

**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

**SECOND AMENDED COMPLAINT &
DEMAND FOR JURY TRIAL**

SECOND AMENDED COMPLAINT

PRELIMINARY STATEMENT

Pursuant to 42 U.S.C. § 1983, Plaintiff Alfredo Valentin sues the City of Manchester and two of its police officers, Brian LeVeille and Christopher Sanders, for arresting him on March 2, 2015 for criminal wiretapping, *see* RSA 570-A:2, simply 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. That arrest violated Valentin's clearly-established First and Fourth Amendment rights.

As the First Circuit Court of Appeals has 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. Following the *Glik* decision, in a March 22, 2012 memorandum, the New Hampshire Attorney General's Office explained this legal principle to the Manchester police department and all other 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 blatantly violated this clearly-established legal principle. Indeed, the police reports and press release that document Defendants' decision to arrest Valentin in this case do not dispute the fact that Valentin was in a public place recording law enforcement officers without interfering with their duties. In fact, the arresting officer's Gerstein 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 City of Manchester arrested and charged Valentin with criminal wiretapping. *See* RSA 570-A. The City ultimately dismissed this charge on May 15, 2015. Unfortunately, by that time, Defendants' unlawful decisions to arrest and charge Valentin had already inflicted (and continue to inflict) tremendous injury on Valentin, including the loss of his career and the potential loss of his home.

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 civil rights lawsuit.

However, Valentin was never secretly recording. But even if he was, the First Amendment right to record law enforcement extends to both open and secret recordings of police officers performing their duties in public. 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 order issued on October 21, 2015, that Court (Abramson, J.) dismissed the wiretapping indictment, 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."

This case is about law enforcement overreach and a breakdown in the justice system that caused Valentin to be detained, arrested, prosecuted, and have his phone confiscated in violation of his clearly-established constitutional rights. Valentin did nothing wrong. He simply was exercising his First Amendment rights. It is deeply disturbing that 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. It is equally disturbing that the largest (and perhaps most legally sophisticated)

County Attorney's Office in New Hampshire would think that it was appropriate to prosecute Valentin after this unlawful arrest. 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.

Unlawful arrests and prosecutions—even if they are dismissed—cause real harm. Being unlawfully arrested and prosecuted greatly upsets the life of the accused and compromises that person's human dignity. Here, the damage caused by Defendants' improper arrest and prosecution go far beyond the interference with Valentin's First Amendment rights, the deprivation of his liberty, and the fear, humiliation, and embarrassment he experienced. Defendants' actions caused Valentin to lose his job which he had held for 11 years.

Accordingly, Valentin seeks declaratory and injunctive relief to stop the City of Manchester from illegally enforcing New Hampshire's wiretap statute to violate the First and Fourth Amendments, as well as damages for the violation of Valentin's constitutional rights.

JURISDICTION AND VENUE

1. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 over Valentin's federal causes of action arising under 42 U.S.C. § 1983 *et seq.*

2. This Court may exercise personal jurisdiction over all Defendants because they reside or do business within the District of New Hampshire.

3. Proper venue lies in the District of New Hampshire because a substantial part of the events giving rise to Valentin's claims occurred in Manchester, New Hampshire. 28 U.S.C. § 1391(b)(2).

PARTIES

4. Alfredo Valentin is an adult citizen and resident of Manchester, New Hampshire. Valentin served in the United States Marine Corps until he was honorably discharged. For 11

years prior to this Complaint, Valentin worked at Longchamps Electric, Inc. as an accounts payable manager.

5. Brian LeVeille is a police officer employed by Manchester's police department. LeVeille is, or was at all times relevant to this lawsuit, acting under color of state law as a police officer employed by Manchester's police department. Defendant LeVeille is being sued in his individual capacity. At all times relevant to this lawsuit, Defendant LeVeille was and is a "person" as that term is used by 42 U.S.C. § 1983.

6. Christopher Sanders is a police officer employed by Manchester's police department. Sanders is, or was at all times relevant to this lawsuit, acting under color of state law as a police officer employed by Manchester's police department. Defendant Sanders is being sued in his individual capacity. At all times relevant to this lawsuit, Defendant Sanders was and is a "person" as that term is used by 42 U.S.C. § 1983.

7. LeVeille and Sanders together are referred to as the "Police Officer Defendants."

8. Defendant City of Manchester is a municipal entity created under the laws of the State of New Hampshire. It is authorized by law to maintain a police department, which acts as its agent in the area of law enforcement and for which it is ultimately responsible. At all times relevant to this lawsuit, Defendant City of Manchester was and is a "person" as that term is used by 42 U.S.C. § 1983. Defendant City of Manchester is the public employer of the Police Officer Defendants.

THE CONSTITUTIONAL RIGHT TO RECORD LAW ENFORCEMENT

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

10. 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 p. 1.

11. The AG Memorandum alerted all law enforcement, including the Manchester police department, to “a recent opinion of the First Court of Appeals, which makes such arrests illegal.” Id.

12. 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 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.

13. 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.

14. 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 p. 2.

15. 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 officer’s performance of those duties.” Id.

16. 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.

17. The Manchester police department received a copy of the AG Memorandum in

2012.

18. Defendants Sanders and LeVeille were police officers in New Hampshire in 2012, and they knew or should have known about the AG Memorandum.

19. In *Gericke v. Begin*, 753 F.3d 1 (2014), the First Circuit Court of Appeals affirmed *Glik* and further explained that “[i]t was clearly established [as of 2010] 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.

**THE CONSTITUTIONAL RIGHT TO RECORD LAW ENFORCEMENT INCLUDES
THE RIGHT TO DO SO SECRETLY**

20. Defendants in this case claim that they are not liable because Valentin’s recording was done “surreptitiously.” However, even if this was the case—and it was not—Valentin’s recording was clearly constitutionally protected.

21. As the cases referenced above make clear, the First Amendment protects the right to record government officials’ public performance of their jobs. This constitutional safeguard preserves two core free speech interests: promoting an informed discussion of government affairs and uncovering government misconduct.

22. The exercise of this First Amendment right has changed 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” eleven times while an officer placed him in a chokehold that ultimately led to his death.

23. Consistent with the profound impact that recordings of police/civilian encounters can have on the public, the First Circuit Court of Appeals did not limit its holding in *Glik* to only open recordings of law enforcement.

24. Thus, this constitutional protection extends to both openly and secretly recording police officers performing their duties in public.

25. In fact, secret recording is a key component of the First Amendment right to record police officers performing their duties in public.

26. Secret recording is necessary 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 police behave when they are not under scrutiny.

27. In addition, some civilians reasonably fear that openly recording police officers in certain circumstances could trigger a hostile response that threatens their physical safety or liberty.

28. When civilians do not feel safe openly recording police officers, they can exercise their First Amendment right to record police officers performing their duties in public only if they do so secretly. This is why the *Glik* decision (and the AG Memorandum) clearly includes the right to record regardless of whether it is done openly.

VALENTIN'S UNCONSTITUTIONAL ARREST

29. Valentin owns his home at 6 Lawton Street in Manchester. His property is subject to an unpaid mortgage. From time to time, Valentin has taken in renters to reduce his housing expenses.

30. In December 2014, a friend of Valentin's told him that an acquaintance, Christopher Chapman, was looking for a place to rent. Chapman began renting a room from Valentin on December 15, 2014. Chapman came and went as he pleased. Valentin thought nothing suspicious of it. Chapman's girlfriend was staying with Chapman, but Chapman kept to himself.

31. Since before Chapman moved in to Valentin's residence in December 2014, the Manchester police department had apparently been investigating Chapman for several months for heroin-related offenses.

32. On approximately February 27, 2015, the Manchester police department obtained a search warrant for Chapman's domicile. The warrant included searching all of Valentin's home and its curtilage.

33. The day before the search warrant was executed, the Manchester police department surveyed the 6 Lawton Street property. The police observed no sign of firearms, dangers on the property, or that any of Chapman's suspected accomplices were present.

34. Early on the morning of March 2, 2015, Valentin left for work at Longchamps Electric. Chapman, Jaz Funkhouser (Chapman's girlfriend), and another woman were still at the property.

35. A brief time later, Chapman left the property to attend a parole violation hearing at the Hillsborough Superior Court Northern Division.

36. At approximately 9:00 A.M., the Manchester police department arrested Chapman in the vicinity of the Superior Court.

37. Shortly after Chapman was arrested, officers from the Manchester police department executed the search warrant at 6 Lawton Street. The police did not ring the doorbell, knock on the door, or announce themselves as police.

38. Instead, the Manchester police conducted a "no-knock" raid, firing incendiary devices through the property's windows, kicking in the doors, and entering the property SWAT-style with semi-automatic weapons. These actions damaged property, terrified the two women who were still in the house, and created an unjustifiable risk of accidental death or injury.

39. At approximately 10:30 A.M., Valentin received a phone call at work. A neighbor a few blocks away from Valentin's property found Valentin's dog wandering the neighborhood. The neighbor called the phone number on the dog's tags. The neighbor reached Valentin's cellular phone.

40. Valentin thought his dog must have escaped. Valentin told his neighbor that he would leave work and retrieve his dog right away. The neighbor mentioned that there were police in the area of Lawton Street, but Valentin thought nothing of it.

41. Valentin then retrieved his dog from the neighbor.

42. Taking his dog home to 6 Lawton Street, Valentin saw two unknown cars parked in his driveway. Valentin saw that his home had signs of forced entry and damage.

43. Two men dressed in flannel shirts were standing near the property. Valentin quickly walked around them and entered his home. Upon crossing the threshold, additional unidentified men in the home quickly approached Valentin and yelled at him to get out of the home. Valentin simultaneously demanded to know what they were doing.

44. One of the intruders—still not known by Valentin to be a police officer—became verbally confrontational to Valentin and told him to leave. Valentin insisted that they tell him what they were doing and that Valentin was going to call the police.

45. After a verbal exchange, one of the men said that he was a police officer. Valentin demanded to see a badge. The officer refused to show his badge.

46. Valentin insisted that he see a badge and get the man's name. After repeated demands, the man said, "You want to see a badge? Fine. Here's my badge!" The officer briefly flashed a metallic badge and quickly concealed it. Valentin took a photograph of the badge with his phone. Valentin then asked to speak to a supervising officer.

47. Sanders approached Valentin and stated that the property was being searched and that he had a warrant.

48. Valentin asked to see the search warrant.

49. Sanders refused to produce the search warrant. Sanders claimed that they had a warrant, but that they would not give it to Valentin. When Valentin asked to see the warrant again, Sanders became verbally demeaning. Valentin asked to speak to Sanders's supervising officer. The supervisor told Valentin that he did not have to give Valentin a copy of the warrant. The supervisor told Valentin to "come back in an hour." Valentin then left the scene.

50. One hour later, Valentin returned to his home, parking in his next-door neighbor's driveway. When Valentin exited his vehicle, he turned on the audio recording function of his Samsung S5 phone.

51. Valentin openly held the phone in front of him at chest level.

52. Sanders and LeVeille then approached Valentin. Valentin asked to see the search warrant for his home.

53. During this recorded exchange, the three men were standing in the street, in public and out in the open, in front of Valentin's house.

54. Despite Valentin's continued requests, the officers refused to produce the search warrant.

55. However, at some point, LeVeille did retrieve the search warrant (which was inside Valentin's house).

56. While Valentin was speaking to LeVeille about the search warrant, Sanders observed that Valentin was holding a cell phone in Valentin's left hand.

57. Sanders's written narrative of the incident, dated March 3, 2015, states that

Sanders observed that Valentin had engaged his cell phone voice recording “which I could further observe was actively recording as the length of the recording was being visibly timed, denoted by changing numbers.” See Valentin Police Reports at MAN013, attached as Exhibit B.

58. After noting this condition of Valentin’s phone, Sanders asked Valentin “Are you recording?”

59. Valentin confirmed that he was recording.

60. LeVeille stated that Valentin could not record and that it was a crime.

61. When recording, Valentin was not interfering with the performance of the Police Officer Defendants’ duties.

62. Valentin responded that he knew his rights to record the police in a public place. Valentin stated that he knew about the “*Glik* case” and that it was in the First Circuit.

63. LeVeille stated that things have changed since then. LeVeille stated that the officers could arrest Valentin.

64. Then, LeVeille and Valentin had a spirited discussion about whether Valentin could record. Tired of the discussion, LeVeille stated that he was done and that Valentin should leave. The conversation ended. Valentin returned to his vehicle, which was parked in his next-door neighbor’s driveway.

65. LeVeille and Sanders then conferred briefly.

66. Valentin was within arm’s reach of a car when he heard one of the officers yell out: “Valentin, stop! Turn around.”

67. Valentin stopped, turned around, and asked “for what.” LeVeille stated, “We’re going to arrest you for wiretapping.”

68. The Police Officer Defendants immediately tried to seize Valentin’s cellular

phone.

69. To prevent the destruction of the audio recordings, Valentin held the phone above his head and hit the “lock” button on the phone. Without the correct code, the phone’s audio recording could not be accessed without non-immediate technical efforts.

70. The officers became visibly angry. Valentin lowered his arm and the officers seized the phone from Valentin’s hands while they placed handcuffs on Valentin’s wrists. From this moment forward, the Manchester police department had exclusive custody and control of Valentin’s cellular telephone until it was returned to Valentin in approximately January 2016.

71. LeVeille’s written supplement to his incident report, dated March 3, 2015, states that “I advised [Valentin] 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” See Valentin Police Reports at MAN006, attached as Exhibit B.

72. Sanders’s written report states that, “Sgt. LeVeille advised Valentin that he had not asked to record our conversation, nor has he advised us that he intended to record the conversation.” Id. at MAN013.

73. Neither Sanders’s nor LeVeille’s written narratives of the arrest state that Valentin’s recording was interfering with the performance of their duties.

74. Neither LeVeille nor Sanders had a reasonable expectation, when standing in the street in public and out in the open, that they were not subject to recording by any member of the public.

75. A person standing in a public street in broad daylight is not in a circumstance which justifies a reasonable belief that any verbal statements publicly uttered could not be recorded by any nearby member of the public.

76. Further, a sign in Valentin's window, just a few feet away, warned that the premises were subject to video surveillance.

77. At the time of Valentin's arrest, neither LeVeille nor Sanders had probable cause to believe that Valentin committed the crime of wiretapping in violation of RSA 570-A:2.

78. Now handcuffed, Valentin was made to stand in the street for about 15 minutes until a Manchester police department transport could arrive.

79. The police officers paraded Valentin down the street past several neighbors' homes. A neighbor snapped a photograph of five Manchester police officers putting Valentin into the van. The photo would later end up publicly shared on social media.

80. Valentin was transported to the Manchester police department where he was confined to a holding cell. He was released approximately three to four hours later on personal recognizance bail, with \$1,000 to be paid in the event of breach.

MANCHESTER'S UNCONSTITUTIONAL PROSECUTION AND DISMISSAL

81. 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 state prison and a fine of up to \$4,000. See RSA 651:2, II(b), IV(a).

82. The criminal complaint was signed by (now former) Manchester Police Chief David Mara.

83. The criminal complaint stated that Valentin "was observed recording the conversation and did not have permission to do so nor had Valentin advise (sic) that they were being recorded." See Valentin Police Reports at MAN007, attached as Exhibit B.

84. Valentin was never charged with any offense related to controlled substances or any other offense (e.g. disorderly conduct, etc.). Valentin was not a suspect in the Chapman

investigation.

85. 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.

86. 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.

87. The Manchester police department’s press release was hastily and recklessly written. A reasonable person would interpret Manchester’s press release as meaning that Valentin was part of the heroin drug ring which was under investigation for eight months.

88. After Manchester published the press release, news stations and newspapers picked up the story immediately. At least one major media source in New Hampshire falsely reported that Valentin was part of an interstate drug ring, and that Valentin was arrested with over 300 grams of heroin and \$16,500 cash in his possession. See NH1 Story, attached as Exhibit D. This was absolutely false.

89. On approximately March 30, 2015, Valentin’s counsel filed a motion to dismiss the criminal complaint for lack of probable cause arguing, in part, that the arrest violated the First Amendment. See First Prosecution Case Summary, attached as Exhibit E; see also Valentin Police Reports at MAN022-25, attached as Exhibit B. The City of Manchester filed no response.

90. On approximately May 15, 2015, after again being informed by Valentin’s counsel that the arrest was unconstitutional, 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.

91. Manchester also failed to timely produce the police reports concerning Valentin's March 2, 2015 arrest to Valentin's counsel while Valentin's prosecution by the City of Manchester was pending.

92. On May 22, 2015—after the case had been dismissed on approximately May 15, 2015—Valentin's counsel submitted, under Chapter 91-A, a right-to-know request to the Manchester police department requesting “[a]ll records and incident reports relating to Mr. Alfredo Valentin's arrest on March 2, 2015 for unlawful wire tapping.” See May 22, 2015 Valentin Ltr., attached as Exhibit F. This request was made so Valentin could investigate a potential civil rights claim against the City of Manchester.

93. The City of Manchester refused to produce this information because “there is a co-defendant associated with this case and this case remains active in Hillsborough County Superior Court.” See Manchester June 1, 2015 Response, attached as Exhibit G. This response presumably refers to Chapman's then-pending prosecution.

94. Manchester's refusal to produce these public documents violated Chapter 91-A. First, Valentin never had a co-defendant, as the charge against him was wholly unrelated to the drug charges Manchester brought against Chapman. Second, any claim by Manchester that these documents were exempt from disclosure under Chapter 91-A as “records or information compiled for law enforcement purposes” the disclosure of which “could reasonably be expected to interfere with enforcement proceedings” was baseless. See *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 583 (2006). Again, Chapman's criminal charges had nothing to do with Valentin. Indeed, there was nothing in Manchester's June 1, 2015 response even remotely

suggesting that disclosure would cause any interference with Chapman's prosecution. See id. at 585 ("It is not the petitioner's responsibility to clarify the respondents' vague categorizations."). The police reports themselves clearly show that their production would have had no effect on Chapman's prosecution. See Valentin Police Reports, attached as Exhibit B. In light of this reality, Manchester's obstructive response to Valentin's valid Chapter 91-A right-to-know request is disturbing.

**THE HILLSBOROUGH COUNTY ATTORNEY'S PROSECUTION AND THE
SUPERIOR COURT'S DECISION THAT VALENTIN'S RECORDING WAS
CONSTITUTIONALLY PROTECTED**

95. On June 18, 2015, the Hillsborough County Attorney's Office inexplicably indicted Valentin on wiretapping, this time as a misdemeanor under RSA 570-A:2, I-a.

96. 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.

97. It appears that the Hillsborough County Attorney's Office added the language "while trying to hide the telephone from view" to the indictment in an attempt to avoid the *Glik* decision. Presumably, this allegation is derived from 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." See Valentin Police Reports at MAN013, attached as Exhibit B.

98. Sanders's allegation did not exist in the original criminal complaint filed by the

Manchester police department on March 4, 2015. See id. at MAN007. This allegation also did not exist in LeVeille's Gerstein Affidavit and police report written contemporaneous with Valentin's arrest on March 2, 2015. Id. at MAN005-06. This allegation also did not exist in the department's March 4, 2015 press release.

99. Indeed, the police reports in this case confirm that Valentin was recording openly in a manner that was readily visible to law enforcement. As LeVeille swore under oath on March 2, 2015, "I observed Valentin was holding his cell phone in his left hand" Id. at MAN006 (emphasis added). As Sanders stated in his report, "I 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 (emphasis added). Officer Sanders added: "I could further observe [Mr. Valentin's phone] was actively recording as the length of the recording was being visibly timed, denoted by changing numbers." Id. (emphasis added).

100. 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.

101. 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.

102. 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 fine only to a penalty of up to one year in jail. See RSA 651:2, II(c), IV(a); see also Second Prosecution Case Summary, attached as Exhibit I.

103. While this second prosecution was pending—and after Manchester already had Valentin's phone for approximately four months—Manchester Detective Robert Tremblay

apparently attempted to perform a forensic examination on Valentin's phone on July 15, 2015. See Valentin Police Reports at MAN016-17, attached as Exhibit B.

104. Upon turning Valentin's phone on, Detective Tremblay noted that the phone appeared to have been factory reset. Detective Tremblay was unable to locate the audio recording which Valentin made immediately prior to his unlawful arrest. Id.

105. Valentin did not set his phone to "factory reset" mode at any time at the time of or following his arrest.

106. In mid-August 2015, the Hillsborough County Attorney's Office made a plea offer where Valentin would plead guilty to Class A misdemeanor wiretapping with the following sentence: (i) one year in the Hillsborough County House of Corrections, all suspended so long as Valentin remains on good behavior for two years; and (ii) 50 hours of community service with a State-registered charitable organization, with proof of completion provided to the State within 12 months. As part of this plea offer, the Hillsborough County Attorney's Office demanded that Valentin endure the harm and collateral consequences of a misdemeanor criminal conviction.

107. Given that this arrest and prosecution was clearly unconstitutional, Valentin rejected the offer.

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

109. 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 p. 3, attached as Exhibit K.

110. Valentin filed his reply brief on September 14, 2015. See Valentin Reply, attached as Exhibit L.

111. Oral argument was held on Valentin’s Motion to Dismiss on October 13, 2015.

112. In the meantime, on September 11, 2015, Sanders sought and obtained a warrant to search Valentin’s phone. See Valentin Police Reports at MAN028-35, attached as Exhibit B. The application stated, in part, that “Detective Tremblay advised that based upon his training and experience, the phone appeared to be in a factory re-set mode.” Id. at MAN033. Disturbingly, Sanders sought information from Valentin’s phone far beyond the audio recording—which was the only piece of “evidence” that had any bearing on the pending criminal wiretap charge. For example, in a fishing expedition that far exceeded his legal authority, Sanders sought (i) “[p]hone usage to include outgoing and incoming numbers for both voice calls, SMS (text) messages and MMS (multi-media) messages,” and (ii) “[a]ll documents and data in electronic form,” which included emails. See id. at MAN030-31. This request was a gross overreach, yet it was rubber stamped.

113. On approximately September 17, 2015, Detective Tremblay attempted to perform another forensic examination on Valentin’s phone. Detective Tremblay was again unable to find the audio recording. Detective Tremblay also was unable to determine the date the phone changed to a “factory reset” mode. See id. at MAN019-20.

114. On October 21, 2015, the Hillsborough County Superior Court Northern Division (Abramson, J.) dismissed the charge. 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 p. 5, attached as Exhibit M (citing *Glik*, 655 F.3d at 82).

115. 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.

116. This decision was not appealed to the New Hampshire Supreme Court.

117. Following this decision, the Manchester police department failed to timely return Valentin’s Samsung S5 cellular phone.

118. It was only until approximately January 2016 when the Manchester police department returned Valentin’s phone. Manchester’s holding of Valentin’s phone for an additional three months after this dismissal also violated Valentin’s Fourth Amendment rights, especially where there was no probable cause to hold and search the phone in the first place.

VALENTIN’S DAMAGES

119. Two days after the Manchester police department’s March 4, 2015 press release announcing Valentin’s arrest, Valentin was terminated from his 11-year position at Longchamps Electric. Valentin was an accounts payable manager—a position of substantial trust within the company, with the authority to use the company seal.

120. Valentin’s employer said that, given the recent press coverage, Longchamps could not have someone working for them with “that kind of felony charge.”

121. At the time of his termination, Valentin earned approximately \$45,000 per year. In addition, Valentin received medical, dental, and prescription benefits; eligibility in a 401(k) plan with employer matching; and he had two weeks of accrued vacation time. All were lost when his employment was terminated.

122. The deprivation of medical and prescription coverage is especially harmful, because Valentin suffers from chronic asthma and diabetes. Without his coverage, he cannot afford his \$600 per month prescription medications.

123. As of the filing of this lawsuit on June 19, 2015, Valentin had exhausted his medication and his medical conditions are untreated. (For now, Valentin must rely on his VA benefits, but the VA does not cover all of his medications.) His untreated diabetes has worsened without medication. From March 2015 to the filing of this lawsuit on June 19, 2015, Valentin was in the emergency room three times because of his untreated medical conditions.

124. As a direct a proximate cause of the Defendants' unlawful conduct, Valentin has suffered a loss of the gainful employment he had held for 11 years and all of its attendant pay, benefits, and opportunities for future advancement. Valentin has suffered extreme emotional distress, emotional suffering, and mental anguish. Valentin has been made the object of scorn and public ridicule by his neighbors and others in the community. Others in the community have even Valentin described as a "murderer" for bringing heroin into Manchester.

125. Plaintiff is entitled to punitive damages, as the actions of Defendants LeVeille and Sanders were motivated by evil motive or intent and/or involved reckless or callous indifference to the federally-protected rights of Plaintiff. Indeed, these Defendants acted contrary to the March 22, 2012 AG Memorandum, as well as contrary to emails and bulletins from the Manchester Police Department's Legal Division confirming that one has the right to secretly record the police performing their duties in public without their permission, even if that recording would otherwise violate the wiretapping statute. For example, an April 2012 training memorandum states that, in light of *Glik*, "[w]e would recommend judicious use of RSA 570:A-2 when you feel that you have been secretly audio recorded under circumstances where an arrest

would be allowed. This RSA has come under attack as of late” In an August 31, 2011 email from the Department’s Legal Division immediately following the *Glik* decision, the Division stated: “*I also would not arrest anyone on a wiretapping charge for video/audio recording you [the police] secretly.* If you feel that this has happened, gather the information and forward a report to Legal. We can look at it and have the county attorney’s office weigh in on seeking indictments or not. With the way things are going on this issue, *I am not confident that a wiretapping case of this nature will get too far.*” (emphasis added). In a subsequent October 2013 email, the Legal Division echoed similar sentiments: “In *public areas* where a person doesn’t have an expectation [of] privacy, and *especially in the case of police officers, a person is within their rights in most cases to audio record another without their knowledge. Please be careful to not infringe on what has been deemed a 1st amendment right.*” (emphasis added). The actions of Defendants LeVeille and Sanders in this case and what they claim they understood the law and Department policy to be *all* run contrary to these directives, thereby evidencing a reckless or callous indifference to the federally protected rights of Plaintiff that make punitive damages appropriate. In short, these bulletins and emails make clear that Defendants LeVeille and Sanders acted in the face of a perceived risk that their actions would violate the federal Constitution.

COUNT I
42 U.S.C. § 1983 – FIRST AMENDMENT
(AGAINST ALL DEFENDANTS)

126. All prior paragraphs are incorporated.
127. The First Amendment to the United States Constitution prohibits abridgment of freedom of speech.
128. The First Amendment is applied to the states through the Fourteenth Amendment.

129. Under the First Amendment, there is a clearly-established right by a member of the public to video and/or audio record law enforcement officers in a public place when the officers are acting in the course of their official duties, provided that the recording does not interfere with the officer's performance of those duties.

130. This right is not contingent on the recording being done openly.

131. Under 42 U.S.C. § 1983, municipal defendants are "persons" liable for unconstitutional customs, practices, and policies, and failure to train their law enforcement officers.

132. Under 42 U.S.C. § 1983, every person acting under color of state law who deprives another person of his or her constitutional rights is also liable at law and in equity.

133. The Police Officer Defendants violated Valentin's clearly-established rights under the First Amendment when they detained, arrested, and charged Valentin with wiretapping when he was simply using his phone to record police officers doing their public duties in a public place without interfering with the performance of those duties.

134. The Police Officer Defendants violated Valentin's clearly-established rights under the First Amendment when they seized Valentin's phone so that he could not review or publish the contents of any audio recordings.

135. The Police Officer Defendants violated Valentin's clearly-established rights under the First Amendment when they detained, arrested, and charged him with wiretapping in retaliation for using his phone to record police officers doing their public duties in a public place without interfering with the performance of those duties.

136. The Police Officer Defendants acted with intentional disregard for Valentin's clearly-established constitutional rights under the First Amendment.

137. The City of Manchester failed to train its police officers about the First Amendment right of individuals to video and audio record law enforcement officers in a public place when the officers are acting in the course of their official duties (provided that the recording does not interfere with the officer's performance of those duties), thereby permitting LeVeille and Sanders to be in a position to violate Valentin's First Amendment rights when they detained, arrested, and charged Valentin.

138. The City of Manchester also failed to train its officers not to abuse the power to arrest and initiate criminal proceedings to discourage the exercise of constitutionally-protected First Amendment activities, thereby permitting LeVeille and Sanders to be in a position to violate Valentin's First Amendment rights when they detained, arrested, and charged Valentin for violating the wiretap statute.

139. The City of Manchester knew or should have known that such training was inadequate and would lead to improper conduct by its employee police officers, but nonetheless exhibited deliberate indifference to the unconstitutional effects of those inadequacies.

140. The City of Manchester's failure to train its officers directly resulted in the violation of Valentin's First Amendment rights by LeVeille and Sanders.

141. Defendant City of Manchester has also intentionally developed and implemented a custom, practice, and/or policy in which it detains, arrests, and charges individuals for criminal wiretapping, see RSA 570-A:2, who record (including secretly) Manchester police officers while they are performing their official duties in a public place and without interfering with the officers' performance of those duties.

142. Manchester city officials have known or should have known about the existence of this custom, practice, and/or policy.

143. Defendant Manchester police officers LeVeille and Sanders, acting under color of state law and pursuant to this unlawful custom, practice, and/or policy, violated Valentin's clearly-established right to record police officers while they are performing their official duties in a public place and without interfering with the officers' performance of those duties when they detained, arrested, and charged Valentin for criminal wiretapping, see RSA 570-A:2.

144. This unlawful custom, practice, and/or policy caused the violation of Valentin's First Amendment rights.

145. The City of Manchester acted with deliberate indifference and/or willful blindness to the strong likelihood that unconstitutional conduct will result from the implementation of this custom, practice, and/or policy.

146. As a result, Valentin has suffered serious damage to his reputation; humiliation, embarrassment, mental and emotional anguish and distress; and significant economic injury.

147. Accordingly, the Defendants violated Valentin's rights under the First Amendment of the United States Constitution to record police officers in a public space outside his home.

148. Plaintiff is entitled to punitive damages, as the actions of Defendants LeVeille and Sanders were motivated by evil motive or intent and/or involved reckless or callous indifference to the First Amendment rights of Plaintiff.

COUNT II
42 U.S.C. § 1983 – FOURTH AMENDMENT
(AGAINST ALL DEFENDANTS)

149. All prior paragraphs are incorporated.

150. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures.

151. The Fourth Amendment is applied to the states through the Fourteenth Amendment.

152. Under 42 U.S.C. § 1983, municipal defendants are “persons” liable for unconstitutional customs, practices, and policies, and failure to train their law enforcement officers.

153. Under 42 U.S.C. § 1983, every person acting under color of state law who deprives another person of his or her constitutional rights is also liable at law and in equity.

154. Because Valentin was engaging in activity protected under the First Amendment when he was simply using his phone to record police officers doing their public duties in a public place without interfering with the performance of those duties, the Police Officer Defendants violated Valentin’s clearly-established right to be free from unreasonable seizures under the Fourth Amendment by detaining him without reasonable suspicion and arresting him without probable cause that he had committed a crime.

155. Moreover, New Hampshire’s wiretap statute only covers an “oral communication,” which is defined as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” See 570-A:1, II.

156. As Valentin engaged in audio recording in a public street immediately adjacent to his home, the Police Officer Defendants clearly did not have an expectation that their communications would not be subject to interception. In short, the Police Officer Defendants did not have a reasonable expectation of privacy in their oral communications while they were on a public street interacting with a member of the public place as part of their official duties.

157. Accordingly, the Police Officer Defendants violated Valentin’s clearly-established

right to be free from unreasonable seizures under the Fourth Amendment by detaining him without reasonable suspicion and arresting him without probable cause that he was committing a violation of New Hampshire's wiretap statute.

158. The Police Officer Defendants violated Valentin's clearly-established rights under the Fourth Amendment when they detained, arrested, and caused him to be charged with wiretapping in retaliation for using his phone to record police officers doing their public duties in a public place without interfering with the performance of those duties.

159. The Police Officer Defendants acted with intentional disregard for Valentin's clearly-established constitutional rights under the Fourth Amendment.

160. The City of Manchester failed to train its police officers about the First Amendment right of individuals to video and audio record law enforcement officers in a public place when the officers are acting in the course of their official duties (provided that the recording does not interfere with the officer's performance of those duties), thereby permitting LeVeille and Sanders to be in a position to violate Valentin's Fourth Amendment right to be free from unreasonable searches and seizures when they detained, arrested, and charged Valentin.

161. The City of Manchester failed to train its police officers about how New Hampshire's wiretap statute does not apply to individuals who record law enforcement officers in a public place because the officers do not have an "expectation that such communication is not subject to interception under circumstances justifying such expectation," thereby permitting LeVeille and Sanders to be in a position to violate Valentin's Fourth Amendment right to be free from unreasonable searches and seizures when they detained, arrested, and charged Valentin for violating the wiretap statute.

162. The City of Manchester also failed to train its officers not to abuse the power to

arrest and initiate criminal proceedings to discourage the exercise of constitutionally-protected First Amendment activity, thereby permitting LeVeille and Sanders to be in a position to violate Valentin's Fourth Amendment right to be free from unreasonable searches and seizures when they detained, arrested, and charged Valentin for violating the wiretap statute.

163. The City of Manchester knew or should have known that such training was inadequate and would lead to improper conduct by its employee police officers, but nonetheless exhibited deliberate indifference to the unconstitutional effects of those inadequacies.

164. The City of Manchester's failure to train its officers directly resulted in the violation of Valentin's Fourth Amendment rights by LeVeille and Sanders.

165. Defendant City of Manchester has also intentionally developed and implemented a custom, practice, and/or policy in which it detains, arrests, and charges individuals for criminal wiretapping, see RSA 570-A:2, who record (including secretly) Manchester police officers while they are performing their official duties in a public place and without interfering with the officers' performance of those duties.

166. Manchester city officials have known or should have known about the existence of this custom, practice, and/or policy.

167. Defendant Manchester police officers LeVeille and Sanders, acting under color of state law and pursuant to this unlawful custom, practice, and/or policy, violated Valentin's clearly-established Fourth Amendment right to be free from unreasonable searches and seizures when they detained, arrested, and charged Valentin for violating the wiretap statute.

168. This unlawful custom, practice, and/or policy caused the violation of Valentin's Fourth Amendment rights.

169. The City of Manchester acted with deliberate indifference and/or willful blindness

to the strong likelihood that unconstitutional conduct will result from the implementation of this custom, practice, and/or policy.

170. Defendants maliciously prosecuted Valentin, as they caused a seizure of Valentin pursuant to legal process unsupported by probable cause, and criminal proceedings terminated in Valentin's favor.

171. As a result, Valentin has suffered serious damage to his reputation; humiliation, embarrassment, mental and emotional anguish and distress; and significant economic injury.

172. Accordingly, the Defendants violated Valentin's rights under the Fourth Amendment of the United States Constitution.

173. Plaintiff is entitled to punitive damages, as the actions of Defendants LeVeille and Sanders were motivated by evil motive or intent and/or involved reckless or callous indifference to the Fourth Amendment rights of Plaintiff.

COUNT III
42 U.S.C. § 1983 – FOURTH AMENDMENT
(AGAINST ALL DEFENDANTS)

174. All prior paragraphs are incorporated.

175. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures.

176. The Fourth Amendment is applied to the states through the Fourteenth Amendment.

177. Under 42 U.S.C. § 1983, municipal defendants are "persons" liable for unconstitutional customs, practices, and policies, and failure to train their law enforcement officers.

178. Under 42 U.S.C. § 1983, every person acting under color of state law who

deprives another person of his or her constitutional rights is also liable at law and in equity.

179. The Police Officer Defendants violated Valentin's clearly-established rights under the Fourth Amendment when they seized, searched, and retained Valentin's phone pursuant to an arrest without probable cause on March 2, 2015 and held the phone until approximately January 2016.

180. The City of Manchester failed to train its police officers about the First Amendment right of individuals to video and/or audio record law enforcement officers in a public place when the officers are acting in the course of their official duties (provided that the recording does not interfere with the officer's performance of those duties), thereby permitting LeVeille and Sanders to be in a position to violate Valentin's Fourth Amendment right to be free from unreasonable searches and seizures when they seized, searched, and retained Valentin's phone pursuant to an arrest without probable cause.

181. The City of Manchester failed to train its police officers about how New Hampshire's wiretap statute does not apply to individuals who record law enforcement officers in a public place because the officers do not have an "expectation that such communication is not subject to interception under circumstances justifying such expectation," thereby permitting LeVeille and Sanders to be in a position to violate Valentin's Fourth Amendment right to be free from unreasonable searches and seizures when they seized, searched, and retained Valentin's phone pursuant to an arrest without probable cause.

182. The City of Manchester knew or should have known that such training was inadequate and would lead to improper conduct by its employee police officers, but nonetheless exhibited deliberate indifference to the unconstitutional effects of those inadequacies.

183. The City of Manchester's failure to train its officers directly resulted in the

violation of Valentin's Fourth Amendment rights by LeVeille and Sanders when they seized, searched, and retained Valentin's phone pursuant to an arrest without probable cause.

184. Defendant City of Manchester has also intentionally developed and implemented a custom, practice, and/or policy in which it detains, arrests, and charges individuals for criminal wiretapping, see RSA 570-A:2, who record (including secretly) Manchester police officers while they are performing their official duties in a public place and without interfering with the officers' performance of those duties. This custom, practice, and/or policy includes the seizure and searching of the device used to make the recording.

185. Manchester city officials have known or should have known about the existence of this custom, practice, and/or policy.

186. Defendant Manchester police officers LeVeille and Sanders, acting under color of state law and pursuant to this unlawful custom, practice, and/or policy, violated Valentin's clearly-established Fourth Amendment right to be free from unreasonable searches and seizures when they seized, searched, and retained Valentin's phone pursuant to an arrest under the wiretap statute without probable cause.

187. This unlawful custom, practice, and/or policy caused the violation of Valentin's Fourth Amendment rights.

188. The City of Manchester acted with deliberate indifference and/or willful blindness to the strong likelihood that unconstitutional conduct will result from the implementation of this custom, practice, and/or policy.

189. Accordingly, the Defendants violated Valentin's rights under the Fourth Amendment of the United States Constitution to be free from unreasonable searches and seizures.

190. Plaintiff is entitled to punitive damages, as the actions of Defendants LeVeille and Sanders were motivated by evil motive or intent and/or involved reckless or callous indifference to the Fourth Amendment rights of Plaintiff.

DEMAND FOR JURY TRIAL

Plaintiff Alfredo Valentin requests a trial by jury on all issues triable by jury.

RELIEF REQUESTED

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

A. Declare that the actions taken by Defendants in arresting, detaining, and charging Plaintiff, as well as searching and seizing his phone, for violating New Hampshire's wiretap statute, see RSA 570-A, when Plaintiff was peacefully recording law enforcement officers in a public place while the officers were acting in the course of their official duties, and without interfering with those official duties, violated Plaintiff's rights under the First and Fourth Amendments;

B. Preliminarily and permanently enjoin Defendants from detaining, arresting, and charging individuals, as well as searching and seizing their property, when these individuals are peacefully—and whether openly or secretly—recording law enforcement officers engaging in official duties in a public place and when the recording does not interfere with those official duties;

C. Monetary damages in an amount to be determined at trial and no less than \$1,250,000;

D. Punitive damages;

E. Costs, expenses, and reasonable attorney's fees pursuant to 42 U.S.C. § 1988(b);
and

F. Any other relief that is just or equitable.

Respectfully submitted,

Alfredo Valentin,

By and through his attorneys,

/s/ Gilles R. Bissonnette

Gilles R. Bissonnette (N.H. Bar. No. 265393)

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Date: October 24, 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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