

UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW HAMPSHIRE

ALFREDO VALENTIN
6 LAWTON STREET
MANCHESTER, NH 03102

Plaintiff,

v.

CITY OF MANCHESTER
ONE CITY HALL PLAZA
MANCHESTER, NH 03101,

BRIAN LEVEILLE
405 VALLEY STREET
MANCHESTER, NH 03103,

CHRISTOPHER SANDERS
405 VALLEY STREET
MANCHESTER, NH 03103,

Defendants.

Case No.: 1:15-cv-00235-PB

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR
PARTIAL SUMMARY JUDGMENT AGAINST THE POLICE OFFICER
DEFENDANTS AS TO COUNT I (FIRST AMENDMENT)**

NOW COMES Plaintiff Alfredo Valentin, and respectfully submits this memorandum of law in support of his Motion for Partial Summary Judgment against Manchester Police Sergeants Brian LeVeille and Christopher Sanders (hereinafter, the "Police Officer Defendants") as to Count I concerning Plaintiff's First Amendment claim.

SUMMARY OF ARGUMENT

This is not a close case. On March 2, 2015, Manchester police officers Sergeant Brian LeVeille and Sergeant Christopher Sanders arrested Plaintiff Alfredo Valentin for criminal

wiretapping, *see* RSA 570-A:2, simply because—and only because—Valentin used his cellular phone to record the officers while they were performing their official duties on the public street outside Valentin’s home and without interfering with the officers’ performance of those duties. These undisputed facts show that the Police Officer Defendants violated Valentin’s clearly-established First Amendment rights as a matter of law.

As the First Circuit Court of Appeals explained in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) and *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014), a person has a clearly-established First Amendment right to both video and audio record police officers engaged in official duties in public places provided that the recording does not interfere with the officers’ performance of those duties. This First Amendment right exists regardless of whether the police officer being recorded consents to the recording and regardless of whether the recording is done openly. Following the *Glik* decision, in a March 22, 2012 memorandum, the New Hampshire Attorney General’s Office explained this legal principle to all law enforcement agencies in New Hampshire and explicitly warned these agencies about the consequences of ignoring it.

In arresting and charging Valentin with criminal wiretapping, Defendants LeVeille and Sanders blatantly violated this clearly-established legal principle. Valentin was in a public place recording law enforcement officers without interfering with their duties. Arresting officer LeVeille’s affidavit simply states: “I advised him that he had not asked for our permission to record, nor had he advised us that he was recording our conversation. I advised him that this was a crime” The Manchester police department’s press release simply states: Valentin “allegedly began audio recording a conversation between two police officers involved in the investigation” without their consent. For this—and only this—the Manchester police department arrested and charged Valentin with criminal wiretapping. *See* RSA 570-A. The City of

Manchester ultimately voluntarily dismissed this charge on May 15, 2015.

Shockingly, even in the face of this clearly unconstitutional arrest, the Hillsborough County Attorney's Office then elected to further prosecute Valentin for a misdemeanor violation of the wiretap statute in an indictment issued on June 18, 2015—one day before this federal civil rights lawsuit was filed. The Hillsborough County Attorney's Office newly contended in the indictment that Valentin's recording was done "while trying to hide the telephone from view." Defendants now reassert this "secret recording" argument as a defense in this action.

However, whether Valentin recorded the Police Officer Defendants "secretly" is immaterial. The First Amendment right to record law enforcement under *Glik* and *Gericke* clearly extends to both open and secret recordings of police officers publicly performing their duties. In fact, secret recording is a key component of this First Amendment right. It is the only way that individuals who are too afraid to openly record police officers can exercise their constitutionally-protected rights, and it is a critical tool to gather accurate information about official government activity. The Hillsborough County Superior Court (Northern Division) agreed. In an October 21, 2015 order dismissing the wiretapping indictment, that Court (Abramson, J.) held that "the First Amendment protects secretly filming police in public, for the reasons that the First Amendment generally protects filming police. The public has the right to gather and disseminate information about the police." Consistent with First Circuit precedent, this Court must reach the same conclusion.

This case is about law enforcement overreach and a breakdown in the justice system that caused Valentin to be detained, arrested, and prosecuted in violation of his clearly-established constitutional rights. Valentin did nothing wrong. He simply was exercising his First Amendment rights. The conduct of the Police Officer Defendants in this case was outrageous. It

is deeply disturbing that police officers employed by the City of Manchester—New Hampshire’s largest city—would think that such an arrest and charge is appropriate in the face of clear First Circuit precedent and crystal clear warnings from the New Hampshire Attorney General’s Office. In short, Valentin had his constitutional rights violated by the very law enforcement personnel who have a duty to uphold and defend his constitutional rights. And, here, the damage caused goes far beyond the interference with Valentin’s First Amendment rights. The Police Officer Defendants’ actions caused Valentin to lose his job which he held for 11 years.

Accordingly, this Court should issue judgment in favor of Plaintiff and against the Police Officer Defendants as to Count I (First Amendment).¹

**STATEMENT OF FACTS CONSTRUED IN FAVOR OF THE POLICE OFFICER
DEFENDANTS**

I. The New Hampshire Attorney General’s Memorandum Regarding the Constitutional Right to Record Law Enforcement

1. On March 22, 2012, the New Hampshire Attorney General distributed a memorandum (hereinafter, “AG Memorandum”) titled “Audio Recording Law Enforcement Officers” to all law enforcement agencies in New Hampshire. *See* AG Memorandum, attached as *Exhibit A*.²

2. The AG Memorandum addressed the fact that “a number of police departments [had] arrested individuals for audio and/or video recording police officers in public engaged in official duties.” *Id.* at 1.

3. The AG Memorandum alerted all law enforcement to “a recent opinion of the First Court of Appeals, which makes such arrests illegal.” *Id.*

¹ Plaintiff requests a jury trial on Plaintiff’s damages.

² All exhibits referenced herein are attached to the accompanying Declaration of Gilles Bissonnette, Esq. in Support of Plaintiff’s Motion for Partial Summary Judgment Against the Police Officer Defendants as to Count I (First Amendment). This declaration and exhibits have been filed simultaneously with this Motion and supporting Memorandum.

4. The AG Memorandum stated that *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) held that “members of the public have a right, under the first amendment to the federal constitution, to video and audio record law enforcement officers in a public place when the officers are acting in in the course of their official duties, provided that the recording is done peacefully and does not interfere with the officers’ performance of their duties.” *Id.*

5. The AG Memorandum repeated the part of the *Glik* opinion stating the following: “[A] citizen’s right to film government officials, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.” *Id.*

6. The AG Memorandum described other locations where the right to record had been upheld, including the “fil[m]ing of a public official outside his home.” *Id.* at 2 (emphasis added).

7. The AG Memorandum stated that the *Glik* opinion “makes clear that a person has a First Amendment right to both video and audio record police officers engaged in official duties in public places such as ... on a public street or sidewalk, provided it does not interfere with the officers’ performance of those duties.” *Id.* (emphasis added).

8. The AG Memorandum warned that “if a person engaging in such activity is arrested, the arresting officer could be subject to liability for his or her actions.” *Id.*

II. Valentin’s Unconstitutional Arrest

9. Valentin owns his home at 6 Lawton Street in Manchester. *See* Valentin Police Reports at MAN005, 014 (LeVeille Sworn Affidavit and Supplement Notes), attached as Exhibit B.

10. At approximately 10:30 a.m., the Manchester police department executed a drug search warrant at 6 Lawton Street as part of an 8-month-long drug investigation concerning

Christopher Chapman. Chapman rented living space at 6 Lawton Street from Valentin. *See id.*; Press Release, attached as Exhibit C.

11. At approximately 11:10 a.m., Valentin arrived at the scene and contact was made with Defendant Manchester police Sergeant Brian K. LeVeille and an additional officer. *See* Valentin Police Reports at MAN005, 014 (LeVeille Sworn Affidavit and Supplement Notes), attached as Exhibit B.

12. These officers “explained to [Valentin] that [they] were executing a search warrant on his residence and that he was not allowed inside until [the police] had completed the search.” *Id.*

13. Valentin “demanded that [the officers] provide him with a copy of the warrant.” *Id.*

14. LeVeille declined to immediately produce it, but “explained to [Valentin] that [the Manchester police department] would leave a copy of the warrant at the residence when [they] were done” with the search. Valentin then left. *Id.*

15. At approximately 1:00 p.m., Defendant Manchester police Sergeant Christopher Sanders “observed that Mr. Valentin had returned.” *See id.* at MAN012 (Sanders Supplement Notes); *see also id.* at MAN005, 014 (LeVeille Sworn Affidavit and Supplement Notes).

16. After a brief conversation with Valentin about the unmarked police vehicle in Valentin's driveway, Sanders “advised Mr. Valentin that he was not allowed on the property until [the police] had concluded [their] search.” *Id.*

17. Valentin “asked for [Sanders’s] name and badge which [Sanders] provided. Mr. Valentin then used his phone to capture a picture of [Sanders’s] badge which [Sanders] held out in front of [him].” *Id.*

18. Sanders “advised Sgt LeVeille that Mr. Valentin had returned at which time [LeVeille] joined [Sanders] in front of the residence.” *Id.* at MAN013 (Sanders Supplement Notes) (emphasis added); *see also id.* at MAN005, 014 (LeVeille Sworn Affidavit and Supplement Notes).

19. Sanders and LeVeille then spoke to Valentin outside his residence, which was in a public place out in the open near or on Lawton Street. *Id.* at MAN013 (Sanders Supplement Notes); *id.* at MAN005, 014 (LeVeille Sworn Affidavit and Supplement Notes); *see also* Order of Dismissal, at 3 (“The State does not dispute that [Valentin] filmed police performing their duties in public.”), attached as Exhibit D.

20. Sanders and LeVeille “explained to [Valentin] that the search [of his residence] was not complete and [that Valentin] was not allowed inside until [the police] were finished. *See* Valentin Police Reports at MAN005, 014 (LeVeille Sworn Affidavit and Supplement Notes), attached as Exhibit B; *id.* at MAN013 (Sanders Supplement Notes).

21. Valentin “demanded to see the search warrant.” *Id.* LeVeille “explained that he would receive a copy as soon as the search was completed.” *Id.*

22. Valentin “indicated that he was not convinced that [the police] had a warrant because [LeVeille] refused to produce it at this time.” *Id.*

23. LeVeille then “explained that a warrant had been issued and agreed to show [Valentin] the warrant.” *Id.*

24. While LeVeille went to retrieve the search warrant inside Valentin’s residence, Sanders remained with Valentin outside in public. *Id.* at MAN013 (Sanders Supplement Notes) noting that they were “at the edge of the walkway and the street”).

25. LeVeille returned outside and “showed [Valentin] the warrant.” *See id.* at

MAN005-6, 014 (LeVeille Sworn Affidavit and Supplement Notes); *id.* at MAN013 (Sanders Supplement Notes).

26. Valentin then “began questioning [the police’s] ability to search [Valentin’s] entire residence, including areas [within] his control.” *Id.*

27. LeVeille “again showed [Valentin] the warrant and explained that the judge had issued the warrant permitting [the police] to search the entire residence, including the curtilage.” *Id.*

28. Valentin “demanded that he be given a copy of the warrant application.” LeVeille “advised [Mr. Valentin] that he was not entitled to a copy of the application under the law.” *Id.* at MAN013 (Sanders Supplement Notes).

29. At this point during the exchange, while they were outside in public, LeVeille “observed Valentin was holding his cell phone in his left hand.” *Id.* at MAN006, 014 (LeVeille Sworn Affidavit and Supplement Notes).

30. At or around this time, Sanders also “observed that Mr. Valentin was holding his cell phone in his left hand down by his side partially obscured by his leg.” *Id.* at MAN013 (Sanders Supplement Notes); *id.* at MAN006, 014 (LeVeille Sworn Affidavit and Supplement Notes). Sanders “further observed that Mr. Valentin had engaged his cell phone voice recorder which [Sanders] could further observe was actively recording as the length of the recording was visibly timed, denoted by changing numbers.” *Id.* at MAN013 (Sanders Supplement Notes).

31. After seeing the phone, Sanders “asked [Valentin] if he was recording the conversation.” *Id.* at MAN013 (Sanders Supplement Notes); *id.* at MAN006, 014 (LeVeille Sworn Affidavit and Supplement Notes). Valentin stated “yes.” *Id.*

32. LeVeille “advised [Valentin] that he had not asked for [the officers’] permission

to record [the conversation], nor had he advised [the officers] that he was recording [the] conversation.” *Id.* at MAN006, 014 (LeVeille Sworn Affidavit and Supplement Notes). LeVeille “advised [Valentin] that this was a crime.” *Id.*

33. The engagement then ended, and Valentin “began walking away toward the driveway” near an unmarked police vehicle. *Id.*

34. LeVeille and Sanders then “followed [Valentin] and again engaged him.” *Id.* LeVeille “explained to [Valentin] that he was under arrest.” *Id.*

III. The Unconstitutional Prosecution and Dismissal

35. On March 4, 2015, the City of Manchester formally charged Valentin with felony wiretapping, a class B felony, in violation RSA 570-A:2, I. The offense is punishable with between 3.5 and 7 years in New Hampshire state prison and a fine of up to \$4,000. *See* RSA 651:2, II(b), IV(a); *see* Felony Complaint, attached as Exhibit E.

36. The criminal complaint stated that Valentin “was observed recording the conversation and did not have permission to do so nor had Valentin advise[d] that they were being recorded.” *See id.*

37. Valentin was never charged with any offense related to controlled substances or any other offense (e.g. disorderly conduct). *See id.*; *see also* First Prosecution Case Summary, attached as Exhibit F; Indictment, attached as Exhibit H; Second Prosecution Case Summary, attached as Exhibit I.

38. On March 4, 2015, the Manchester police department published a press release stating that Valentin was one of three individuals arrested in connection with the eight-month heroin investigation which yielded over 300 grams of heroin and \$16,000 cash. *See* Press Release, attached as Exhibit C.

39. The press release added: Valentin “allegedly began audio recording a conversation between two police officers involved in the investigation. New Hampshire requires two party consent when audio recording individuals, so Valentin was immediately placed into custody and transported to police headquarters.” *Id.*

40. On approximately March 30, 2015, Valentin’s counsel filed a motion to dismiss the criminal complaint. *See* First Motion to Dismiss, attached as Exhibit G.

41. The City of Manchester filed no response. *See* First Prosecution Case Summary, attached as Exhibit F.

42. On approximately May 15, 2015, the City of Manchester *nolle prossed* the criminal charge against Valentin. This dismissal occurred days before the probable cause hearing scheduled for May 20, 2015. *Id.*

IV. The Hillsborough County Attorney’s Prosecution, and the Superior Court’s Decision that Valentin’s Recording was Constitutionally Protected.

43. On June 18, 2015, the Hillsborough County Attorney’s Office indicted Valentin on criminal wiretapping, this time as a misdemeanor under RSA 570-A:2, I-a. *See* Indictment, attached as Exhibit H; *see also* Second Prosecution Case Summary, attached as Exhibit I.

44. The indictment alleged that Valentin, “without the consent of all parties to the communication or without otherwise having authority under RSA 570-A, knowingly intercepted or endeavored to intercept oral communications between himself and two officers of the Manchester Police Department without their consent by using his cellular telephone to record a conversation he had with the officers while trying to hide the telephone from view.” *See* Indictment, attached as Exhibit H (emphasis added); *see also* Second Prosecution Case Summary, attached as Exhibit I.

45. In short, this indictment—through its language “while trying to hide the telephone

from view”—alleged that Valentin engaged in secret recording, presumably based on Sanders’s police report. *See* Valentin Police Reports at MAN013 (Sanders’s statement in his police report that he “observed that Mr. Valentin was holding his cell phone in his left hand down by his side partially obscured by his leg”) attached as *Exhibit B*.

46. Valentin filed this civil rights lawsuit in federal court on June 19, 2015. This case was then stayed on September 24, 2015 pending the outcome of the new criminal action.

47. Valentin entered a “not guilty” plea on July 17, 2015, and he was released on personal recognizance bail, with \$2,000 to be paid in the event of breach. *See* Second Prosecution Case Summary, attached as *Exhibit I*.

48. On approximately July 17, 2015, the Hillsborough County Attorney’s Office filed a notice of intent to seek class A misdemeanor penalties—which increased the potential sentence from a \$1,200 fine only (as a class B misdemeanor) to a penalty of up to one year in jail and a fine of up to \$2,000. *See* RSA 651:2, II(c), IV(a); *see also* Second Prosecution Case Summary, attached as *Exhibit I*.

49. On approximately August 24, 2015, Valentin moved to dismiss the indictment on the ground that the arrest and charge violated his First Amendment rights. *See* Valentin Memo. on Mot. to Dismiss, attached as *Exhibit J*; *see also* Second Prosecution Case Summary, attached as *Exhibit I*.

50. On approximately September 8, 2015, the Hillsborough County Attorney’s Office responded, arguing that Valentin’s recording was not protected under the theory that “the constitution does not protect an individual who surreptitiously records the communications of police officers engaged in their official duties in a public place.” *See* State’s Objection at 3, attached as *Exhibit K*. Valentin filed a reply on September 14, 2015. *See* Valentin Reply,

attached as Exhibit L.

51. Oral argument was held on Valentin's Motion to Dismiss on October 13, 2015. See Second Prosecution Case Summary, attached as Exhibit I.

52. On October 21, 2015, the Hillsborough County Superior Court Northern Division (Abramson, J.) dismissed the indictment. The Court held that "the First Amendment protects secretly filming police in public, for the reasons that the First Amendment generally protects filming police. The public has the right to gather and disseminate information about the police." See Order of Dismissal, at 5 (citing *Glik*, 655 F.3d at 82), attached as Exhibit D. The Superior Court's order characterized the State's representation that the *Glik* and *Gericke* decisions allow Valentin to be punished for wiretapping as "manifestly incorrect." *Id.* at 3.

53. This decision was not appealed to the New Hampshire Supreme Court. See Second Prosecution Case Summary, attached as Exhibit I.

STANDARD OF DECISION

Summary judgment is appropriate when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, a court "construe[s] the record evidence in the light most favorable to, and [draws] all reasonable inferences in favor of, the non-moving party." *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002) (citation and internal quotations omitted). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions [of the record] which it believes demonstrate the absence of a material fact." *Celotex v. Catrett*, 477 U.S. 317, 323 (1986) (citation and internal quotations omitted). Once that burden is met, the non-moving party must "produce evidence on which a reasonable finder of fact ... could base a

verdict for it,” or else the motion will be granted. *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 94 (1st Cir. 1996) (citation omitted).

ARGUMENT

No dispute of material fact exists preventing this Court from concluding that the Police Officer Defendants are liable for violating Plaintiff’s First Amendment rights and are not entitled to qualified immunity. The Police Officer Defendants’ own admissions make clear that they arrested Plaintiff simply for recording them without their consent as they publicly performed their official duties. While the Police Officer Defendants contend that Plaintiff’s recording was done “surreptitiously,” clear First Circuit precedent makes this factual contention irrelevant.

I. The Material Facts, Construed in Favor of the Police Officer Defendants, Bar the Application of Qualified Immunity and Establish Their Liability as to Plaintiff’s First Amendment Claim as a Matter of Law.

Generally, qualified immunity protects government officials performing discretionary functions from liability for conduct that is objectively reasonable. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This objective standard requires a court to analyze “whether an objectively reasonable officer in the defendant’s position would have understood [his] action to violate the plaintiff’s rights” under the circumstances. *Mihos v. Swift*, 358 F.3d 91, 110 (1st Cir. 2004) (quoting *Suboh v. District Attorney’s Office of Suffolk Dist.*, 298 F.3d 81, 95 (1st Cir. 2002)); see also *Floyd v. Farrell*, 765 F.2d 1, 6 (1st Cir. 1985) (“The objective focus of the *Harlow* test precludes us from undercutting this finding of objectively reasonable belief with inquiries into actual motives or beliefs.”). Thus, as Plaintiff is the moving party, this Court’s inquiry must construe the facts in favor of the Police Officer Defendants and assess whether, under those factual circumstances, an objectively reasonable officer in their position would have understood that their actions in arresting Valentin violated clearly-established First Amendment

principles.

Under this qualified immunity analysis, the Court must decide “(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was ‘clearly established’ at the time of the defendant’s alleged violation.” *See Glik*, 655 F.3d at 81 (quoting *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009)). Plaintiff will address these elements in reverse order.

A. As Clearly Established by the First Circuit, the First Amendment Protects the Recording of Police Officers Engaged in the Public Performance of their Official Duties, Regardless of Whether the Recording is Done Openly

The First Circuit Court of Appeals held clearly and unequivocally in the 2011 *Glik* opinion that individuals have a First Amendment right to audio or video record law enforcement officers in a public place when the officers are acting in the course of their official duties so long as the recording does not “interfere with the police officers’ performance of their duties.” *Glik*, 655 F.3d at 82-84 (holding that there is “a constitutionally protected right to videotape police carrying out their duties in public”); *see also ACLU v. Alvarez*, 679 F.3d 583, 603-08 (7th Cir. 2012) (discussing scrutiny and balancing tests as applied to recording police officers). This right extends to public streets. *Alvarez*, 679 F.3d at 594 (holding that the argument that recording on public streets is disallowed was an “extreme position”). In *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014), the First Circuit Court of Appeals affirmed *Glik* and further explained that “[i]t was clearly established that the First Amendment right to film police carrying out their duties in public, including a traffic stop, remains unfettered if no reasonable restriction is imposed or in place [i.e., reasonable orders to maintain safety and control].” *Id.* at 10.³

³ The analysis of whether a right was “clearly established” divides into two parts: “(1) ‘the clarity of the law at the time of the alleged civil rights violation,’ and (2) whether, given the facts of the particular case, ‘a reasonable defendant would have understood that his conduct violated the plaintiff[’s] constitutional rights.’” *Glik*, 655 F.3d at

In describing this right, the *Glik* court explained that “[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’” *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The Court added:

Freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.

Id. (internal citations and quotations omitted). Indeed, “[i]n our society, police officers are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights.” *Id.* “The same restraint demanded of law enforcement officers in the face of ‘provocative and challenging’ speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.” *Id.* (internal quotations and citations omitted).

As *Glik*’s First Amendment holding makes clear, the right to record law enforcement broadly covers all recordings of police officers in public spaces without regard to the officer’s awareness that a recording is being made. Nothing in *Glik* permits an arrest for recording a police officer without his consent or without his knowledge. *See Gericke v. Begin*, No. 11-cv-231-SM, 2012 U.S. Dist. LEXIS 148007, at *22 n.4 (D.N.H. Oct. 12, 2012) (noting “the court’s broad holding in *Glik*”), *aff’d*, 753 F.3d 1 (1st Cir. 2014). In short, First Circuit case law has made clear that “a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established

81 (quoting *Maldonado*, 568 F.3d at 269). An affirmative finding on these inquiries does “not require a case directly on point, but existing precedent must have placed the ... constitutional question beyond debate.” *Id.* (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

liberty safeguarded by the First Amendment.” *Glik*, 655 F.3d at 85.

The Police Officer Defendants likely will claim that they are entitled to qualified immunity because (i) Valentin’s recording was done secretly and (ii) the right to secretly record the police publicly performing their official duties without interference was not clearly established in *Glik* and *Gericke* at the time of Plaintiff’s March 2, 2015 arrest. For example, Sanders’s police report, but not LeVeille’s report or arrest affidavit, states that “Valentin was holding his cell phone in his left hand down by his side partially obscured by his leg” (though Sanders also claims that he “observed that Mr. Valentin had engaged his cell phone voice recorder”). See Valentin Police Report, at MAN013 (Sanders Supplement Notes), attached as Exhibit B. However, this “secret recording” argument, as Judge Abramson correctly held, is “manifestly incorrect” and can be summarily dismissed. See Order of Dismissal, at 3, attached as Exhibit D.

The First Amendment principle in *Glik* contains no limitation that the recording must be done openly. In *Glik*’s First Amendment analysis, the Court explained: “[I]s there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative.” *Glik*, 655 F.3d at 82. As Judge Abramson accurately observed in citing this language, “[t]he question of ‘openness’ did not enter into the First Amendment analysis in either case [*Glik* and *Gericke*].” See Order of Dismissal, at 3, attached as Exhibit D. The only explicit limitation on the right to record referenced in *Glik* or *Gericke* concern situations where the recording “interfere[s] with the police officers’ performance of their duties.” *Glik*, 655 F.3d at 84; see also *Gericke*, 753 F.3d at 8 (“a police order that is specifically directed at the First Amendment right to film police performing their

duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties”).

The right to secretly record the police in public is not an extension of *Glik* and *Gericke*, but rather has already been definitively recognized by these two cases. The right to record preserves two core free speech interests: promoting an informed discussion of government affairs and uncovering government misconduct. The exercise of this First Amendment right has informed and expanded the public’s understanding of encounters between police officers and civilians. In New York City, for example, a civilian recording of the arrest of Eric Garner revealed that he said “I can’t breathe” approximately eleven times while an officer placed him in a chokehold that ultimately led to his death. *See* Joseph Goldstein and Nate Schweber, “Man’s Death After Chokehold Raises Old Issue for the Police,” *N.Y. Times* (July 18, 2014), *available at* <http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html>. A civilian recording at the United States-Mexico border revealed Anastacio Hernandez-Rogas screamed “Ayudame”—help me—as Border Patrol agents struck him with a baton and shocked him with a taser before he suffered a heart attack. *See* John Carlos Frey, “What’s Going On With The Border Patrol?,” *L.A. Times* (Apr. 20, 2012), *available at* <http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420>. The rule in *Glik* and *Gericke* recognizes that recording itself—whether openly or in secret—is a valuable tool that enhances government transparency and accountability.

Indeed, the right to secretly record exists and is vital because police officers may change their conduct if they are aware that they are being recorded. This may prevent the public from gathering accurate information about how the police behave when they are not under scrutiny. Some civilians reasonably fear that openly recording police officers in certain circumstances

could trigger a hostile response that threatens their physical safety or liberty. The facts of this case—where Plaintiff’s recording triggered an arrest—confirm the reasonableness of this fear. *Glik*, again, reminds us that the First Amendment’s protections are important because the government, including police officers, has a “special incentive to repress opposition and often wields a more effective power of suppression.” *Glik*, 655 F.3d at 82 (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 n.11 (1978)). Anonymity when recording law enforcement is vital, as it “is a shield from the tyranny of the majority It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation.” See *McIntyre v. Ohio Elections Commission*, 362 U.S. 60, 76 (1995). When a person does not feel safe interacting with law enforcement, he can only exercise his First Amendment right to record police officers effectively if he does so secretly. Secret recordings—where the recording individual is anonymous during the recording—protect individuals from immediate law enforcement retaliation. Requiring a person to record openly or affirmatively seek an officer’s consent places the person in the precarious position of singling himself out to the very law enforcement officer he is seeking to document. Given that this “outing” carries the risk of an adversarial confrontation with law enforcement, it is common sense that many would not record law enforcement if they could not do it secretly.

In short, the broad scope of the *Glik* and *Gericke* decisions (and the AG Memorandum) clearly established the right to record, regardless of whether it is done openly. This is why, on October 21, 2015, the Hillsborough County Superior Court Northern Division (Abramson, J.) dismissed the indictment against Plaintiff, correctly holding that “the First Amendment protects secretly filming police in public, for the reasons that the First Amendment generally protects filming police. The public has the right to gather and disseminate information about the police.”

See Order of Dismissal, at 5 (citing *Glik*, 655 F.3d at 82), attached as Exhibit D. This Court must reach the same result.

B. The Police Officer Defendants Violated This Clearly-Established First Amendment Right

Under clearly established principles in *Glik* and *Gericke*, Plaintiff must prove the following elements under his First Amendment claim: (i) LeVeille and Sanders were police officers in a public place; (ii) LeVeille and Sanders were engaged in their official duties; (iii) Valentin was not interfering with Sanders's or LeVeille's official duties; and (iv) Sanders and LeVeille arrested Valentin for recording their conversation under the color of law. Here, the Police Officer Defendants' own reports and arrest affidavit—which make clear what they understood the facts to be, the actions they took, and why they took them—conclusively establish each of these elements.

First, there is no dispute that the Police Officer Defendants were in a public place—namely, on or near a public street in front of Plaintiff's home—at the time Plaintiff recorded his interaction with the Police Officer Defendants. See Valentin Police Reports at MAN013 (Sanders Supplement Notes noting that Valentin was outside “at the edge of the walkway and the street”), attached as Exhibit B; Order of Dismissal, at 3 (“The State does not dispute that defendant filmed police performing their duties in public.”), attached as Exhibit D.

Second, there is no dispute that Plaintiff was recording the Police Officer Defendants while they were engaging in their official duties—here, interacting with a property owner who was having his home searched by the police pursuant to a search warrant. In fact, the recorded exchange concerned the Officers' performance of their duties in executing a search warrant—something which is obviously of public concern. See also *id.* Again, the Police Officer Defendants likely will contend that Plaintiff's recording was done secretly. Though Plaintiff

asserts that he openly held the phone in front of him at chest level, this factual dispute is immaterial. As discussed in Section I.A *supra*, even assuming that Plaintiff was “secretly” recording the Police Officer Defendants while they were engaging in their official duties, *Glik* incorporates under the First Amendment the right to secretly record law enforcement so long as the recording does not interfere with the officers’ performance of their duties.

Third, there is no dispute that Plaintiff’s recording did not impair or otherwise interfere with the Police Officer Defendants’ performance of their official duties. The recording in no way interfered with the Police Officer Defendants’ ability to interact with an owner of a property being searched about the search being conducted. Indeed, the Officers did not arrest Valentin while he was recording this interaction; rather, they waited to arrest him after their interaction had ended. There is also no contention, for example, that Valentin’s recording created a safety concern or implicated confidential information. *See* Order of Dismissal, at 6 (“[T]he State points to no specific safety concerns caused by [Valentin’s] filming and does not allege [Valentin’s] filming interfered with police duties [T]he State does not allege [Valentin] actually filmed any confidential information or undercover officers.”), attached as *Exhibit D*.

Finally, there is no dispute that the Police Officer Defendants arrested Valentin for criminal wiretapping under RSA 570-A because Valentin was recording the Police Officer Defendants. As LeVeille stated in his sworn affidavit: “I advised him that he had not asked for our permission to record, nor had he advised us that he was recording our conversation.” *See* Valentin Police Reports, at MAN006 (LeVeille Sworn Affidavit), attached as *Exhibit B*. LeVeille matter-of-factly (and incorrectly) told Valentin that this was a crime. *Id.* The Manchester police department press release reiterated this point: “[Valentin] allegedly began audio recording a conversation between two police officers involved in the investigation. New

Hampshire requires two party consent when audio recording individuals, so Valentin was immediately placed into custody and transported to police headquarters.” See Press Release, attached as Exhibit C.

The satisfaction of these four elements of the right to record in *Glik* ends this Court’s inquiry. Qualified immunity does not apply as a matter of law and, as Judge Abramson correctly concluded, the Police Officer Defendants’ arrest of Plaintiff violated his clearly-established constitutional rights under the First Amendment principles in *Glik*.⁴

CONCLUSION

Glik and *Gericke* clearly establish that Valentin had a First Amendment right to record the Police Officer Defendants. The undisputed facts construed in favor of the Police Officer Defendants show that these Defendants violated this right. Because an objectively reasonable officer in the position of the Police Officer Defendants would understand under *Glik/Gericke* that arresting Valentin would violate his First Amendment rights, the Police Officer Defendants are not entitled to qualified immunity and Plaintiff is entitled to judgment as a matter of law.

Accordingly, Plaintiff Alfredo Valentin respectfully requests that this Court grant the following relief:

A. Grant his Motion for Summary Judgment Against the Police Officer Defendants LeVeille and Sanders as to Count I (First Amendment);

B. Declare that the actions taken by the Police Officer Defendants in arresting, detaining, and charging Plaintiff for violating New Hampshire’s wiretap statute, *see* RSA 570-A, when Plaintiff was recording law enforcement officers publicly performing their official duties without

⁴The absence of probable cause under New Hampshire’s wiretap statute is not a required element of Plaintiff’s First Amendment claim raised in this Motion alleging simply that the Police Officer Defendants violated clearly-established First Amendment principles under *Glik*. Indeed, *Glik*’s First Amendment analysis did not concern whether probable cause existed under a criminal statute; rather, *Glik* recognized an independent constitutional right to record under the First Amendment. Simply put, *Glik* categorically bars any arrest based on protected recording regardless of whether probable cause to make an arrest may exist under the elements of a separate criminal statute.

interfering with those official duties violated Plaintiff's rights under the First Amendment as a matter of law;

C. Enter judgment in favor of Plaintiff and against the Police Officer Defendants LeVeille and Sanders, jointly and severally, as to liability on Count I (First Amendment); and

D. Grant any other relief that is just or equitable.

Respectfully submitted,

Alfredo Valentin,

By and through his attorneys,

/s/ Gilles R. Bissonnette

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Date: May 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this date by ECF to:

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