in this case would seem to apply with equal force to passengers recording police performing car stops—and this Court

B. The Evidence in the Record Requires a Remand to Determine Whether Trial Is Necessary on the City's Liability for the Violation of Plaintiffs' Rights.

Even if the Court were to find that the defendant officers are entitled to qualified immunity on Plaintiffs' First Amendment claims, the Court must nonetheless reverse the dismissal of Plaintiffs' First Amendment claims against the City of Philadelphia.

The City has no available defense of qualified immunity. *Owen v. City of Indep.*, 445 U.S. 622, 656 (1980). In these cases, Plaintiffs have created an extensive record demonstrating that PPD officers have an unconstitutional practice or custom of retaliating against civilians who attempt to record them, and that PPD policymakers failed to implement training, supervisory protocols, and discipline to address this misconduct. *See* Model Civ. Jury Instructions §§ 4.6.3, 4.6.5, 4.6.6, 4.6.7 (3d Cir. 2016) (addressing municipal liability). The evidence in the record includes more than twenty incidents of retaliation for recording known to high-ranking PPD officials, a memorandum from the Police Advisory Commission

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should acknowledge as much at an appropriate time—for now, it should suffice to note that, because of this aspect of the reasoning in *Kelly*, that decision provides no basis for the individual officer defendants here to believe that they had any constitutional authority to prevent or retaliate against civilians recording them in public situations that were not "inherently dangerous." *See Glik*, 655 F.3d at 85 ("*Kelly* is clearly distinguishable on its facts; a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged.").

identifying the problem and urging additional training, and an admission by the Commissioner's legal counsel that the PPD's training on the First Amendment right to record was not sufficient. Pls.' Stmt. Facts, *Fields* ECF No. 27-1, *Geraci* ECF No. 27-1, ¶¶ 71, 81–91, 108, 110–113, 139, 141, 147, 151). The district court did not evaluate the sufficiency of Plaintiffs' evidence supporting municipal liability because it found that Plaintiffs had not suffered a violation of their First Amendment rights. JA11 (Memorandum at 5).

The Court should hold that retaliating against civilians for recording or attempting to record the police violates the First Amendment, and remand so that the district court can weigh the evidence to determine whether there is a triable issue of fact as to whether the City acted with deliberate indifference to the violations of Mr. Fields' and Ms. Geraci's constitutional rights and whether the City's failures caused the violations.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated: October 24, 2016

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LOCAL RULE 28.3(D) CERTIFICATION

I hereby certify that at least one of the attorneys whose names appear on the foregoing brief, including the undersigned, is a member of the bar of this Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,565 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman size 14 font.

3. The text of the electronic versions of this Brief and Joint Appendix filed on ECF are identical to the text of the paper copies filed with the Court.

4. The electronic versions of the Brief and Joint Appendix filed on ECF were virus checked using Webroot SecureAnywhere, and no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing Brief of Appellants and accompanying Joint Appendix Volumes I–IV were filed electronically and served on all counsel of record via the ECF system of the United States Court of Appeals for the Third Circuit.

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 16-1650 & 16-1651

RICHARD FIELDS,
Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, *et ano*,
Defendants-Appellees.

AMANDA GERACI,
Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, *et al*.,
Defendants-Appellees.

On Appeal From the Memorandum and Order Granting Partial Summary Judgment Dated February 19, 2016, at E.D. Pa. Nos. 14-cv-4424 & 14-cv-5264

APPENDIX VOLUME I
Pages JA 1–27

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APPENDIX
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FIELDS,	:	
	:	CIVIL ACTION
Plaintiff,	:	No. 14cv4424
	:	
v.	:	
	:	
CITY OF PHILADELPHIA et al.,	:	
	:	
Defendants.	:	
	:	

NOTICE OF APPEAL

Notice is hereby given that Plaintiff in the above-captioned case, Richard Fields, appeals from that portion of the Order and Opinion (Doc. Nos. 46, 47) entered February 19, 2019 by the Honorable Mark A. Kearney, which dismissed Plaintiffs' First Amendment claim against the City of Philadelphia and Joseph Sisca, as well as Plaintiff's malicious prosecution claim against Joseph Sisca. The Order of February 19, 2016 (Doc. No. 47) is now final and appealable because Plaintiff has dismissed his remaining claims against the Defendants, resulting in a final Order dismissing the case, entered on March 15, 2016 (Doc. No. 57).

Dated: March 21, 2016.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMANDA GERACI,	:	
	:	CIVIL ACTION
Plaintiff,	:	No. 14cv5264
	:	
v.	:	
	:	
CITY OF PHILADELPHIA et al.,	:	
	:	
Defendants.	:	
	:	

NOTICE OF APPEAL

Notice is hereby given that Plaintiff in the above-captioned case, Amanda Geraci, appeals from that portion of the Order and Opinion (Doc. Nos. 44, 45) entered February 19, 2019 by the Honorable Mark A. Kearney, which dismissed Plaintiffs' First Amendment claim against the City of Philadelphia and Police Officer Dawn Brown. The Order of February 19, 2016 (Doc. No. 45) is now final and appealable because Plaintiff has dismissed her remaining claims against the Defendants, resulting in a final Order dismissing the case, entered on March 15, 2016 (Doc. No. 55).

Dated: March 21, 2016.

Respectfully submitted,

/s/ Molly Tack-Hooper

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FIELDS	:	**CIVIL ACTION**
	:	
v.	:	
	:	**NO: 14-4424**
CITY OF PHILADELPHIA, et al	:	

AMANDA GERACI	:	**CIVIL ACTION**
	:	
v.	:	
	:	**NO: 14-5264**
CITY OF PHILADELPHIA, et al	:	

ORDER

AND NOW, this 19th day of February 2016, upon consideration of the Defendants' Motion for Partial Summary Judgment (ECF Doc. No. 24), Plaintiff's Response (ECF Doc. No. 27), following our January 28, 2016 oral argument during which Plaintiffs conceded they were not seeking to impose supervisory liability other than through their First Amendment Retaliation claims, and for the reasons in the accompanying Memorandum, it is **ORDERED** Defendants' Motion (ECF Doc. No. 24) is **GRANTED in part and DENIED in part:**

1. Defendants' Motion is **GRANTED** as to Plaintiffs' claims for First Amendment Retaliation and these claims are **DISMISSED;**

2. Upon Plaintiffs' consent, Defendants' Motion is **GRANTED** as to Plaintiffs' Fourth Amendment supervisory liability claims and these claims are **DISMISSED;**

3. Defendants' Motion is **GRANTED** as to Richard Fields' claim for malicious prosecution and this claim is **DISMISSED;** and,

4. Defendants' Motion is **DENIED** as to Fourth Amendment liability for the officers and we will proceed to trial on: a) Mr. Fields' claims for unreasonable search and seizure and false arrest against Officer Sisca; and, b) Ms. Geraci's claims for excessive force against Officers Brown, Barrow, Jones and Smith.

KEARNEY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FIELDS	:	**CIVIL ACTION**
	:	
v.	:	
	:	**NO: 14-4424**
CITY OF PHILADELPHIA, et al	:	
AMANDA GERACI	:	**CIVIL ACTION**
	:	
v.	:	
	:	**NO: 14-5264**
CITY OF PHILADELPHIA, et al	:	

KEARNEY, J. **February 19, 2016**

MEMORANDUM

In two incidents a year apart, Philadelphia police officers possibly violated the Fourth Amendment when encountering citizens either before or after the citizens captured police conduct on film. The citizens never told the police why they were capturing images of the police interacting with people they did not know. They were watching their police officers in action and wanted to capture the images because, at least for one of the citizens, "[i]t was an interesting scene. It would make a good picture" and for the other because she is a legal observer trained to observe the police. 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 expressive conduct protected by the First Amendment. While we instinctively understand the citizens' argument, particularly with rapidly developing instant image sharing technology, we find no basis to craft a new First Amendment right based solely on "observing and recording" without expressive conduct and, consistent with the teachings of the Supreme Court and our Court of Appeals, decline to do so today.

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. Our analysis must temporally separate the police's taking of a cell phone, arresting the citizen or applying excessive force. While courts applying the Fourth Amendment have long held police may not seize phones or arrest citizens without probable cause and cannot use excessive force, this case asks us only to study one snapshot in time through the lens of the First Amendment only: whether photographing or filming police on our portable devices without challenging police is expressive conduct protected by the First Amendment.

Richard Fields' conduct

On September 13, 2013, Temple University student Richard Fields ("Fields") stopped walking on the Broad Street sidewalk to use his cell phone to photograph approximately twenty (20) police officers standing outside a home hosting a party.[1] He thought "what a scene, and ... took a picture from the other side of the street."[2] "It was an interesting scene. It would make a good picture..."[3] "I just thought that would make a great picture.... It was pretty cool, it was like a mob of them, so I was, like, just take a picture."[4] He did not say a word to anyone.[5] Fields does not claim taking another picture.

Officer Sisca approached him after he took the picture.[6] Fields alleges Officer Sisca questioned him, "[d]o you like taking pictures of grown men?" Fields answered "No, I'm just walking by." Officer Sisca asked him to leave. Fields refused to leave "[b]ecause I felt that I was doing nothing wrong. I was perfectly acting within my rights just standing on the sidewalk, taking a picture of public property."[7] Fields "was about 15 feet away from any police officer."[8]

After Fields refused to leave, Officer Sisca detained him, handcuffed him, emptied his pockets, took his cell phone and searched his phone.[9] Officer Sisca did not delete the photo. Officer Sisca placed Fields in a police van while he cited Fields for Obstructing Highway and Other Public Passages under 18 Pa.C.S.§5507. After citing him, Officer Sisca returned the cell phone and released Fields from custody.[10] Officer Sisca did not appear for the court hearing on the citation.

Fields seeks damages under 42 U.S.C. §1983 against Officer Sisca alleging retaliation for exercising a First Amendment right to "observe and record" police, and for violating his Fourth Amendment rights against unreasonable search and seizure, and false arrest. Fields also seeks damages under §1983 for malicious prosecution. These facts, taken in the light most favorable to Fields, could result in Fourth Amendment liability arising from Officer Sisca's possibly inexplicable statement and conduct. But the question today is whether the First Amendment protects Fields from police retaliating against him for photographing them without criticizing or challenging police before or contemporaneous with the photo.

Amanda Geraci's conduct

Amanda Geraci ("Geraci") is a self-described "legal observer" who, following training at Cop Watch Berkley, observes interaction between police and civilians during civil disobedience or protests.[11] She claims to wear a pink identifier.[12] While she thinks the police know who she is, she is not a liaison with the police.[13] Before 6:45 A.M. on September 21, 2012, Geraci attended a public protest against hydraulic fracturing near the Pennsylvania Convention Center in Philadelphia, and carried a camera with her to videotape the scene.[14] She described the people as "excited. They were dancing, they were playing music. Relatively chill, I guess."[15]

Approximately six to ten civil affairs officers attended to manage crowd control and ensure convention guests could enter the Convention Center.[16]

During the protest, Philadelphia police arrested one of the protestors.[17] Geraci moved closer to get a better view and hoped to videotape the incident.[18] Geraci claims Officer Brown "attacked her" by physically restraining her against a pillar and preventing her from videotaping the arrest.[19] Geraci recalls this as being her only physical interaction with the police despite having attended at least twenty (20) similar events.[20] The police released Geraci and did not arrest or cite her.[21] Geraci could not remember any other police officers around her.[22] Geraci recalls telling Officer Brown "things like I'm not doing anything wrong. I was just legal observing. I don't remember much. It's very blurry. Like it was really kind of shocking."[23]

Geraci seeks damages under 42 U.S.C. §1983 for First Amendment retaliation against Officer Brown and the City of Philadelphia and claims her peaceful attempt to observe and record police amounts to an exercise of a First Amendment right. Geraci also seeks damages under §1983 against Officer Brown and three fellow officers, Defendants Barrow, Jones and Smith, for violating her Fourth Amendment right to be free from excessive force when she tried to get a better view of the police arrest. Although Geraci does not claim Officers Barrow, Jones or Smith had any physical contact with her and she cannot testify they were ever near her, she seeks recovery against them because they failed to intervene in Officer Brown's alleged use of excessive force.

I. ANALYSIS OF FIRST AMENDMENT RETALIATION CLAIM

Fields and Geraci filed separate actions under 42 U.S.C. §1983 seeking damages for constitutional injuries inflicted by individual Philadelphia police officers and their employer City of Philadelphia.[24]

While the officers seek dismissal of the First Amendment retaliation claim based on qualified immunity, and the City based on lack of supervisory liability under *Monell v. Dep't of Soc. Servs. of City of New York*[25], we focus on the threshold issue: whether Fields or Geraci engaged in First Amendment protected conduct. We find there is no First Amendment right under our governing law to observe and record police officers absent some other expressive conduct. As we find Fields and Geraci did not engage in constitutionally protected conduct, we do not address the potentially liable parties and their defenses.

We first analyze the facts of expressive conduct adduced by Fields and Geraci under the customary analysis and then address Fields' and Geraci's argument we should expand our understanding of expressive conduct to include taking, or attempting to take, a photograph.

A. Fields and Geraci offer no factual basis for customary expressive conduct required for a First Amendment retaliation claim.

To prevail on their First Amendment retaliation claim, Fields and Geraci must prove "(1) each engaged in constitutionally protected conduct; (2) defendant officials took adverse action sufficient to deter a person of ordinary firmness from exercising constitutional rights; and (3) the constitutionally protected conduct was a 'substantial or motivating factor' in the decision to take adverse action against the plaintiff." [26]

Fields' and Geraci's alleged "constitutionally protected conduct" consists of observing and photographing, or making a record of, police activity in a public forum.[27] Neither uttered any words to the effect he or she sought to take pictures to oppose police activity. Their particular behavior is only afforded First Amendment protection if we construe it as expressive conduct.[28] Because we find this issue dispositive on all of Plaintiffs' First Amendment retaliation claims, we first address whether Fields' and Geraci's conduct is constitutionally protected activity under prevailing precedent.

We analyze Fields' and Geraci's conduct mindful of the Supreme Court's admonition "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' ...."[29] "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies."[30] "Expressive conduct exists where 'an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it.'"[31] "[T]his is a fact-sensitive, context-dependent inquiry, and ... the putative speaker bears the burden of proving that his or her conduct is expressive." [32]

As the Supreme Court explained in *Texas v. Johnson,* we recognize expressive conduct in the areas of picketing, armband-wearing, flag-waving and flag-burning.[33] "Conduct is protected by the First Amendment when the 'nature of [the] activity, combined with the factual context and environment in which it was undertaken', shows that the 'activity was sufficiently imbued with elements of communication to fall within the First Amendment's scope.'"[34] In addition, "context is crucial to evaluating an expressive conduct claim because 'the context may give meaning to the symbol' or act in question."[35] The conduct must be direct and expressive; we cannot be left guessing as to the "expression" intended by the conduct.

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.

As in *Troster* and *Tenafly*, we find Fields and Geraci offered nothing more than a "bare assertion" of expressive conduct. Because this bare assertion falls short of their burden of proof following discovery, Fields and Geraci cannot proceed on a First Amendment retaliation claim under our customary analysis.

B. Expanding "expressive conduct" to include "observing and recording."

Fields and Geraci essentially concede they spoke no words or conduct expressing criticism of the police before or during their image capture. They instead want to persuade us "observing" and "recording" police activity is expressive conduct entitled to First Amendment protection as a matter of law. In their view, observing is a component of "criticizing" and citizens may engage in speech critical of the government. We find no controlling authority compelling this broad a reading of First Amendment precedent.

a. Guidance in the Third Circuit.

Our Court of Appeals recognizes "videotaping or photographing the police in the performance of their duties on public property *may* be a protected activity."[36] Quoting *Gilles v. Davis*, our Court of Appeals in *Kelly v. Borough of Carlisle* stated, "more generally, photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection."[37] While acknowledging activities observing and recording the police *may* be protected, our Court of Appeals has never held speech unaccompanied by an expressive component is always afforded First Amendment protection.[38] The Court of Appeals for the Third Circuit's pronouncement in *Kelly*, stating videotaping police officers *may* be protected activity, together with our reading of these district court cases, compels us to apply a similar traditional First Amendment analysis when assessing whether speech or conduct may be afforded

constitutional protection, inquiring whether the activity is "expressive" or otherwise "critical" of the government.

Our Court of Appeals discussed the purported "right" to videotape officers most recently in its non-precedential opinion in *True Blue Auctions v. Foster*,[39] where plaintiff videotaped a private auction and police ordered him to remove an auction sign. Plaintiff claimed the police violated his First Amendment rights because they "threatened to arrest" him if he continued to videotape them. Our Court of Appeals affirmed the district court's order granting officers' qualified immunity because at the time of the alleged incident there was "no clearly established constitutional right to videotape the officers without threat of arrest."[40] In 2013, the court of appeals recognized "our case law does not clearly establish a right to videotape police officers performing their official duties."[41] No Third Circuit case since *True Blue Auctions* holds there is a blanket First Amendment right to videotape or photograph officers.

Following *Kelly v. Borough of Carlisle*, several district courts in this circuit similarly contemplate a constitutional right to observe and record *may* exist in certain circumstances, but none has so held when there is an absence of protest or criticism. Judge Dalzell in *Fleck v. Trustees of Univ. of Pennsylvania* granted summary judgment to defendant officers on plaintiffs' claim officers violated their First Amendment rights when seizing a video camera after plaintiffs allegedly refused to shift the camera away from officers' faces after being ordered to do so.[42] Judge Dalzell acknowledged "the right to record matters of public concern is not absolute" and consistent with *True Blue* confirmed, albeit in the context of qualified immunity, "our case law does not clearly establish a right to videotape police officers performing their official duties."

Judge McHugh in *Gaymon v. Borough of Collingdale*[43] rejected qualified immunity where plaintiff videotaped police while verbally protesting police harassing her husband during

an arrest. "It is indisputable that 'the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.' In fact, the Supreme Court has gone so far as to say that 'the 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.'"[44]

Fields and Geraci direct us to Judge Bartle's holding in *Robinson v. Fetterman*[45] and Judge Yohn's holding in *Montgomery v. Killingsworth*[46] to argue the right to observe and record is protected by our First Amendment regardless of context. We find no inherent conflict between these cases and our decision today.

In *Robinson*, plaintiff expressed displeasure with the police's method of inspecting trucks on a highway. He contacted his state representative to express his opinion, and inquire about his rights to videotape. By all accounts, Robinson's activities were expressive from the start. On two occasions, police officers approached and investigated Robinson. Videotaping in conjunction with an intent to chronicle or criticize the alleged unsafe manner in which officers inspected trucks on a state roadway is "speech" critical of the government, as Judge Bartle concluded in that case. Based on the particular facts gleaned during the bench trial in *Robinson*, Judge Bartle entered judgment for the plaintiff on his First Amendment retaliation claim, holding an individual observing and videotaping for the stated purpose of challenging or protesting police conduct is expressive conduct entitled to First Amendment protection.[47]

Judge Yohn's cogent and exhaustive analysis in *Montgomery v. Killingsworth* applies a similar test for assessing conduct protected by the First Amendment. [48] As Judge Yohn observed last year, "Peaceful criticism of a police officer performing his duties in a public place is a protected activity under the First Amendment."[49] Judge Yohn noted, "this protection,

however, is not absolute."[50] Quoting the Supreme Court in *Colten v. Kentucky,*[51] and as it relates to Fields, Judge Yohn found "conduct in refusing to move on after being directed to do so was not, without more, protected by the First Amendment."[52]

Because Fields and Geraci do not adduce evidence their conduct may be construed as expression of a belief or criticism of police activity, under governing Supreme Court or Third Circuit precedent we do not find they exercised a constitutionally protected right for which they suffered retaliation. This is fatal to their First Amendment retaliation claim.[53] We find the citizens videotaping and picture-taking in *Montgomery, Gaymon, Fleck* and even *Robinson* all contained some element of expressive conduct or criticism of police officers and are patently distinguishable from Fields' and Geraci's activities.

Each situation remains subject to analysis based on the unique set of facts presented. Police officers remain limited by the Fourth Amendment proscriptions including false arrest, unreasonable search and excessive force in all situations, including those involving videotaping and photography.

b. Guidance from other authorities.

We recognize courts outside the Third Circuit and at least one noted commentator have found observing and photographing police activity without any criticism of the government fall within the realm of First Amendment protected activity. While we understand these opinions, the present law in this Circuit does not recognize a First Amendment right to observe and record without some form of expressive conduct and photographing police is not, as a matter of law, expressive activity.

Several circuits analyzing this identical issue have interpreted activities involving citizens observing and recording police more broadly. In *Smith v. City of Cumming*[54], the Eleventh Circuit found citizens had a First Amendment right, subject to reasonable time, manner and place

restrictions, to photograph or videotape police, because in their view "the First Amendment protects the right to gather information about what public officials do on public property."[55] Drawing an analogy to the line of cases permitting journalists a First Amendment right to access information for news gathering, and relating a paramount First Amendment interest in promoting free discussion of governmental affairs and to prevent corruption, the Courts of Appeals for the First Circuit and Ninth Circuit have similarly held citizens photographing or observing official conduct is merely information gathering, similar to protections afforded to news sources, which is a necessary step in the process of expressing a right to criticize or challenge government behavior.[56]

Most recently, in *Garcia v. Montgomery County, Maryland,*[57] the district court held a photojournalist had "a constitutional right to video record public police activity" but ultimately concluded the right was not clearly established at the time of the incident and found the officers entitled to qualified immunity Interpreting the First Amendment in a broad manner, the court reasoned,

> [R]ecording governmental activity, even if that activity is not immediately newsworthy, has the potential to prevent government abuses through scrutiny or to capture those abuses should they occur. As [plaintiff] stated, recording police activity enables citizens to 'keep them honest,' an undertaking protected by the First Amendment.[58]

We also recognize commentary suggesting image capture before the decision to transmit the image is, as a matter of law, expressive conduct.[59] While we appreciate Professor Kreimer's analysis as it relates to shared images, or an intent to share images, Fields and Geraci do not suggest they intended to share their images immediately upon image capture. Geraci wanted to observe only and Fields took a picture of an "interesting" and "cool" scene.

We find these authorities are inapposite. We need not apply a qualified immunity standard as we do not find a right *ab initio*.[60] Neither Fields nor Geraci assert they engaged in conduct "critical" of the government; both assert they were only "observing" police activity. They are not members of the press. Each engaged in activity they personally described as non-confrontational "observing" and "recording." Unlike the situation contemplated by *Kelly* involving critical or expressive conduct, there is no dispute Geraci attended the protest against fracking intending to "observe" any interaction between the crowd and police. We do not find Geraci's attempt to get a better look and possibly film protected speech the same as expressing or criticizing police conduct. Geraci may have filmed a peaceful arrest of an otherwise unruly protester. We do not find this conduct "expressive" simply because she attempted to film police activity. We reach a similar conclusion as to Fields. Fields does not allege he engaged in speech or expressive conduct critical of the police. Fields claims he was walking down the street and stopped to take a picture of something interesting to him.

There is no contrary authority by the Supreme Court or our Court of Appeals holding a citizen observing or recording police without criticism or challenge is engaging in the expressive conduct necessary for First Amendment protection. As such, summary judgment will be granted Defendants on Fields' and Geraci's First Amendment retaliation claims.

III. ANALYSIS OF FOURTH AMENDMENT CLAIMS

We find sufficient evidence to deny summary judgment on the excessive force and false arrest/imprisonment claims against the officers but grant summary judgment on Fields' claim for malicious prosecution. [61]

A. Fields' claims against Sisca for false arrest and unreasonable search will proceed to trial.

Fields claims Officer Sisca, in violation of the Fourth Amendment, conducted an unlawful search which caused him to suffer injury.[62] Officer Sisca contends there is no evidence to support Fields' claim anyone searched his phone, and summary judgment is warranted on the Fields' claim.[63] If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial," summary judgment is appropriate.[64]

We must consider Plaintiff's evidence and all reasonable inferences which may be drawn from it, in the light most favorable to the non-moving party.[65] Fields' testimony constitutes sufficient evidence from which a jury could find in his favor. It is not our role to weigh the disputed evidence and decide which is more probative, or to make credibility determinations.[66] The disputed evidence must be resolved by a jury.

B. We grant summary judgment on Fields' malicious prosecution claim.

Defendants seek summary judgment on Fields' malicious prosecution claim. A constitutional claim for malicious prosecution stems from the Fourth Amendment and is "intended to redress [ ] the deprivation of liberty accompanying prosecution, not prosecution itself."[67] To prevail on a malicious prosecution claim under §1983, Fields must show (1) the officers initiated a criminal proceeding; (2) the criminal proceeding ended in his favor; (3) officers initiated the proceeding without probable cause; (4) officers acted maliciously or for a purpose other than bringing Fields to justice; and, (5) the officers deprived Fields of liberty consistent with the concept of seizure as a consequence of a legal proceeding.[68] Where plaintiff fails to proffer evidence on any one of the five prongs, the malicious prosecution claim fails as a matter of law.[69] The parties dispute the last element.

The last element of a malicious prosecution claim requires Fields show "some deprivation of liberty consistent with the concept of 'seizure'" as a consequence of a legal proceeding.[70] Where the alleged deprivation of liberty is not "as a consequence of a legal proceeding" it cannot give rise to a malicious prosecution claim.[71]

Fields has no evidence Defendants deprived him of a liberty *"as a consequence* of a legal proceeding."[72] The facts show Officer Sisca detained Fields, placing him in the police van for a period of time *before* issuing a citation. Where arrest and custody occurred prior to initiation of legal proceedings, the arrest "cannot be said to have been a seizure as a consequence of the alleged malicious prosecution."[73] We deny summary judgment on Geraci's excessive force claim.

C. Geraci may proceed to trial on her excessive force claim.

Geraci claims Officers Brown, Barrow, Jones and Smith violated her Fourth Amendment right to be free from excessive force.[74] Defendants Barrow, Jones and Smith each move for summary judgment arguing there is no evidence of physical contact with Geraci.[75]

To establish a claim for excessive force under the Fourth Amendment, Geraci must show that a "seizure" occurred and it was unreasonable.[76] A seizure occurs when police restrain a citizen through physical force or show of authority, and occurs only when a reasonable person would have believed she was not free to leave a situation.[77]

Barrow, Jones and Smith did not physically contact Geraci. The question is whether they should have intervened. Police officers have a duty to protect a victim from another officer's use of excessive force if there is a reasonable and realistic opportunity to intervene.[78] An officer is only liable for failing to intervene if Geraci can show: (1) another officer violated her constitutional rights; (2) the officer had a reason to believe that his colleague was committing a

constitutional violation; and (3) he had a reasonable and realistic opportunity to intervene.[79] Officers only have an opportunity to intervene when excessive force is used in the officer's presence or if the officer saw his colleague use excessive force and had time to intervene.[80]

Geraci adduced evidence, through pictures, of officers near the scene. She adduced the officers' admission they witnessed Officer Brown's conduct toward her.[81] We cannot make factual findings as to whether these officers knew of the extent of Officer Brown's conduct towards Geraci and had a reasonable and realistic opportunity to intervene.

Viewing the adduced evidence in her favor as we must at this stage, Geraci directs us to sufficient facts from which a jury could conclude Officers Barrow, Smith and Jones failed to intervene in Officer Brown's alleged use of excessive force.

IV. CONCLUSION

We have not found, and the experienced counsel have not cited, any case in the Supreme Court or this Circuit finding citizens have a First Amendment right to record police conduct without any stated purpose of being critical of the government. Absent any authority from the Supreme Court or our Court of Appeals, we decline to create a new First Amendment right for citizens to photograph officers when they have no expressive purpose such as challenging police actions. The citizens are not without remedy because once the police officer takes your phone, alters your technology, arrests you or applies excessive force, we proceed to trial on the Fourth Amendment claims.

We also find Fields and Geraci adduced competent evidence precluding summary judgment under the Fourth Amendment challenging Officer Sisca's arrest and search and seizure of Fields' cell phone and for the officers' excessive force upon Geraci. Fields did not adduce evidence to sustain a malicious prosecution claim. At oral argument, Plaintiffs conceded a lack of supervisory liability against the City for their arrest, search, seizure and excessive force

claims. In the accompanying Order, we partially grant the Defendants' motion for summary judgment and trial will proceed on: Fields' claims for unreasonable search and false arrest against Officer Sisca and Geraci's claim for excessive force against the four officers.

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[1] The Court's Policies require a Statement of Undisputed Material Facts ("SOF") and Appendix ("App.") filed in support of a summary judgment motion. SOF ¶28-29.

[2] App. 32

[3] App. 56

[4] App. 35

[5] App. 36

[6] App. 37

[7] *Id.*

[8] App. 33

[9] App. 41

[10] SOF ¶34.

[11] SOF ¶35.

[12] App. 9

[13] *Id.*

[14] SOF ¶36-37; Compl. ¶12.

[15] App. 9

[16] App. 539, 719-20, 844, 910

[17] SOF ¶38.

[18] SOF ¶40-41, App. 32-33.

[19] SOF ¶45; Compl. ¶34-35.

[20] SOF ¶44; App. 9

[21] SOF ¶45; Compl. ¶¶44, 49.

[22] App. 11

[23] App. 12

[24] At the parties' request we consolidated the cases for discovery, dispositive motions and possibly trial.

[25] *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 659 (1978).

[26] *Rauser v. Horn,* 241 F.3d 330, 333–334 (3d Cir.2001) (quoting *Mount Healthy Bd. of Ed. v. Doyle,* 429 U.S. 274 (1977)); *Thomas v. Independence Twp.,* 463 F.3d 285, 296 (3d Cir.2006).

[27] Neither Fields nor Geraci allege or offer evidence their conduct expressed criticism of police activity; each maintain the mere act of observing and recording is entitled to First Amendment protection. The act of "observing and recording," Plaintiffs contend, is a fundamental constitutional right protected by the First Amendment.

[28] *Heffernan v. City of Paterson*, 777 F.3d 147, 152 (3d Cir. 2015) (speech need not be a message communicated verbally because "expressive conduct is protected under the First Amendment.") *cert. granted,* -- U.S. --, 136 S. Ct. 29 (2015).

[29] *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *see also Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 409 (1974).

[30] *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 161 (3d Cir. 2002) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, n.5 (1984)).

[31] *Heffernan, supra* at 152 (quoting *Texas v. Johnson,* 491 U.S. at 404).

[32] *Id.* (quoting *Tenafly*, 309 F.3d at 161).

[33] *Johnson*, 491 U.S. at 404.

[34] *Tenafly*, 309 F.3d at 158 (quoting *Spence v. Washington*, 418 U.S. at 409-10); *Troster v. Pa.State Dept. of Corrections*, 65 F.3d 1086, 1090 (3d Cir. 1995)).

[35] *Id.*

[36] *Kelly v. Borough of Carlisle*, 622 F.3d 248, 260 (3d Cir. 2010) (quoting *Gilles v. Davis*, 427 F.3d 197, 204 n.14 (3d Cir. 2005) (citing *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)).

[37] *Id.*

[38] These opinions discuss constitutional rights in the context of evaluating qualified immunity to police officers. *Kelly, supra,* 622 F.3d at 260 ("we have not addressed directly the right to videotape police officers"); *Gilles* 427 F.3d at 221, n. 14 ("videotaping or photographing the police in the performance of their duties on public property may be a protected activity...photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection."); *Whiteland Woods v. Township of W.Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999)("[Plaintiff] does not allege [defendant] interfered with its speech or other expressive activity. Rather, the alleged constitutional violation consisted of a restriction on [plaintiff's] right to receive and record information."). *See also Snyder v. Daugherty*, 899 F.Supp.2d 391, 413-14 (W.D.Pa. 2012)("There is no clearly established, 'unfettered' constitutional right, in generalized terms, under the First, Fourth, or any other Amendment, to record police officers in the performance of their duties."); *Pomykacz v. Borough of West Wildwood*, 438 F.Supp.2d 504, 513, n. 14 (D.N.J. 2006)("An argument can be made that the act of photographing, in the abstract, is not sufficiently expressive or communicative and therefore not within the scope of First Amendment protection – even when the subject of the photography is a public servant.").

[39] *True Blue Auctions v. Foster,* 528 F. App'x 190 (3d Cir. 2013).

[40] *Id.* at 192.

[41] *Id.* at 193.

[42] *Fleck v. Trustees of Univ. of Pennsylvania*, 995 F. Supp. 2d 390, 403 (E.D. Pa. 2014)

[43] *Gaymon v. Borough of Collingdale* , No. 14-5454, 2015 WL 4389585 (E.D. Pa. July 17, 2015)

[44] *Id.* (quoting *City of Houston, Texas v. Hill*, 482 U.S. 451, 461 (1987))(internal citations omitted).

[45] *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005).

[46] *Montgomery v. Killingsworth*, No. 13-256, 2015 WL 289934 (E.D. Pa. Jan. 22, 2015).

[47] *Robinson*, 378 F. Supp. 2d at 541.

[48] In *Montgomery v. Killingsworth*, Judge Yohn analyzed these consolidated cases under a qualified immunity rubric and ultimately found no "clearly established" right to observe and record police, leaving the question to be resolved and decided by the court of appeals. In line with the guidance from the Third Circuit, these cases held plaintiffs' expressive conduct does fall within these protections, but activity not deemed 'expressive' probably did not. Ultimately, the court did not have to decide whether the expressive conduct *was* constitutionally protected because defendants, all individual officers, were given qualified immunity. The City of Philadelphia was dismissed by stipulation of the parties.

[49] *Montgomery, supra* at *6 (citing *City of Houston*).

[50] *Id.* at *7 (citing *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942)).

[51] *Colten v. Kentucky*, 407 U.S. 104, 107 (1972).

[52] *Montgomery, supra* at *7.

[53] *See e.g. Damiano v. Scranton Sch. Dist.,* No. 13-2635, 2015 WL 5785827, at *14 (M.D. Pa. Sept. 30, 2015)(summary judgment warranted where plaintiffs did not allege or produce facts to support a claim they engaged in First Amendment protected conduct).

[54] *Smith v. Cunning*, 212 F.3d 1332, 1333 (11th Cir.2000)

[55] *Id.* at 1333.

[56] *Glik v. Cunniffe,* 655 F.3d 78 (1st Cir.2011); *Fordyce v. City of Seattle,* 55 F.3d 436, 439 (9th Cir.1995). In *Glik*, the plaintiff expressed concern police were using excessive force arresting a young man in a public park and began recording the arrest on his cell phone and the police then arrested plaintiff. Affirming the district court and rejecting officers' claim of qualified immunity, the court of appeals held qualified immunity did not apply to officers because it was clearly established, "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.'" *Id.* at 82 (citing *Mills v. Alabama*, 384 U.S.214 (1966)). In *Fordyce*, the court mentioned a "First Amendment right to film matters of public interest," although the right was not clearly established for purposes of qualified immunity because state privacy laws prohibiting electronic recording without permission did not clearly impact these rights. Notably, the plaintiff in *Fordyce* claimed he was recording a public protest for a local news station. Recently, in *Adkins v. Limtiaco*, the court of appeals found a clearly established constitutional right to photograph the scene of an accident during a police investigation. 537 F. App'x 721 (9th Cir. 2013) (citing *City of Houston v. Hill,* 482 U.S. 451, 461 (1987)).

[57] *Garcia v. Montgomery County, Maryland*, No. 12-3592, 2015 WL 6773715 (D.Md. Nov. 5, 2015).

[58] *Id.* at *8.

[59] Seth F. Kreimer, *"Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record,"* 159 U.Pa.L.Rev. 335, 377 (2011).

[60] As our Court of Appeals noted today in reviewing qualified immunity, we must initially ask "[w]hat is the right here?" *Mammaro v. New Jersey Div. of Child Prot. and Permanency,* No. 15-1448, slip op. at 9 (3d Cir. Feb. 19, 2016)

[61] Fields' and Geraci's counsel withdrew any Fourth Amendment supervisory liability claim during oral argument. Accordingly, we do not consider whether the City may be liable for failure to train and/or supervise officers in responding to incidents where citizens observed, recorded or photographed them in a manner violating the Fourth Amendment.

[62] Fields also claims Officer Sisca violated his Fourth Amendment right to be free from arrest and imprisonment without probable cause. Officer Sisca concedes there are disputed facts for the jury to resolve and does not seek summary judgment on these claims.

[63] A party may meet its summary judgment burden by "pointing out... there is an absence of evidence to support the nonmoving party's claims." *Cichonke v. Bristol Twp.*, No. 14-4243, 2015 WL 8764744, at *8 (E.D. Pa. Dec. 14, 2015) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[64] *Celotex*, 477 U.S. at 322.

[65] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3d Cir. 1987).

[66] *Boyle v. Cty. of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998) (citing *Petruzzi's IGA Supermkts., Inc. v. Darling-Del. Co. Inc.*, 998 F.2d 1224, 1230 (3d Cir. 1993)).

[67] *White v. Glenn*, No. 13-984, 2014 WL 5431200, at *2 (E.D. Pa. Oct. 27, 2014) (citing *DiBella v. Borough of Beachwood,* 407 F.3d 599, 603 (3d Cir.2005)).

[68] *Johnson v. Knorr,* 477 F.3d 75, 81–82 (3d Cir.2007); *Blythe v. Scanlan*, No. 14-7268, 2015 WL 4743786, at *3 (E.D. Pa. Aug. 11, 2015); *see also Estate of Smith v. Marasco,* 318 F.3d 497, 521 (3d Cir. 2003).

[69] *Domenech v. City of Phila.,* No. 06–1325, 2009 WL 1109316, at *9 (E.D.Pa. Apr.23, 2009), *aff'd,* 373 F. App'x 254 (3d Cir.2010).

[70] *Gallo v. City of Phila.,* 161 F.3d 217, 222 (3d Cir.1998), *as amended,* (Dec. 7, 1998).

[71] *White*, *supra* at *2 (no deprivation of liberty consistent with seizure in violation of Fourth Amendment where only in custody prior to initiation of legal proceedings).

[72] *Johnson,* 477 F.3d at 81–82 (emphasis added); *see also Gallo,* 161 F.3d at 222.

[73] *White, supra* at *3-4; *see also Lopez v. Maczko,* No. 07–1382, 2007 WL 2461709, at *3 (E.D.Pa. Aug. 16, 2007) (no facts supporting seizure as a consequence of legal proceeding where only seizure alleged is arrest which occurred prior to initiation of criminal proceedings); *Luck v. Mount Airy No. 1, LLC,* 901 F.Supp.2d 547, 556 (M.D.Pa.2012) (no deprivation of liberty as a result of a legal proceeding where plaintiffs "only recite facts pertaining to their seizure and arrest prior to the institution of a legal proceeding.").

[74] In certain circumstances, allegations of excessive force may give rise to a Fourteenth Amendment substantive due process claim. These situations generally involve "egregious" "brutal" "offensive" and arbitrary government action which "shocks the conscience." She does not argue, and we do not interpret, her excessive force claim is a Fourteenth Amendment substantive due process claim.

[75] Officer Brown concedes there are disputed facts on this claim which must be resolved by a jury, and does not move for summary judgment on this claim.

[76] *Estate of Smith v. Marasco,* 318 F.3d 497, 515 (3d Cir.2003).

[77] *Graham v. Connor,* 490 U.S. 386, 395 n. 10 (1989); *United States v. Mendenhall,* 446 U.S. 544, 553–54 (1980).

[78] *Smith v. Mensinger,* 293 F.3d 641, 651 (3d Cir.2002) (citations omitted).

[79] *Id.* at 650–51; *see also Knox v. Doe,* 487 F. App'x 725, 728 (3d Cir.2012).

[80] *Bean v. Ridley Twp.,* No. 14–5874 2015 WL 568640, *11 (E.D.Pa. Feb. 10, 2015); *Bryant v. City of Philadelphia,* No. 10–3871 2012 WL 258399, *8 (E.D.Pa. January 27, 2012); *Sullivan v. Warminster Twp.,* 765 F.Supp.2d 687, 701–02 (E.D.Pa.2011).

[81] App. 735, 848, 911.