IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-1650 and 16-1651

RICHARDS FIELDS,
Appellant
v.

CITY OF PHILADELPHIA; SISCA,
POLICE OFFICER, BADGE NO. 9547;
JOHN DOE, AN UNKNOWN PHILADELPHIA
POLICE OFFICER

AMANDA GERACI,
Appellant
v.

CITY OF PHILADELPHIA; DAWN BROWN,
POLICE OFFICER, BADGE NO. 2454;
TERRA M. BARROW, POLICE OFFICER,
BADGE NO. 1147; NIKKI L. JONES,
POLICE OFFICER, BADGE NO. 2549;
RHONDA SMITH, POLICE OFFICER,
BADGE NO. 1373

BRIEF FOR APPELLEES THE CITY OF PHILADELPHIA, POLICE OFFICER JOSEPH SISCA, AND POLICE OFFICER DAWN BROWN

On Appeal from the February 19, 2016 Order of the United States District Court for the Eastern District of Pennsylvania, Judge Mark A. Kearney, Docket No. 14-4424 & 14-5264, Entering Partial Summary Judgment

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Dated: December 23, 2016

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1. Did Plaintiffs prove a clearly established First Amendment right to record the police in 2013 without any evidence of expressive conduct, when this Court held in 2010 that any First Amendment right to record the police without evidence of expressive conduct is not clearly established, and when intervening non-binding caselaw does not demonstrate that the right is clearly established, both because that other law is distinguishable and because it cannot vitiate the binding 2010 holding of this Court anyway?

Answered below: No (District Court Opinion ("Opinion") at 12 (App. 18))

Suggested answer: No.

2. Did Plaintiffs create a genuine issue of material fact that the City of Philadelphia acted pursuant to a policy of deliberate indifference to the need to train its police officers to allow citizens to record their actions, when the City enacted a specific policy requiring officers to allow recordings, and when the City proactively protected citizens' rights where it learned of occasional violations of the policy?

Answered below: Not answered (Opinion at 5 (App. 11))

Suggested answer: No.

COUNTER-STATEMENT OF THE CASE

On September 13, 2013, Defendant City of Philadelphia Police Officer Joseph Sisca ("Officer Sisca") arrested Plaintiff Richard Fields ("Mr. Fields"), who had been taking photographs of police breaking up a house party. App. 60 (Fields dep. at 9). On September 21, 2012, Defendant City of Philadelphia Police Officer Dawn Brown ("Officer Brown" and, with Officer Sisca, the "Officers") restrained Plaintiff Amanda Geraci ("Ms. Geraci," and, with Mr. Fields, "Plaintiffs"), before Ms. Geraci could record any interactions between the police and protestors at a protest. App. 37 (Geraci dep. at 34).

This case concerns the lawfulness of those police actions and, in particular, whether it was clearly established that the right to record the police under these circumstances is protected by the First Amendment.

Plaintiffs filed suit against the individual Officers and the City of Philadelphia (the "City," and with the Officers, "Defendants"), alleging that the Officers violated their First Amendment rights by retaliating against Plaintiffs for recording police activity. Plaintiffs also alleged, under Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978), that the police actions here resulted from a municipal policy where the Philadelphia Police Department ("PPD") acted with deliberate indifference to the need to train its officers that they should not retaliate against citizens who recorded their actions. The cases were consolidated before the Honorable Mark A. Kearney.

After discovery, Defendants moved for summary judgment, contending that the Officers were entitled to qualified immunity, because there is no clearly

established law providing that a plaintiff can record the police where that plaintiff has not demonstrated an intent to express that recording to an audience, and that the City was entitled to judgment, because Plaintiffs failed to prove that the City was deliberately indifferent to the need to train its officers.

The Court granted the motion, entering judgment for Defendants on Plaintiffs' First Amendment claims. The Court held that because Plaintiffs merely recorded and observed the police -- and engaged in no expressive activity beyond those acts -- Plaintiffs engaged in no speech protected by the First Amendment. The District Court here never reached the issue of municipal liability because it held that there was no right to record the police in the first place.

This appeal followed.[1]

We do not ask this Court to decide whether the underlying constitutional right exists, but instead we seek alternative grounds for affirmance. Specifically, we contend, as we did below, that the Officers are entitled to qualified immunity because there is no clearly established law, and that the City is entitled to judgment because Plaintiffs failed to prove a policy or custom.

[1] Plaintiffs also brought Fourth Amendment claims related to their interactions with the police, but voluntarily dismissed those claims in order to pursue this First Amendment appeal.

COUNTER-STATEMENT OF FACTS

We describe the facts in the light most favorable to Plaintiffs, as the summary judgment non-movants.

1. Mr. Fields' Conduct.

On September 13, 2013, Mr. Fields, a Temple University student, took an iPhone photograph from the sidewalk of police officers breaking up a house party. App. 59 (Fields dep. at 8); App.100 (photograph). He thought, "what a scene," and then he took a picture from the other side of the street. App. 59 (Fields dep. at 8). Mr. Fields took the photograph, admittedly not for any expressive purpose, but because he thought the scene "was pretty cool," because it "would make a great picture," App. 62 (Fields dep. at 11), and because "it was an interesting scene," App. 84 (Fields dep. at 33). He did not say anything to anyone. App. 63 (Fields dep. at 12).

Officer Sisca approached after Mr. Fields took the picture, and allegedly asked Mr. Fields if he "like[d] taking pictures of grown men." Mr. Fields answered, "No, I'm just walking by." App. 60 (Fields dep. at 9). Officer Sisca asked Mr. Fields to leave, but Mr. Fields refused, believing that he had done nothing wrong. App. 64 (Fields dep. at 13). Officer Sisca handcuffed Mr. Fields, took his cell phone, searched it, but did not delete the photo. App. 60 (Fields dep. at 9). Officer Sisca cited Mr. Fields for Obstructing Highway and Other Public Passages under 18 Pa. C.S. § 5507. Officer Sisca then returned the phone and released Mr. Fields. App. 71 (Fields dep. at 20).

2. Ms. Geraci's Conduct

Ms. Geraci is a self-described "legal observer" who observes interactions between police and civilians during civil disobedience or protests. App. 30 (Geraci dep. at 9). She believes in general that the police know who she is, but she is not a police liaison. App. 36 (Geraci dep. at 9). On September 21, 2012, Ms. Geraci attended a protest against hydraulic fracturing near the Pennsylvania Convention Center, App. 34 (Geraci dep. at 25), and carried a video camera with her, App. 38 (Geraci dep. at 40-41).

During the protest, the police arrested one of the protestors. App. 36 (Geraci dep. at 38). Ms. Geraci approached the location where the arrest was occurring to get a better view. App. 37 (Geraci dep. at 34). Ms. Geraci contends that Officer Brown then physically restrained her against a pillar and prevented Ms. Geraci from videotaping the arrest. App. 38 (Geraci dep. at 39). Ms. Geraci told Officer Brown that she was "not doing anything wrong" but "was just legal observing." App. 39 (Geraci dep. at 43). The police released Ms. Geraci and did not arrest or cite her. App. 38 (Geraci dep. at 39).

Ms. Geraci had observed the police at least twenty other times, bringing her video camera with her each time, and this was the only time she was arrested. App. 39 (Geraci dep. at 43). This particular restraint was the exception for Ms. Geraci; she "generally" found her interactions with the PPD to be "cordial." App. 36 (Geraci dep. at 43).

3. PPD Policies and Training

According to Captain Fran Healy, a special advisor to Police Commissioner Charles Ramsey, the City has consistently attempted to be "proactive" and "ahead of the cur[ve]" with respect to the question of allowing citizens to record police officers. App. 117 (2013 deposition of Captain Healy at 46-47 (hereinafter "2013 Healy dep.").

a. Issuance of Memorandum 11-01 in September 2011

In late summer 2011, Police Commissioner Ramsey attended a conference on policing in major American cities. App. 118 (2013 Healy dep. at 50). At the conference, attendees discussed the newly developing issue of whether police should permit citizens to record police-involved incidents. App. 118 (2013 Healy dep. at 50). In Philadelphia, officers did "not understand the police [were] allowed to be taped in public." App. 119 (2013 Healy dep. at 54). Because there was "some confusion on the street" in 2011, there "was a definite need for the policy." App. 121 (2013 Healy dep. at 62).

Therefore, consistent with his desire "to be on the forefront rather than on the back end," Commissioner Ramsey immediately requested the development of a policy requiring police to allow citizens to record the police. App. 118 (2013 Healy dep. at 52). He wanted to ensure "clarification out on the street so the officers knew what their duties [were]." App. 120 (2013 Healy dep. at 59).

In response to the Commissioner's request, Captain Healy drafted Commissioner's Memorandum 11-01 in the summer of 2011. App. 118 (2013 Healy dep. at 50). A Memorandum is a statement of policy that police can draft

and issue more quickly than an official Directive. App. 110 (2013 Healy dep. at 19). The City viewed the Memorandum as "clear and succinct." App. 125 (2013 Healy dep. at 77); see also App. 127 (2013 Healy dep. at 84-85).

Memorandum 11-01, published on September 23, 2011, specified that "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 by members of the general public." App 1185. The Memorandum's stated purpose was to "remove any confusion as to the duties and responsibilities of sworn personnel when being photographed, videotaped or audibly recorded." App 1185. The Memorandum unambiguously commanded Philadelphia police officers that they "shall not interfere . . . [with] photographing, videotaping, or audibly recording police personnel." App. 1185. Furthermore, "under no circumstances" were police officers to "intentionally damage[]" or "destroy[]" devices used to record the police. App. 1185.

The City published Memorandum 11-01 on September 23, 2011. It distributed the Memorandum to supervisors and those supervisors read it verbatim to officers during roll call for three straight days. App. 125 (2013 Healy dep. at 80). Such training was "standard procedure" for policy changes. App. 200 (2015 deposition of Captain Healy at 10 ("2015 Healy dep."). There are 6500 police officers in the PPD. App. 278 (2015 Healy dep. at 89).

Post-Memorandum violations were sporadic. For example, between the time of the issuance of Memorandum 11-01 in September 2011 and the time that the

police restrained Ms. Geraci in September 2012, Plaintiffs identified eight Internal Affairs Division ("IAD) complaints involving retaliation against citizens for recording the police. App. 1569, 1617, 1625, 1636, 1643, 1644, 1647. In response, the City further clarified its policy in late 2012.

b. Issuance of Directive 145 In November 2012

In 2012, the City took action both to address these occasional violations and to incorporate recommendations from the United States Department of Justice (DOJ). Specifically, in May 2012, the DOJ wrote a Statement of Interest Letter for the case of Sharp v. Baltimore. App. 1675. In its detailed letter, the DOJ provided the "United States' position on the basic elements of a constitutionally adequate policy on individuals' right to record police activity." App. 1675. These elements provided that police department policies should: "affirmatively set forth the First Amendment right to record police activity," "describe the range of prohibited responses to individuals observing the police," "provide clear guidance on supervisory review," and "describe when it is permissible to seize recordings." App. 1676-1684.

After the Commissioner learned of the Baltimore litigation and the DOJ's letter, and after the City understood that there were occasional post-Memorandum violations, the Commissioner called upon Captain Healy and the PPD's Research and Planning Unit to rewrite Memorandum 11-01 into a departmental Directive, which would incorporate the DOJ's recommendations. App. 129 (2013 Healy dep. at 93-94). A Directive, like a Memorandum, is a statement of official policy, but

the Directive is more detailed and takes more time to draft. App. 128 (2013 Healy dep. at 91).

The Commissioner wanted the Directive to be adopted "black and white from the Justice Department." App. 130 (2013 Healy dep. at 99). "We basically took that [DOJ] letter to heart and . . . almost everything in that letter is now incorporated into our policy." App. 240 (2015 Healy dep. at 51). Although the new Directive would be detailed, its message would still be straightforward, requiring officers to allow recordings. App. 242 (2015 Healy dep. at 53).

On November 9, 2012, the City completed Directive 145. App. 1187. The Directive stated on its face that it was issued in response to the DOJ's letter, and offered the articulated purpose of "protect[ing] the constitutional rights of individuals to record police officers engaged in the public discharge of their duties." App. 1187. It opined that "observing, gathering, and disseminating of information . . . is a form of free speech" protected under the First Amendment. App. 1187. Therefore, it specifically instructed Philadelphia police officers not to "block[], obstruct[], or otherwise hinder[]" recording activities "unless the person making such recording engages in actions that jeopardize the safety of the officer, any suspects or other individuals in the immediate vicinity, violate the law, incite others to violate, or actually obstruct an officer from performing any official duty." Id. Directive 145 also provided guidance on supervisory review. App. 1193. In other words, the Directive closely followed the DOJ's letter.

Captain Healy was subsequently selected to sit on the International Association of Chiefs of Police's ("ICP") panel on public recording of police

because of his role in developing this Directive. The ICP is creating a model policy for the rest of the country on this issue which is based in large part upon the policy developed and implemented by the PPD. App. 225 (2015 Healy dep. at 36).

Upon publication, Directive 145 was issued via teletype notice and a sergeant read the relevant contents during roll call for three days. App. 111 (2013 Healy dep. at 22); App. 132 (2013 Healy dep. at 108). The City sent copies to each district and unit, and each police officer and supervisor received a copy of Directive 145 and was required to verify their receipt by signature. App. 132 (2013 Healy dep. at 106-107); App. 205 (2015 Healy dep. at 16). After being notified of the new Directive, each officer was then responsible for knowing and following the Directive. App. 132-133 (2013 Healy dep. at 108-109). Additionally, any officers who have received Crisis Intervention Training since 2013 have received training on Directive 145 as part of that training. App. 227 (2015 Healy dep. at 38).

c. <u>The Period After The Issuance Of Directive 145</u>

Thus, through the issuance of Memorandum 11-01 and then Directive 145, the City has pursued its goal of being proactive in informing police officers that they were required to allow citizens to record the police. Furthermore, the City has also sent copies to each of its 6500 officers, and had the contents read during roll call for three days.

There were still sporadic, post-Directive violations. Specifically, between the time of the issuance of Directive 145 in November 2012 and the time of the arrest of Mr. Fields in September 2013, Plaintiffs identified three more IAD

Complaints involving retaliation against citizens for recording the police. App. 1642, 1649, 1740. Thus, over the two-year span between the original issuance of Memorandum 11-01 in September 2011 and the time of Mr. Fields' arrest in September 2013, Plaintiff could identify only 11 total instances of alleged police misconduct, out of 6500 officers.

However, despite the relatively small number of violations of City policy over these two years, the City remained proactive in ensuring that even fewer violations would occur in the future.

Throughout 2013, for example, after Captain Healy heard there were occasional violations, he directed additional roll call instructions about compliance with Directive 145. App. 285-298 (2015 Healy dep. at 96-109); App. 369 (March 2013: "commanding officers will ensure that all members of their command comply [with] Directive 145"); App. 374 (same in April 2013); App. 378 (same in May 2013); App. 380 (same in June 2013); App. 398 (same in July 2013).

On November 26, 2013, Plaintiffs' counsel deposed Captain Healy in connection with three other right-to-record lawsuits brought against the City of Philadelphia, Fleck v. City, Montgomery v. City, and Loeb v. City. These cases related to pre-Memorandum interactions. See Montgomery v. Killingsworth, 2015 WL 289934, at *3 (E.D. Pa. Jan. 22, 2015). During the deposition, Plaintiffs' counsel reviewed with Captain Healy the aforementioned pre-Directive complaints, plus some additional complaints that occurred after the issuance of the Directive in November 2012, including the citation related to Mr. Fields' September 2013 arrest. App. 143 (2013 Healy dep. at 150-152).

Thereafter, based upon the information presented to him at the November 2013 deposition, Captain Healy proactively recognized that the training provided to officers on Directive 145 had not been as effective as the PPD would have liked. App. 208 (2015 Healy dep. at 19); App. 235 (2015 Healy dep. at 46: "after we had met, I saw a failing"); see also App. 249 (2015 Healy dep. at 60); App. 260 (2015 Healy dep. at 71).

Accordingly, on December 18, 2013, less than a month after the deposition, Captain Healy drafted a (privileged) memorandum to a Deputy Police Commissioner "recommend[ing] . . . a training module . . . associated with Directive [145]." App. 335. Specifically, in the Memorandum (which proposed subsequent remedial measures), Captain Healy wanted the PPD to remain "probably the most proactive police department in the country" on the issue of allowing recording of police. Id. However, during the November 2013 deposition, "it became very clear that the PPD could have done more training when the policy was initially implemented." Id.

Therefore, immediately thereafter, in January 2014, App. 213 (2015 Healy dep. at 24), the Police Department developed advanced training on Directive 145, which was given to every one of the more than 6500 PPD officers as part of their annual Municipal Police Officer training in 2014. App. 211-213 (2015 Healy dep. at 22-24).

The goal of the advanced training was to emphasize to the officers that, like the ability to protest, the ability to record police was a right that they had sworn to protect. App. 231-235 (2015 Healy dep. at 42-46). Moreover, officers were

trained that there would be no constitutional right to record if a citizen's actions jeopardized safety or obstructed the officer. App. 359 (training powerpoint).

The training is a 45 minute to 1 hour module that began with a lecture on the policy, and continued with a question and answer session that allowed officers to ask hypotheticals and clarify their understanding of the policy. App. 214 (2015 Healy dep. at 25).

SUMMARY OF ARGUMENT

This Court should affirm the entry of judgment for the Officers, because Plaintiffs failed to prove the violation of a clearly established constitutional right to record the police absent expressive activity; and this Court should affirm the entry of judgment for the City, because Plaintiffs failed to demonstrate an unconstitutional municipal policy. This Court need not address the District Court's conclusion that there was no constitutionally protected right to record the police.

Regarding the *Officers*, this Court has already addressed the qualified immunity question at issue here -- is it clearly established that a plaintiff can record the police where the plaintiff has not demonstrated an intent to express that recording to an audience? -- and held that Plaintiffs' claimed right was not clearly established in this Circuit. Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010).

Plaintiffs attempt to avoid the reach of Kelly by arguing that subsequent non-binding cases since Kelly now render the law clearly established, but such non-binding cases cannot vitiate the binding holding of this Court that the law is not clearly established. Moreover, Plaintiffs' cases are distinguishable anyway, as all of them contain evidence of expressive intent. Further, Plaintiffs' cases are contradicted by other non-binding cases, rendering the law unclear again.

Regarding the *City*, Plaintiffs must prove that the Officers here acted pursuant to a policy where the City was deliberately indifferent to the need to train its police officers to allow citizens to record their actions. Plaintiffs cannot make

such a showing. On the contrary, at every step of the way, the City consistently tried to allow the recording of police, not to prohibit it.

When the Commissioner learned at a conference in the summer of 2011 that there was confusion regarding whether citizens could record the police, he published a Memorandum in September 2011 clarifying the City's policy of allowing recording. When the Commissioner learned in the spring of 2012 that there were occasional lapses in the policy, and that the DOJ had specific suggestions as to how to improve the policy, the Commissioner immediately promulgated Directive 145 in November 2012. When Captain Healy learned in early 2013 that there were still occasional breaches, he directed additional roll call instructions. And when Captain Healy learned in late 2013 that there was still confusion, and further occasional lapses, he immediately ordered specific training. As a matter of law, this is not deliberate indifference.

ARGUMENT

We first explain that the Officers are entitled to qualified immunity because Plaintiffs failed to prove the violation of a clearly established constitutional right to record the police absent expressive conduct. We then explain that the Court should affirm judgment for the City because Plaintiffs failed to demonstrate an unconstitutional municipal policy. The Court need not address the question of whether a constitutional right exists in the first place.

I. The Officers Are Entitled To Qualified Immunity Because Plaintiffs Failed To Prove The Violation Of A Clearly Established Right

The parties seem to agree that Plaintiffs engaged in no expressive activity beyond the acts of recording and observing. Plaintiffs contend, in fact, that the First Amendment protects "civilians . . . recording images in public for their own use," Plaintiffs' Brief at 8 ; see also Plaintiffs' Brief at 25, which is what Plaintiffs were doing here. Mr. Fields had no expressive intent but engaged in the act of recording the police for his own purposes because the scene "was pretty cool." App. 62 (Fields dep. at 11). Ms. Geraci had no expressive intent but attempted to videotape the police for her own purposes because she "was just legal observing." App. 39 (Geraci dep. at 43). The District Court, in turn, concluded that Plaintiffs were "observing and recording [the police] without expressive conduct." Opinion at 1.[2]

[2] Although the DOJ believes that Ms. Geraci (but not Mr. Fields) actually proved expressive intent by telling the police that she was legal observing, the DOJ accepts on appeal that this Court "need not evaluate the district court's findings on intent," but instead should "hold that no such findings are needed." Brief for DOJ at 16 n. 10.

Thus, at a basic level, the Officers' prohibition upon Plaintiff's actions was aimed at Plaintiffs' conduct of recording and observing, not at any intended expression relating to such recordings and observations. The question here is whether it was clearly established that such conduct was protected by the First Amendment such that the Officers would not be entitled to qualified immunity. We first explain the law of qualified immunity. We then explain why Plaintiffs cannot demonstrate the existence of a clearly established right to record the police without evidence of expressive activity.

A. The Law Of Qualified Immunity -- This Court Should Only Evaluate Whether The Alleged Right To Record Is Clearly Established

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, Courts perform a two-step inquiry: (1) whether the facts alleged by the plaintiff show the violation of a constitutional right, and (2) whether the law was clearly established at the time of the violation. Saucier v. Katz, 533 U.S. 194, 201 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 202.

This inquiry "must be undertaken in light of the specific context of the case." Id. at 201. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances," as long as the law gave the

defendant officer "fair warning" that his conduct was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 739, 471 (2002).

Therefore, to decide whether a right was clearly established, a court must consider the state of the existing law at the time of the alleged violation and the circumstances confronting the officer to determine whether a reasonable state actor could have believed his conduct was lawful. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

In Saucier, the Supreme Court required lower courts, in performing the two-step qualified immunity inquiry, to first determine whether a constitutional right was violated before deciding whether the law was clearly established. 533 U.S. at 201. However, in Pearson v. Callahan, 555 U.S. 223, 236 (2009), the Supreme Court overruled Saucier's order of operations, holding that courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Here, in order to avoid unnecessarily deciding a difficult constitutional question, we recommend that the Court address prong two first -- whether a purported right to record the police without a corresponding expressive intent is clearly established under the First Amendment.

Although the Supreme Court acknowledged that Saucier's previously mandatory two-step procedure can sometimes be advantageous, Pearson, 555 U.S. at 241, it also recognized that the costs of Saucier outweigh its benefits in some cases. As the Supreme Court explained:

> [T]he rigid Saucier procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.

Id. at 236-237 (emphasis added).

Moreover, unnecessarily deciding the first-step constitutional question, when a decision based upon the second-step, clearly-established question would suffice, "departs from the general rule of constitutional avoidance and runs counter to the older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable." Id. at 241 (citations omitted). Therefore, this Court should start (and, as we explain momentarily, end) its analysis with the step-two question of whether Plaintiffs' claimed right to record the police was clearly established.

Indeed, this Court has already held that in this very situation -- where the question presented is whether an officer is entitled to qualified immunity after arresting an individual for recording the police without evidence of expressive intent -- it makes sense to skip step one (because it is "far from obvious" whether the underlying constitutional right to record exists) and decide the case on the basis of step two (because it was "plain" that any such alleged right is not clearly established). Kelly v. Borough of Carlisle, 622 F.3d 248, 259 n.6 (3d Cir. 2010).

We explain in more detail below the basis for this Court's holding in Kelly that it was "plain," based upon a review of the caselaw, that the right to record was not clearly established. For now, though, our point is that if it was "plain" in Kelly

that the right was not clearly established, then it is necessarily even more "plain" here that the right is not clearly established, because this Court has the added benefit of the holding in Kelly itself finding an absence of clearly established law. Therefore, like the Court in Kelly, this Court should not hesitate to skip step one and decide this case on the basis of the step-two absence of a clearly established right. See also Werkheiser v. Pocono Twp., 780 F.3d 172, 176 (3d Cir. 2015) (similar).

Plaintiffs may contend, in response, that the Court should decide the first-step constitutional question because the Court is obligated to reach this question anyway due to the Monell claim against the City, which allegedly requires a resolution of the constitutional issue. However, as we explain in more detail below in the section on municipal liability, the Court need not decide the constitutional issue even on the Monell claim. Assuming arguendo that there is a constitutional right to record the police even without expressive intent, Plaintiffs still have not established a municipal policy or custom sufficient to satisfy the standards of Monell.

Accordingly, the Court need not decide the constitutional issue at any point, and should instead only resolve the step-two question of whether the right to record without expressive intent is clearly established.

To determine whether a legal rule was "clearly established" at the time an official action was taken, and hence whether an officer's actions had "objective legal reasonableness," a judge must "evaluat[e] . . . the opinions of [the] Courts,"

Procunier v. Navarette, 434 U.S. 555, 565 (1978), analyzing the "relevant precedents," McLaughlin v. Watson, 271 F.3d 566, 571 (3d Cir. 2001).

The officer will be liable only if, "in light of th[is] pre-existing law," it was "apparent" that the officer's actions at the time of the arrest were unlawful, Anderson v. Creighton, 483 U.S. 635, 640 (1987); see also McLaughlin, 271 F.3d at 571 (plaintiff must "show that in light of preexisting law the unlawfulness was apparent"); Leveto v. Lapina, 258 F.3d 156, 166 (3d Cir. 2001) (noting that presence of authority in both directions meant that constitutional right at issue was not "apparent"), meaning that "existing precedent placed the constitutional question beyond debate," Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (emphasis added); see also City & Cnty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (same); Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015) (same); Acierno v. Cloutier, 40 F.3d 597, 620 (3d Cir. 1994) (granting qualified immunity because relevant constitutional law was "subject to considerable uncertainty and differing interpretations").

Put simply, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Id. Plaintiffs cannot satisfy this high burden.

B. Plaintiffs Cannot Demonstrate A Clearly Established Right To Record The Police Without Evidence Of Expressive Intent

We explain next in detail why Plaintiffs have failed to demonstrate a clearly established right, but we note, at the outset, that the Court can reach this conclusion fairly quickly. Initially, this case presents a rare situation where the Court need not actually evaluate competing precedents to decide whether a right was clearly established. Instead, this Court has already specifically addressed the very question at issue here and held that Plaintiffs' claimed right to record was not clearly established in this Circuit. Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010).

Moreover, the District Court judge himself concluded that there was no First Amendment protection. If the District Court judge could conclude that Plaintiffs' non-expressive actions were not protected by the First Amendment, then (even if the District Court were incorrect about the existence of the right itself) certainly a police officer could reasonably believe that Plaintiffs' non-expressive actions were not protected by the First Amendment. Cf. Wilson v. Layne, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

Indeed, even the DOJ agrees in its amicus brief in support of Plaintiffs that this issue -- whether a right exists absent expressive intent -- is one of "first impression": "While several courts of appeals have addressed the issue of recording police activity, courts have not had to confront the issue of contemporaneous expressive intent because, in those cases, the plaintiffs'

objectives or opinions were apparent from context. In this respect, Fields's case in particular is one of first impression." Brief for DOJ at 22 n.14.

Therefore, as we now describe in more detail, Plaintiffs have not proven a clearly established right. We first explain how Kelly held that there is no clearly established right to record the police without expressive intent. We then explain why Plaintiffs' attempts to limit Kelly fail. Finally, we explain why Plaintiffs' policy arguments in favor of the creation of a constitutional right do not prove clearly established law either.

1. This Court Has Already Held In *Kelly v. Carlisle* That There Is No Clearly Established Right To Record The Police Absent Expressive Intent

This Court has already specifically addressed the very question at issue here and held that Plaintiffs' claimed right was not clearly established in this Circuit.

In Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010), a police officer pulled over a car for a routine traffic stop. The plaintiff was riding in the passenger seat and recorded the stop with a small handheld video camera held in his lap. The officer, after noticing the camera, arrested the plaintiff. The Court ultimately affirmed the grant of summary judgment to the officers on the plaintiff's First Amendment retaliation claim, holding that the right to videotape police officers without an expressive intent was not clearly established. The Court first noted that it was appropriate for courts to skip the step-one question from Saucier regarding the existence of a constitutional right where it was "plain that a constitutional right [was] not clearly established." Kelly, 622 F.3d at 259 n.6.

The Court then held, after evaluating the existing case law, that there was no "clearly established right to videotape police officers during a traffic stop." Kelly, 622 F.3d at 262. "[W]e conclude 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, 622 F.3d 248, 259–60 (3d Cir. 2010).

The Court recognized that there were certain cases holding that there is a constitutional right to record the police under certain circumstances (e.g., 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)), but these cases did not create clearly established law, because there were other cases in conflict that recognized "that videotaping without an expressive purpose may not be protected." Kelly, 622 F.3d at 262; see 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"); Gilles v. Davis, 427 F.3d 197, 203 (3d Cir. 2005) (implying that videotaping without an expressive purpose might not be protected).

Plaintiffs claim (at 20) that Kelly is distinguishable because it only involved the specific situation of videotaping police officers during a traffic stop. This argument is doubly flawed. First, Kelly, by its own terms, is not so limited. The

Court explained that the universal point -- that a right to videotape the police absent evidence of expressive intent is never clearly established -- "is further supported by the fact that none of the precedents upon which [the plaintiff] relies involved traffic stops." Id. (emphasis added). Thus, the fact that Kelly involved a traffic stop only further supported the already-established general conclusion that there was no clearly established right to videotape even outside the traffic-stop context.

Moreover, even if Kelly only applies to traffic stops (and it applies more broadly), there still is no clearly established law putting an officer on notice that videotaping is constitutionally protected in non-traffic stop situations. Indeed, relevant authority agrees that there is no clearly established law relating to recording in non-traffic stop situations. In True Blue Auctions v. Foster, 528 F. App'x 190, 192 (3d Cir. 2013), a case where an officer threatened arrest for videotaping on a public sidewalk, the plaintiff argued that Kelly was distinguishable because that was a traffic stop case. The Court explained that, "[e]ven if the distinction between traffic stops and public sidewalk confrontations is as meaningful as the plaintiffs claim, such that Kelly is not dispositive," there was still no clearly established law holding that videotaping public-sidewalk confrontations was protected, because the caselaw went in both directions. Id.

Thus, under Kelly (and True Blue), Plaintiffs have not shown that the right to record the police without an expressive purpose is protected.

2. Plaintiffs' Efforts To Distinguish *Kelly* -- By Arguing That Non-Binding Cases Have Rendered The Law Clearly Established Since The Arrest In *Kelly* Occurred -- Are Misplaced

Attempting to avoid the binding reach of Kelly, Plaintiffs contend that, "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." Plaintiffs' Brief at 46. Thus, in order to survive Kelly, Plaintiffs claim that, even though this Court expressly held that the law was not clearly established as of May 2007, it became clearly established by September 2013. Plaintiffs rely upon district court cases and appellate cases from other Circuits. Plaintiffs are mistaken that the law has become clearly established since Kelly.

True Blue is not published, but it does represent the only updated Third Circuit law on the issue (as opposed to Plaintiffs' reliance upon updated law from other Circuits). In concluding that the right to record the police was not clearly established, this Court relied upon Snyder v. Daugherty, 899 F.Supp.2d 391, 413–14 (W.D. Pa. 2012), which analyzed the purported right to record the police as of July 2011, and held that the right was not clearly established as of that date. In particular, Snyder held that the law had not changed since the Kelly arrest: "While Kelly determined that there was no 'clearly established' right as of May 2007, there has been no significant development of First Amendment law in the Third Circuit between then and July 2011 that would suggest that the law had materially changed." Snyder v. Daugherty, 899 F. Supp. 2d 391, 414 n.11 (W.D. Pa. 2012). Given the True Blue Court's recognition of Snyder, a reasonable officer could conclude that there was no clearly established right as of July 2011.

In response, Plaintiff points to ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012), and Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), two appellate cases from other circuits which identified a right to record the police in May 2012 and August 2011, respectively. Plaintiffs also rely upon a series of district court cases.

But these non-binding are cases are not helpful to Plaintiffs. We explain next why Plaintiffs' non-binding cases have minimal impact on the clearly-established analysis under any circumstances. But putting aside for the moment for the moment this point that these non-binding cases have little to no impact upon the clearly-established analysis, it is critical to remember at the outset that Plaintiffs are not relying upon these non-binding cases to show the existence of clearly established law in a vacuum; Plaintiffs instead are relying upon these non-binding cases to show clearly established law even though there is currently binding Third Circuit law on point.

Given the existence of Kelly, it is plain that Plaintiffs' reliance upon non-binding cases cannot demonstrate the existence of a clearly established right. Where the non-binding law suggests the existence of a constitutional right, and the binding law holds that any such right is not clearly established, then the right is not clearly established. For this simple reason alone, the Court should affirm.

Moreover, as we explain next, Plaintiffs' non-binding cases have little to no impact on the clearly-established analysis under any circumstances (regardless of Kelly), for two independent and alternative reasons: (a) Plaintiffs' non-binding cases are distinguishable; and (b) Plaintiffs' non-binding cases (even if

indistinguishable) are contradicted by other non-binding cases, rendering the law unclear again.

a. Plaintiffs' Non-Binding Cases Are All Distinguishable

Plaintiffs' cases did not put the Officers here on notice by September 2013 of a constitutional right to record the police without expressive intent because these cases only recognized the right to record the police where there was evidence of expressive intent. See Alvarez, 679 F.3d at 588 ("The ACLU intends to publish these recordings online and through other forms of electronic media."); Glik, 655 F.3d at 82 (First Amendment protects "a range of conduct related to the gathering and dissemination of information") (emphasis added); see also Bowens v. Superintendent of Miami S. Beach Police Dep't, 557 F. App'x 857, 859 (11th Cir. 2014) (plaintiff "was covering mistreatment of citizens by Miami South Beach Police Department officers as a freelance photojournalist for an independent media outlet") (citing Smith v. Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000)).[3]

In this case, however, there was no such evidence of expressive intent. And, as noted above, even the DOJ agrees in its amicus brief that this issue -- whether a right exists absent expressive intent -- is one of "first impression." Brief for DOJ at 22 n.14.

[3] Plaintiff also points to the Ninth Circuit's decision in Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995), but this Court has already explained that the Ninth Circuit recognized the right to record police "only in passing." Kelly, 622 F.3d at 261.

Plaintiffs also rely upon many district court cases from outside the Third Circuit, but these cases, too, contained evidence of expressive intent. Higginbotham v. City of N.Y., 105 F. Supp. 3d 369, 378 (S.D.N.Y. 2015) (distinguishing another case on the basis that the plaintiff in that case, "although he called himself a 'citizen journalist,' did not allege that he ever intended to disseminate his videos"); Buehler v. City of Austin, 2015 WL 737031, at *8 (W.D. Tex. Feb. 20, 2015) ("The First Amendment protects a private citizen's right . . . to record . . . information for the purpose of conveying that information."), aff'd sub nom. Buehler v. City of Austin/Austin Police Dep't, 824 F.3d 548 (5th Cir. 2016); Lambert v. Polk Cty., Iowa, 723 F. Supp. 128, 133 (S.D. Iowa 1989) (similar; also, limited by Kelly as only recognizing right "in passing," 622 F.3d at 261-262); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972) (similar).

Similarly, the District Court here correctly distinguished other cases from the Eastern District of Pennsylvania on the basis that those cases "all contained some element of expressive conduct." Opinion at 10; see Gaymon v. Borough of Collingdale, 150 F. Supp. 3d 457, 468 (E.D. Pa. 2015) (acknowledging "First Amendment right to verbally express . . . disagreement" with officers); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) ("Videotaping is a legitimate means of gathering information for public dissemination."). The District Court here also discussed Fleck v. Trustees of Univ. of Pennsylvania, 995 F. Supp. 2d 390, 408 (E.D. Pa. 2014), and Montgomery v. Killingsworth, 2015 WL 289934, at *15 (E.D. Pa. Jan. 22, 2015), but those cases did not actually find

that there was a right to videotape the police (whether expressive or not); instead, they found that such an alleged right was not clearly established for arrests in 2010 and 2011, respectively.

Finally, we note that Plaintiffs' non-binding caselaw has only a minimal impact upon the clearly-established law analysis anyway. Regarding the district court decisions, this Court has recognized that although district court decisions play a role in the qualified immunity analysis, see, e.g., Pro v. Donatucci, 81 F.3d 1283 (3d Cir.1996), they "do not establish the law of the circuit, and are not even binding on other district courts within the district." Doe v. Delie, 257 F.3d 309, 321 n.10 (3d Cir. 2001).

Moreover, although a consensus of non-binding circuit court decisions is certainly relevant to the clearly-established law analysis, even that consensus may not demonstrate a clearly established right. On this point, the Supreme Court has only recognized that, "to the extent that a robust consensus of cases of persuasive authority in the Courts of Appeals could itself clearly establish the federal right respondent alleges," it would conditionally consider the holdings of such non-binding precedent (and, upon such conditional consideration, the Court explained that the non-binding precedent did not demonstrate a clearly established right anyway). Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015) (citing City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1779 (2015)) (emphasis added). However, the Court declined to actually hold that a consensus of non-binding circuit decisions could demonstrate clearly established law in the first place.

Therefore, given that Plaintiffs' cases are distinguishable anyway, the Court should find the Officers qualifiedly immune.

b. Even If Indistinguishable, Plaintiffs' Non-Binding Cases Do Not Create Clearly Established Law Because There Is Conflicting Precedent Elsewhere

Additionally, Plaintiffs' non-binding cases do not create clearly established law because there is conflicting precedent elsewhere, thereby rendering the law uncertain once more. See, e.g., Szymecki v. Houck, 353 F. App'x 852, 853 (4th Cir. 2009) (no clearly established right to record police); see also Crawford v. Geiger, 131 F. Supp. 3d 703, 714 (N.D. Ohio 2015) (no clearly established right as of August 2012), affd in part, rev'd in part and remanded, 2016 WL 4245480 (6th Cir. Aug. 11, 2016); Garcia v. Montgomery Cty., Maryland, 145 F. Supp. 3d 492, 508 (D. Md. 2015) (no clearly established right as of June 2011); Lawson v. Hilderbrand, 88 F. Supp. 3d 84, 100 (D. Conn. 2015) (no clearly established right as of November 2010), rev'd and remanded on other grounds, 642 F. App'x 34 (2d Cir. 2016); Williams v. Boggs, 2014 WL 585373, at *5 (E.D. Ky. Feb. 13, 2014) (no clearly established right as of January 2013); Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002, 1075 (D.N.M. 2014) (no clearly established right as of November 2009), aff'd on other grounds, 813 F.3d 912 (10th Cir. 2015); Banks v. Gallagher, 2010 WL 1903597, at *12 (M.D. Pa. Mar. 18, 2010) (similar), report and recommendation adopted, 2010 WL 1903596 (M.D. Pa. May 10, 2010).

Accordingly, Plaintiffs have not demonstrated a clearly established right to record the police absent evidence of expressive intent.

In fact, several courts (including the District Court here) have affirmatively held that recording without expressive intent is not protected. As one court explained, the act of capturing an image "does not partake of the attributes of expression; it is conduct, pure and simple." D'Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1538, 1541 (D.R.I. 1986), aff'd, 815 F.2d 692 (1st Cir. 1987); see also Larsen v. Fort Wayne Police Department, 825 F.Supp.2d 965, 979 (N.D. Ind. 2010) (father's videotaping of his daughter's school performance for "personal archival purposes" and "family documentation" also did not qualify for First Amendment protection); Jones v. Lakeview Sch. Dist., 2007 WL 2084341, at *7 (N.D. Ohio July 19, 2007) (capturing an image is conduct); Porat v. Lincoln Towers Cnty. Ass'n, 2005 WL 646093, at *4-5 (S.D.N.Y. Mar. 21, 2005) (denying protection to "purely private recreational, non-communicative photography" taken for photographer's personal use), aff'd, 464 F.3d 274 (2d Cir. 2006); Montefusco v. Nassau Cty., 39 F. Supp. 2d 231, 242 n.7 (E.D.N.Y. 1999) (similar); cf. Barry P. McDonald, The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age, 65 Ohio St. L.J. 249, 348 (2004) ("[W]e should also require that "qualifying" information be sought for the purpose of disseminating it to the public, and not just for individual consumption or dissemination to a limited audience selected for personal reasons.").

Therefore, Defendants are entitled to qualified immunity.[4]

[4] Moreover, the fact that the City's Directive 145 (issued in November 2012) identified the right to record as a protected First Amendment right does not create clearly established law, for four reasons. First, the issue in this case concerns

3. Plaintiffs' Policy Arguments In Favor Of The Creation Of A Constitutional Right Do Not Prove Clearly Established Law Either

Plaintiffs (as well as several amici, see, e.g., Brief for DOJ at 16-18; Brief for Cato Institute at 9; Brief for Rutherford Institute at 11; Brief for Electronic Frontier Foundation at 29; Brief for National Police Accountability Project at 9), argue that, even without evidence of expressive intent, the Court should nonetheless find that recording and observing is protected First Amendment activity because such a conclusion represents sound policy. At the outset, we note that these policy arguments cannot create clearly established law. At most, the arguments create a debate, but do not "place[] the constitutional question beyond debate." City & Cnty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (emphasis added).

Moreover, the policy arguments are insufficient. Plaintiffs claim that courts should not demand a showing of expressive intent at the time of the taking of the photograph because the photographer may not know that she intends to use the photographs until after she actually takes the photographs. They also claim that

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whether a right exists absent expressive intent, whereas the Directive contemplates an expressive intent. App. 1187 ("observing, gathering, and disseminating of information . . . is a form of free speech") (emphasis added). Second, the record demonstrates that many individual officers did not appreciate at the time of the issuance of the Directive that recordings were protected by the First Amendment. App. 229 (2015 Healy dep. at 40) ("[The officers] see First Amendment as free speech, as vocal or written. They don't see [the act of recording] as being First Amendment."). Third, clearly established law is defined by the Courts, not by the Police Commissioner. And the City is certainly free to provide greater protections than those required by the Constitution. Finally, we note that, at worst, the Directive applies to Mr. Fields, who was arrested in September 2013; it cannot apply to the September 2012 confrontation with Ms. Geraci.

courts should not demand a showing of expressive intent at the time of the taking of the photograph because such a requirement could increase confrontation with the police.

These arguments are flawed. As for Plaintiffs' assertion that they might not know if the photographs would be useful prior to taking the photographs, neither Plaintiff ever stated even a potential desire to share any photographs, if such photographs had been permitted. Indeed, Plaintiff Fields had the opportunity to take the photograph, and still only claimed that he took the photograph because it "was pretty cool," JA62 (Fields dep. at 11), not because he potentially wanted to share it.

Notably, one of the Amici Curiae, the First Amendment Law Professors, argue that taking a photograph should be protected even if the photographer does not intend to share her photograph. Brief for First Amendment Law Professors at 28-30 (arguing against "requiring an intent to distribute"); see also Brief for Society for Photographic Education at 9 ("Some [photographers allegedly entitled to protection] . . . do not intend to share any of their work, ever."); Brief for the Reporters Committee for Freedom of the Press and 31 Media Organizations at 14-15 (similar).

This brief was filed on behalf of "professors who write in First Amendment law." Id. at 1. But even these Law Professors do not cite any cases holding that such intent is irrelevant; they cite only to their own law review articles. Brief for First Amendment Law Professors at 28-30. And one of these Law Professors recognized, in an article that she independently authored, that many courts require

an "intended audience." E.g., Jane Bambauer, Is Data Speech?, 66 Stan. L. Rev. 57, 82 (2014).

And a different one of these Law Professors appeared to concede that, in 2016, there simply is no clearly established law: "Although four circuit courts -- the First, Seventh, Ninth, and Eleventh Circuits -- have found such a First Amendment right to record the police, in many other federal jurisdictions, courts have yet to clearly articulate a right to record, and some courts have even expressed doubt as to whether the right should exist at all. Indeed, in 2015, district courts within at least five different circuits held that there is not yet a 'clearly established' First Amendment right to record police activity in public, a finding that results in qualified immunity for police officers accused of violating the right." Jocelyn Simonson, Beyond Body Cameras: Defending A Robust Right to Record the Police, 104 Geo. L.J. 1559, 1561-1562 (2016).

These concessions are consistent with the DOJ's "first impression" concession. Brief for DOJ at 22 n.14.

Therefore, at a minimum, Plaintiffs' claim -- that there is a First Amendment right to record the police without a showing of expressive intent -- is not clearly established.

Also, as for Plaintiffs' claim that courts should not demand a statement of intent because such a showing would increase the likelihood of a confrontation with police, a plaintiff could still testify after the fact that such fear dissuaded her from informing the police of her expressive intent. Here, however, there is no

evidence of expressive intent at all, let alone evidence of expressive intent that was purposefully repressed in order to avoid a confrontation with police.[5]

Finally, we note that the DOJ (at 18) also relies upon Heffernan v. Patterson, 136 S. Ct. 1412 (2016). There, the Court held that the government violated an employee's First Amendment rights by firing him for perceived political activity (even though he apparently did not actually engage in political activity). Heffernan, however, was decided in 2016, and cannot demonstrate clearly established law as of September 2013. Indeed, the underlying appellate decision arose in this Circuit, which held that perceived political activity was not actual speech. Heffernan v. City of Paterson, 777 F.3d 147, 152-153 (3d Cir. 2015).

Regardless, Heffernan is fully distinguishable. In Heffernan, the plaintiff held up a politician's sign, and spoke in public with the politician's staff members outside the politician's office. 136 S. Ct. at 1417. The Supreme Court held that

[5] Plaintiffs (at 26-32) also rely heavily upon the claim that the First Amendment protects not only the right to express, but also the right to gather information. But, as Plaintiffs' cases state, the right to gather information itself must be accompanied by a subsequent plan to disseminate. See, e.g., Glik, 655 F.3d at 82 ("Gathering information about officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest."). Merely gathering information for oneself, without an intent to subsequently express or disseminate that information, is likewise unprotected. Indeed, the concept of a First Amendment right to access information is based upon the supposition that such access will lead to dissemination of information. "Because a major purpose of the First Amendment was to protect the free discussion of governmental affairs, the public and press have the right to attend certain types of governmental proceedings." Whiteland Woods, L.P. v. Twp. of W. Whiteland, 193 F.3d 177, 180 (3d Cir. 1999) (citations omitted) (holding that, even if an individual has a right of access, such access does not imply a right to videotape). Plaintiffs here, however, did not suggest an intent to disseminate.

such conduct was protected by the First Amendment. There is a big difference, however, between the eminently speech-like actions in Heffernan (holding up a political sign) and the actions at issue here, where Plaintiffs simply took, or attempted to take, photographs of the police. It is no surprise that the actions in Heffernan, unlike the actions here, would be protected, particularly given that the perceived speech there was of a political nature, which receives extra protection.

II. The Court Should Affirm The Entry Of Judgment For The City Because Plaintiffs Failed To Prove A Municipal Policy Or Custom

In addition to affirming judgment for the Officers because Plaintiffs failed to demonstrate a clearly established right, the Court should also affirm judgment for the City because Plaintiffs failed to establish a municipal policy or custom.

As explained above, the District Court here never reached the issue of municipal liability because it held that there was no right to record the police in the first place. We offer an alternative route to affirmance here; this Court need not reach the difficult constitutional question of whether the First Amendment protects Plaintiffs' right to record the police absent evidence of expressive intent, because (1) as just explained, regarding individual liability, Plaintiffs plainly failed to demonstrate the existence of a clearly established constitutional right, and (2) as we now explain, regarding municipal liability, Plaintiff did not prove the existence of a genuine issue of material fact regarding the existence of a municipal policy or custom showing that the City was deliberately indifferent to the need to train its officers regarding the right to record.

Therefore, this Court can assume arguendo that a right to record the police exists, but still reject Plaintiffs' claim for municipal liability against the City (and individual liability against the Officers).

We recognize that sometimes, without the benefit of a District Court ruling on the municipal liability issue, the Court might remand so that the District Court would rule first on this issue. However, as we now demonstrate, this Court can easily conclude on its own, as a matter of law, that Plaintiffs failed to create a fact issue as to the existence of municipal policy or custom showing that the City acted with deliberate indifference to the need to train its officers that they must not retaliate against citizens who recorded their actions.

Therefore, this Court should affirm the District Court's entry of judgment for Defendants, without remanding and without ever reaching the constitutional question. We first explain the law of municipal liability, and we then explain why Plaintiffs failed to carry their stringent burden of proving the City liable.

A. To Establish An Unconstitutional Policy, Plaintiffs Must Prove That The City Acted With Deliberate Indifference To The Need To Train Or Discipline Its Officers To Prevent Them From Violating Citizens' Constitutional Rights

As this Court is well-aware, under Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691-92 (1978), a municipality is not responsible for its employees' unconstitutional conduct merely because it employs them. A municipality can only be responsible for unconstitutional conduct when it can truly be said that a municipal "policy or custom" has caused an employee to commit a

constitutional violation. See Board of Bryan County v. Brown, 520 U.S. 397, 404 (1997).

There are three ways in which a plaintiff can demonstrate that a policy or custom caused the violation of her rights: (1) where a governmental policy is unconstitutional on its face; (2) where a policymaker acts personally to violate a citizen's constitutional rights; or (3) when the policymaker has failed to act to train or discipline its employees to avoid violating citizens' constitutional rights such that it could be said that the policymaker was deliberately indifferent to the rights of its citizens. See Bryan County, 520 U.S. at 404.

There is no evidence in this case that it was official City policy for police to retaliate against citizens that recorded police activity (in fact, our official policy was that police were supposed to allow it, App. 1185 (Memorandum 11-01); App. 1187 (Directive 145)), or that a City policymaker specifically approved of the actions of Officer Sisca or Officer Brown. Thus, Plaintiffs must proceed under the third category of Monell cases, in which it is alleged that policymakers were deliberately indifferent to need to train or discipline employees to prevent them from violating citizens' constitutional rights. See Bryan County, 520 U.S. at 404.

"When a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." Id. at 405 (emphasis added). Thus, the municipal custom or policy at issue must have been the "moving force" behind the individual officer's constitutional violation with a "direct causal link" to the

constitutional violation. Id. at 404; see also Doe v. Luzerne Cty., 660 F.3d 169, 180 (3d Cir. 2011) (same).

Moreover, while courts have held that a lack of training and discipline could support constitutional liability on the part of policymakers, these deficiencies in training and discipline must be "so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymaker . . . can reasonably be said to have been deliberately indifferent to the need." City of Canton v. Harris, 489 U.S. 378, 390 (1989). "A showing of simple or even heightened negligence will not suffice." Bryan County, 520 U.S. at 407; see also Chambers ex rel. Chambers v. Sch. Dist. Of Philadelphia Bd. Of Educ., 587 F.3d 176, 193 (3d Cir. 2009) (same). Further, the fact that one employee demonstrates that his training was not satisfactory is insufficient. Canton, 489 U.S. at 390-91.

"Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Connick v. Thompson, 563 U.S. 51, 61 (2011) (emphasis added).

Generally, this stringent and rigorous burden of proof is satisfied by showing, at a minimum, that municipal decisionmakers were aware of a pattern of improper conduct by their subordinates such that the policymakers were on notice that their current training or disciplinary policies were obviously insufficient to prevent constitutional violations. See id.; see also City of Canton, 489 U.S. at 397 (O'Connor, J., concurring in part and dissenting in part) ("Municipal liability for

failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations.").

"Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." Connick v. Thompson, 563 U.S. 51, 62 (2011). A pattern of violations puts municipal decisionmakers on notice that a new program is necessary, and their "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action -- the deliberate indifference -- necessary to trigger municipal liability." Id.; cf. Bryan County, 520 U.S. at 410 (ability to prove deliberate indifference absent pattern of conduct to put policymakers on notice applies to "narrow range of circumstances").

Furthermore, this Court has "held that a failure to train, discipline or control can only form the basis for section 1983 municipal liability if the plaintiff can show both contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate." Montgomery v. De Simone, 159 F.3d 120, 127 (3d Cir. 1998).

As we now explain, Plaintiffs cannot satisfy their stringent burden of because they cannot show that the City -- once it purportedly became aware of any occasional flaws with its training and discipline -- adhered to those flaws or

communicated a message of approval of those flaws. Quite to the contrary, the City proactively cured any breaches in its policy requiring officers to allow recordings.[6]

B. Plaintiffs Failed To Establish That The City Was Deliberately Indifferent To The Need To Train Or Supervise Its Officers

We first explain why Plaintiffs failed to show deliberate indifference. We then explain why Plaintiffs' contentions to the contrary are flawed.

1. The City's Consistent Policy Was To Proactively Prohibit Officers From Retaliating Against Those Who Recorded The Police, And To Cure Any Breaches In That Policy

This Court should conclude as a matter of law that Plaintiffs failed to show deliberate indifference. At the outset, it is difficult to see how City policymakers could be deliberately indifferent to the constitutional rights of citizens when, as explained above, those constitutional rights were not clearly established in the first place.

Moreover, at every step of the way, the City proactively tried to protect citizens' rights to record the police every time it realized there was a potential deficiency; it certainly did not deliberately and indifferently ignore, or communicate a message of approval of ignoring, those rights. The chronology is straightforward and telling.

[6] Apart from alleging a failure to train, Plaintiffs also alleged that there was an unconstitutional custom of PPD officers retaliating against citizens for recordings. Given that an unconstitutional custom claim also requires proof of acquiescence, this claim fails too. See, e.g., Baker v. Monroe Township, 50 F.3d 1186, 1191 (3d Cir. 1995); cf. Kelly, 622 F.3d at 263 (showing of deliberate indifference required for claims of unconstitutional municipal custom).

a. When The City Realized That Officers Were Confused In 2011, The City Proactively Published Memorandum 11-01

In late summer 2011, after attending a conference, Commissioner Ramsey first understood that officers did not understand that police were allowed to be recorded. App. 118 (2013 Healy dep. at 50); see also App. 119 (2013 Healy dep. at 54).

Accordingly, Commissioner Ramsey immediately requested the development of a policy requiring police to allow citizens to record the police, App. 118 (2013 Healy dep. at 52), so that "the officers knew what their duties [were]," App. 120 (2013 Healy dep. at 59).

On September 23, 2011, the City published Memorandum 11-01, which unambiguously commanded Philadelphia police officers that they "shall not interfere . . . [with] photographing, videotaping, or audibly recording police personnel." App. 1185.

The City viewed the Memorandum as "clear and succinct." App. 125 (2013 Healy dep. at 77). "As long as the people are not impeding your investigation or interfering with officer safety issues, they can tape whatever they want." App. 127 (2013 dep. at 84-85).

When the City published Memorandum 11-01 on September 23, 2011, it was distributed to supervisors and read verbatim to officers during roll call for three straight days. App. 125 (2013 Healy dep. at 80). Such training was "standard procedure" for policy changes. App. 200 (2015 Healy dep. at 10).

b. In 2012, The City Continued Its Proactive Stance By Converting The Memorandum Into A Directive

In May 2012, after there were some occasional instances where officers violated the policy, and after the DOJ drafted a letter in a separate litigation where the DOJ outlined its detailed position on the basic elements of a constitutionally adequate policy, App. 1675, the Commissioner once again set out to proactively reform the policy and repair any breaches. App. 129 (2013 Healy dep. at 93-94).

On November 9, 2012, the City completed Directive 145. App. 1187. The Directive stated on its face that it was issued in response to the DOJ's letter, offered the articulated purpose of "protect[ing] the constitutional rights of individuals to record police officers engaged in the public discharge of their duties," and specifically instructed Philadelphia police officers not to "block[], obstruct[], or otherwise hinder[]" recording activities unless the recording interfered with police work. Id.

Upon publication, Directive 145 was issued via teletype notice and a sergeant read the relevant contents during roll call for three days. App. 111 (2013 Healy dep. at 22); App. 132 (2013 Healy dep. at 108). The City sent copies to each district and unit, and each police officer and supervisor received a copy of Directive 145 and was required to verify their receipt by signature. App. 132 (2013 Healy dep. at 106-107); App. 205 (2015 Healy dep. at 16). After being notified of the new Directive, each officer was then responsible for knowing and following the Directive. App. 132-133 (2013 Healy dep. at 108-109).

c. In 2013, The City Actively Enforced Directive 145

Throughout 2013, after Captain Healy heard there were occasional violations, he directed additional roll call instructions where commanding officers would provide further reminders to officers to comply with Directive 145. App. 285-298 (2015 Healy dep. at 96-109); see also App. 369, 374, 378, 380, 398.

On November 26, 2013, Plaintiffs' counsel deposed Captain Healy in connection with three other right-to-record lawsuits. App. 143 (2013 Healy dep. at 150-152). Based upon the information presented to him at the November 2013 deposition, Captain Healy "realized that we should, or could have done more for the training." App. 260 (2015 Healy dep. at 71); see also App. 208, 235, 249.

Just thereafter, on December 18, 2013, less than a month after the deposition, Captain Healy "recommended . . . a training module . . . associated with Directive [145]." App. 335.

Then, immediately starting in January 2014, App. 213 (2015 Healy dep. at 24), in response to the deficiencies identified after the deposition, and fully consistent with the PPD's desire to remain proactive and ahead of the curve, the Police Department developed advance training on Directive 145, which was given to every one of the more than 6500 PPD officers as part of their annual Municipal Police Officer training in 2014. App. 211-213 (2015 Healy dep. at 22-24).

Thus, at every step of the way, the City set out to resolve recording-of-police problems, not exacerbate them, when those problems came to the City's attention. Accordingly, Plaintiffs failed to satisfy their "stringent" burden of showing that the City "adhered" to any known flaws in the execution of its, or "communicated a

message of approval" of those flaws. Connick v. Thompson, 563 U.S. 51, 62 (2011); Montgomery v. De Simone, 159 F.3d 120, 127 (3d Cir. 1998). Therefore, the Court should affirm the entry of judgment for the City.

2. Plaintiffs' Arguments To The Contrary Are Flawed

Plaintiffs pointed to several pieces of evidence allegedly creating a fact issue as to the existence of deliberate indifference. See Geraci v. City, E.D. Pa. No. 14-5264, Docket No. 27 (Plaintiffs' summary judgment response); Fields v. Geraci, E.D. Pa. No. 14-4424, Docket No. 27 (same). Upon further review, however, Plaintiffs' proffered evidence makes no such showing. Almost all of this evidence relates to non-compliance before the enactment of the City's policies. E.g., App. 1403, 1419, 1464 (Plaintiffs are relying upon complaints in Fleck v. City, Montgomery v. City, and Loeb v. City; all of these cases concerned alleged retaliation occurring prior to Memorandum 11-01). Such evidence cannot demonstrate deliberate indifference after the enactment of the policies.

And as for those few instances of non-compliance after the enactment of the policies, Plaintiffs can only point to, at most, a total of eleven violations of the policy across a 6500-member police department over a two-year period between the issuance of Memorandum 11-01 in September 2011 and the arrest of Mr. Fields in September 2013. Assuming arguendo that the City's policymakers were actually aware of these violations, Plaintiffs' offering of eleven violations is de minimis.

Put differently, even if the City took no further action, these eleven instances fail to demonstrate either an unconstitutional custom or deliberate indifference to

an unconstitutional policy. App. 278 (2015 Healy dep. at 89: "But out of 6500 officers, I don't see a rampant problem. I see a problem with maybe a handful of officers not compl[ying] with policy."). Indeed, even Ms. Geraci conceded that she had at least twenty different interactions with the police, and the September 21, 2012 incident represented the only time there was a confrontation. App. 39 (Geraci dep. at 43).

Moreover, even if City acquiescence in these eleven instances could demonstrate municipal liability if the City failed to respond, Plaintiffs' proof fails because the City did respond. Most notably, out of the eleven examples, eight took place prior to the City's affirmative enactment of Directive 145 in 2012. App. 1362, 1569, 1617, 1636, 1640, 1643, 1644, 1647. And it was during this pre-Directive time frame that the City was already actively working to improve its policy of allowing citizens to record the police. App. 129 (2013 Healy dep. at 93-94).

Put differently, the enactment of Directive 145 itself constitutes response to notice of an alleged deficiency. So Plaintiffs' reliance upon pre-Directive violations to show deliberate indifference cannot succeed.[7]

[7] Plaintiffs rely heavily upon a March 2013 letter to Commissioner Ramsey from the Police Advisory Commission ("PAC"), advising the Commissioner that the PAC did not believe that officers were adhering to the City's policies relating to recording of officers. App. 1653. However, although the letter was written in March 2013, after the Directive, the letter relied upon incidents in late 2011 and early 2012, prior to the issuance of the Directive, and at a time when the City was actively curing any policy breaches. App. 1360 (letter from Captain Healy: "the PPD was in the process of changing the exi[s]ting culture without the PAC memo"). Accordingly, the PAC's letter cannot support deliberate indifference.

This leaves only three post-Directive instances of non-compliance. App. 1642, 1649, 1740. Putting aside the fact that these three instances are only relevant to Mr. Fields' claim (and not Ms. Geraci's claim), these three violations, standing alone, surely do not support a municipal liability theory, as they are de minimis.

Moreover, as explained above, the City reacted curatively with respect to even these few, post-Directive violations. Specifically, Captain Healy ordered additional roll call readings throughout 2013, and ordered a training immediately after his November 2013 deposition identified certain training flaws.

Plaintiffs' claim -- that Captain Healy's admission that he knew that there was a training error demonstrates municipal liability, because we should have started training earlier -- is flawed.

As noted, as soon as he realized there was a training deficiency (at the November 2013 deposition), he immediately initiated a training program (in December 2013).[8]

Moreover, even if Captain Healy were aware of alleged training deficiencies in early 2013 (and he was not), he still acted to fix these deficiencies within a year. Plaintiffs did not prove that taking a year to overhaul an entire training module

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See also App. 1362 (PAC advising Commissioner Ramsey of additional breach in early 2012).

[8] Moreover, Plaintiffs failed to prove that any knowledge of Captain Healy equates to knowledge on behalf of the City.

establishes constitutional deliberate indifference, particularly where Captain Healy ordered additional roll call readings throughout 2013 anyway.[9]

Therefore, Plaintiffs failed to show the necessary deliberate indifference, and this Court should affirm.

[9] Even if the City should have initiated a training program earlier than December 2013 (which Plaintiffs do not prove), this does not create municipal liability for failure to train, because Plaintiffs did not prove that the training deficiencies rose to a constitutional level anyway. At best, Plaintiffs established that the City "could have done more for the training." App. 260 (2015 Healy dep. at 71). This is insufficient. City of Canton, 489 U.S. at 392.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's Order of February 19, 2016, entering judgment for Defendants The City of Philadelphia, Police Officer Dawn Brown, and Police Officer Joseph Sisca on Plaintiffs' First Amendment claim.[10]

Respectfully submitted,

Dated: December 23, 2016

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[10] Should the Court remand for a qualified immunity trial (which the Court should not do), the Officers would seek to demonstrate, even if it is clearly established that an individual has the right to record the police absent interference, that Plaintiffs here actually interfered with the police.

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I hereby certify that I am a member of the bar of this Court.

Date: December 23, 2016

/s/ Craig Gottlieb
Craig Gottlieb

CERTIFICATION OF COMPLIANCE WITH RULE 32(a) AND REQUIREMENTS FOR ELECTRONIC FILING

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,584 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(f).

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3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

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Date: December 23, 2016

/s/ Craig Gottlieb
Craig Gottlieb

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Brief of Appellees upon all counsel of record via the ECF system of the United States Court of Appeals for the Third Circuit.

Dated: December 23, 2016

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