UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW HAMPSHIRE

ALFREDO VALENTIN **Plaintiff,** **v.** **CITY OF MANCHESTER, ET AL.** **Defendants.**	**Case No.: 1:15-cv-00235-PB**

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT AS TO ALL CLAIMS

This case is about Defendants' violation of Plaintiff's clearly-established constitutional rights under *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) and *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014). The list of violations in this case is extensive. Defendant Manchester Police Department ("MPD") issued an unlawful policy/training memorandum to its officers stating its view that the "secret" recording of the police, which includes while officers are publicly performing official duties, is prohibited. Defendants needlessly arrested and charged Plaintiff, as well as seized his phone, simply for recording the police publicly performing their official duties. Defendants overzealously pursued an indictment when the Hillsborough County Attorney's Office ("HCAO") originally declined to prosecute. Defendants sought an overbroad search warrant exceeding the wiretapping offense charged. And Defendants held Plaintiff's phone for over four months without obtaining a warrant approving of its seizure. No dispute of material fact exists preventing this Court from concluding that the Defendants are liable for violating Plaintiff's First and Fourth Amendment rights. And even if Plaintiff recorded the Officer Defendants "surreptitiously" (which he disputes), clear First Circuit precedent makes this factual contention irrelevant. Indeed, both the Hillsborough

County Superior Court and the New Hampshire Attorney General's Office have agreed that Plaintiff engaged in protected activity even if he was recording secretly. Consistent with First Circuit precedent, this Court must reach the same conclusion and find that the City of Manchester is liable under *Monell* and that the Officer Defendants are not entitled to qualified immunity. This case should be set for trial on damages.

STATEMENT OF MATERIAL FACTS CONSTRUED IN FAVOR OF THE DEFENDANTS

I. The *Glik* Decision, the New Hampshire Attorney General's Memorandum Regarding it, and the MPD's Policy/Training Memorandum

1. On August 26, 2011, the First Circuit Court of Appeals held in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) that members of the public have a First Amendment right 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. Nothing in *Glik* limits its application to cases involving open and notorious recording of police activities. On August 31, 2011, the MPD circulated the *Glik* opinion to all sworn officers, including Defendants Sgts. LeVeille and Sanders. *See* Cunha Depo. Ex. 3/LeVeille Depo. Ex. 15, attached to the Declaration of Gilles Bissonnette, Esq. (hereinafter, "Biss. Decl.") at <u>*Ex. A*</u>.[1]

2. 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* Cunha Depo. Ex. 4/LeVeille Depo Ex. 17, Biss. Decl. at <u>*Ex. B*</u>. The AG Memorandum explained the holding of *Glik*, and repeated the part of the *Glik* opinion stating the following: "[A] citizen's right to film government

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[1] All exhibits referenced herein are attached to the accompanying Declaration of Gilles Bissonnette, Esq. in Support of Plaintiff's Motion for Summary Judgment as to All Claims. This declaration and exhibits have been filed simultaneously with this Motion and supporting Memorandum.

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.* at 1. The MPD received the AG memorandum and distributed it to all sworn officers, including Defendants Sgt. LeVeille and Sanders, on April 5, 2012 and August 28, 2012. *See* Cunha Depo. Ex. 4/LeVeille Depo Ex. 17, Biss. Decl. at *Ex. B*; Cunha Depo. Ex. 5/LeVeille Depo. Ex. 4, Biss. Decl. at *Ex. C*.

3. On April 5, 2012, after the *Glik* decision, the MPD intentionally sent to all its sworn officers—including Sgts. LeVeille and Sanders—a training memorandum stating that the New Hampshire wiretapping statute "prohibits someone from secretly audio recording" the police. *See* Cunha Depo. Ex. 4/LeVeille Depo Ex. 17, Biss. Decl. at *Ex. B*.

II. Valentin's Unconstitutional Arrest on March 3, 2015[2]

4. Valentin owns his home at 6 Lawton Street in Manchester. At approximately 10:30 a.m. on March 3, 2015, the MPD executed a drug search warrant at 6 Lawton Street as part of an 8-month-long drug investigation concerning Christopher Chapman. Chapman rented a room at 6 Lawton Street from Valentin. Press Release, Biss. Decl. at *Ex. G*. Valentin was not a target of the drug investigation.

5. At approximately 11:10 a.m., Valentin arrived at the scene and made contact with Defendant Manchester police Sergeant Brian K. LeVeille and an additional officer. 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." Valentin "demanded that [the officers] provide him with a copy of the warrant." LeVeille declined to immediately produce it, but "explained to [Valentin] that [the MPD] would leave a copy of the warrant at the residence when [they] were done" with the search. Valentin then left. *See also* Sanders Depo. 26:14-17 ("I think

[2] Unless otherwise noted, the facts in this section (Section II) can be found in the police report of Sgt. Sanders and the police report/affidavit of Sgt. LeVeille. *See* Sanders Depo. Ex. 20, Biss. Decl. at *Ex. D*; LeVeille Depo. Ex. 5 and Arrest Affidavit, Biss. Decl. at *Exs. E and F*.

we said we would call him, but he might have misunderstood and said come back in an hour, something to that effect"), Biss. Decl. at *Ex. I*.

6. At approximately 1:00 p.m., Defendant Manchester police Sergeant Christopher Sanders "observed that Mr. Valentin had returned." 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." Valentin "asked for [Sanders's] name and badge which [Sanders] provided." Sanders "advised Sgt LeVeille that Mr. Valentin had returned at which time [LeVeille] joined [Sanders] in front of the residence." 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. 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." Valentin "demanded to see the search warrant." LeVeille "explained that he would receive a copy as soon as the search was completed." Valentin "indicated that he was not convinced that [the police] had a warrant because [LeVeille] refused to produce it at this time." LeVeille then "explained that a warrant had been issued and agreed to show [Valentin] the warrant." While LeVeille went to retrieve the search warrant inside Valentin's residence, Sanders remained with Valentin outside in public "at the edge of the walkway and the street." LeVeille returned outside and "showed [Valentin] the warrant." Valentin then "began questioning [the police's] ability to search [Valentin's] entire residence, including areas [within] his control." 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." 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."

7. At or around this time, Sanders "observed that Mr. Valentin was holding his cell

phone in his left hand down by his side partially obscured by his leg." 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." *See also* Sanders Depo. 30:11-15 (same), 61:13-17 (same), Biss. Decl. at *Ex. I*. At this point during the exchange, while they were outside in public, LeVeille "observed Valentin was holding his cell phone in his left hand." After seeing the phone, Sanders "asked [Valentin] if he was recording the conversation." Valentin stated "yes." 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." LeVeille "advised [Valentin] that this was a crime."

8. The engagement then ended, and Valentin "began walking away toward the driveway" near an unmarked police vehicle. LeVeille and Sanders then "followed [Valentin] and again engaged him." LeVeille "explained to [Valentin] that he was under arrest." In conjunction with the arrest, Defendants confiscated Plaintiff's phone.

III. The Unconstitutional Prosecution and Dismissal

9. On March 4, 2015, the MPD 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). The complaint was signed by the Manchester police chief. *See* LeVeille Depo. Ex. 3, Biss. Decl. at *Ex. J*. 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.* Valentin was never charged with any offense related to controlled substances or any other offense (e.g., knowingly creating a public nuisance, resisting arrest, etc.). *See id.*; *see also* First Prosecution Case Summary, Biss. Decl. at *Ex. K*; June 18, 2015 Indictment, Biss. Decl. at *Ex. L*; Second Prosecution Case Summary, Biss. Decl. at *Ex. M*.

10. On March 4, 2015, the MPD published a press release stating that 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, Biss. Decl. at *Ex. G*. The press release was based, in part, on an email Sgt. LeVeille sent to Lt. Brian O'Keefe, among others, on the evening of March 3, 2015. *See* March 3, 2015 Email from B. LeVeille, Biss. Decl. at *Ex. N*.

11. On approximately March 29, 2015, Valentin's counsel filed a motion to dismiss the criminal complaint. *See* Mar. 29, 2015 Motion to Dismiss, Biss. Decl. at *Ex. O*. The City of Manchester filed no response. *See* First Prosecution Case Summary, Biss. Decl. at *Ex. K*.

12. The City of Manchester ultimately voluntarily dismissed this charge on May 15, 2015 after the HCAO decided not to seek an indictment against Plaintiff. *See* LeVeille Depo. Ex. 6, Biss. Decl. at *Ex. P*. At the time, the HCAO disagreed with Defendants that this was a meritorious prosecution. LeVeille Depo. 99:13-15, Biss. Decl. at *Ex. Q*. This dismissal occurred days before the probable cause hearing scheduled for May 20, 2015. *See* First Prosecution Case Summary, Biss. Decl. at *Ex. K*.

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

13. However, Defendant Sgts. LeVeille "couldn't let it go," called HCAO Attorney Andrew Ouellette, and initiated a meeting with the HCAO on June 1, 2015 to "send a message that we are not okay with their decision" to not prosecute Plaintiff. *See* May 18, 2015 Email from B. LeVeille to M. Sanclemente, Biss. Decl. at *Ex. R*; LeVeille Depo. Ex. 7/Reardon 11, Biss. Decl. at *Ex. S*; LeVeille Depo. Ex. 9, Biss. Decl. at *Ex. T*; June 1, 2015 A. Ouellette Meeting Notes, Biss. Decl. at *Ex. U*.

14. That Office succumbed to Defendants' pressure to prosecute Plaintiff for criminal wiretapping and, on June 18, 2015, presented the case to the grand jury for indictment both as a felony and as a misdemeanor. Sgt. Sanders testified before the grand jury. Sanders Depo. 73:19-21, Biss. Decl. at *Ex. I*. That day, the grand jury declined to issue an indictment for felony wiretapping—the crime he was originally arrested for—but did issue an indictment for misdemeanor wiretapping under RSA 570-A:2, I-a. *See* June 18, 2015 Indictment, Biss. Decl. at *Ex. L*; *see also* Second Prosecution Case Summary, Biss. Decl. at *Ex. M*; June 19, 2015 HCAO Attorney Andrew Ouellette Notes (reflecting that "The felony was a 'No True Bill"), Biss. Aff. at *Ex. Y*.

15. 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 MPD 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* June 18, 2015 Indictment (emphasis added), Biss. Decl. at *Ex. L*. This indictment—through its language "while trying to hide the telephone from view"—alleged that Valentin engaged in secret recording based on Sgt. Sanders's grand jury testimony. This testimony echoed his police report, which stated 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* Sanders Depo. Ex. 20, Biss. Decl. at *Ex. D*.

16. 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.

17. On July 8, 2015—over four (4) months after seizing Plaintiff's phone—Defendants secured a search warrant for the phone. This warrant, which was reviewed by Sgt. LeVeille, was broad and far exceeded the audio recording at issue in the criminal case. This search warrant included, for example, "passwords," any "[o]ther electronically stored records," and "[s]tored

images relating to any SIM cards." *See* LeVeille Depo. Ex. 11, Biss. Decl. at *Ex. Z*; LeVeille Depo. 118:16-17, 119:3-23 (acknowledging his review of the warrant, and that it was based on his police reports), Biss. Decl. at *Ex. Q*. At deposition, Sgt. LeVeille acknowledged that this language was "boilerplate" and that it gave him the authority to search the entire cell phone. LeVeille Depo. 121:7-18, 123:5-9, Biss. Decl. at *Ex. Q*. He also attempted to explain away this overbreadth by stating that this warrant language reflected locations where the audio recording may be located, or reflected records "in terms of when that recording was created." *Id.* at 122:20-123:4, 123:18-124:11.

18. 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, Biss. Decl. at *Ex. M*.

19. On approximately July 17, 2015, the HCAO 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, Biss. Decl. at *Ex. M*.

20. On August 24, 2015, Valentin moved to dismiss the indictment on the ground that the arrest and charge violated his First Amendment rights. *See* Aug. 24, 2015 Valentin Mot. to Dismiss, Biss. Decl. at *Ex. V*. On September 8, 2015, the HCAO 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* Sept. 8, 2015 State's Objection at 3, Biss. Decl. at *Ex. W*. Valentin filed a reply on September 14, 2015. *See* Sept. 14, 2015 Valentin Reply, Biss. Decl. at *Ex. X*.

21. Oral argument was held on Valentin's Motion to Dismiss on October 13, 2015. *See* Oct. 13, 2015 Oral Argument Transcript, attached as *Ex. AA*.

22. 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* Dismissal Order, at 5 (citing *Glik*, 655 F.3d at 82), Biss. Decl. at *Ex. H*. 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. The Court also explained that "[T]he State … does not allege [Valentin's] filming interfered with police duties …." *Id.* at 6.

23. On October 25, 2015, the HCAO asked the Attorney General's Office whether they "would be interested in taking" the case on appeal. HCAO Attorney Andrew Ouellette acknowledged in this email that "[t]here is no issue of interference with the police by [Valentin], nor was there … other circumstances present that would have otherwise placed reasonable restrictions on [Valentin's] conduct." *See* Oct. 25, 2015 Email from A. Ouellette to A.G.'s Office, Biss. Decl. at *Ex. BB*.

24. On October 26, 2015, Lt. Stephen Reardon—who oversees MPD's legal division—informed all sworn officers of the Superior Court's decision and advised all officers to use caution: "Because of a recent and decidedly unfavorable Superior Court ruling regarding this [wiretapping] statute as it concerns police officers being recorded during the normal course of their duties, we are requesting that any enforcement of this RSA that involve[s] allegations of illegal wiretapping of police officers during this public performance of their duties be done by warrant or, preferably, direct indictment until further notice." *See* LeVeille Depo. Ex. 19, Biss. Decl. at *Ex. CC*.

25. On November 4, 2015, the New Hampshire Attorney General's Office informed the MPD that it was declining to appeal and that it agreed with the Superior Court's decision: "Having reviewed the relevant case law, we agree with the trial court's reasoning that the First Amendment protects members of the public from recording police officers performing their duties in public. This

is true regardless of whether the person does so openly or secretly. The only limitations to this exercise of First Amendment rights would be the appropriately tailored time, place, and manner restrictions on recording in a manner that interferes with police activities or threatens officer safety." *See* Nov. 4, 2015 Email from A.G.'s Office to A. Ouellette, Biss. Decl. at *Ex. DD*.

26. Two days later, Captain Maureen Tessier of the MPD sent an email to all sworn officers informing them of the Superior Court's and the Attorney General's respective decisions. Captain Tessier explained that the Office of the Attorney General's decision not to appeal "basically indicat[es] their opinion that the only limitations to this exercise of First Amendment rights would be recording in a manner that interferes with police activities or threatens officer safety." *See* LeVeille Depo. Ex. 16, Biss. Decl. at *Ex. EE*.

STANDARD OF REVIEW

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).

MUNICIPAL LIABILITY/*MONELL* CLAIMS AGAINST THE CITY

Plaintiff raises two independent *Monell* claims against the City of Manchester. First, Plaintiff raises an official policy/custom claim. As the First Circuit has explained, "municipalities can be liable for constitutional violations only if the violation occurs pursuant to an official policy or custom. A plaintiff can establish the existence of an official policy by showing that the alleged constitutional injury was caused … by a person with final policymaking authority." *Welch v. Ciampa*, 542 F.3d 927, 941 (1st Cir. 2008) (internal citations omitted); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). When a policy is facially unconstitutional, the only evidence the plaintiff need show in order to prevail is the presence of the policy and its application to the plaintiff. *See Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404 (1997) ("Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving [the] issues of fault and causation is straightforward."); *Rossi v. Town of Pelham*, 35 F. Supp. 2d 58, 74 (D.N.H. Sept. 28, 1997) (same); *Szabla v. City of Brooklyn Park, MN,* 486 F.3d 385, 389-90 (8th Cir. 2007) (same).[3] Here, in attempting to immunize the Officer Defendants in this case, Defendants have effectively conceded that (i) the MPD, at the time of Plaintiff's arrest on March 3, 2015, had what is tantamount to a policy in place that deemed the secret recording of the police as not being constitutionally protected (even if the recording was of officers engaging in public duties and done without interference) because it violated New Hampshire's wiretapping statute and (ii) Sgts. LeVeille and Sanders acted pursuant to this policy when arresting Plaintiff. This policy, on its face, violates the First Amendment and is inconsistent

[3] Municipal liability under this theory—in which the policymaker directs unlawful conduct in a written policy—is distinct from municipal liability based on the municipality's failure to prevent constitutional violations by its employees. Only the latter requires a showing that the municipality was "deliberately indifferent" to the violations. *See Brown,* 520 U.S. at 404-05 ("the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains"); *Haley v. City of Boston*, 657 F.3d 39, 52 (1st Cir. 2011) (describing these two ways of establishing *Monell* liability); *see also Williams v. Kaufman Cnty.*, 352 F.3d 994, 1014 n.66 (5th Cir. 2003); *Rossi v. Town of Pelham*, 35 F. Supp. 2d 58, 78 n.1 (D.N.H. Dec. 18, 1997) ("Thus, for a municipal policy that is either facially unlawful or directs unlawful conduct, plaintiffs need not further establish 'deliberate indifference.'").

with the wiretapping statute.

Second, and alternatively, the MPD failed to train its officers that both the First Amendment and the wiretapping statute allow such "secret" recordings where the officers are performing their official duties in public and where the recording is done without interference. This too is apparent based on the fact that the training actually provided to MPD officers said the opposite. Given this failure to train on what the law requires—and, in fact, by providing the opposite guidance in its training—it was highly predictable that an officer, like the Officer Defendants, would violate the civil rights of a person like Plaintiff alleged to be secretly recording the police. *See Brown*, 520 U.S. at 399 (even where a pattern does not exist, municipal liability exists for a failure to train where "a violation of federal rights [was] a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations"); *see also Young v. City of Providence*, 404 F.3d 4, 28 (1st Cir. 2005) (same).

I. This Policy/Training Memorandum and its Application in this Case Violated the First Amendment (Count I – Policy and Failure to Train *Monell* Claims)

A. The Policy/Training Memorandum and its Causal Impact

On April 5, 2012, after the *Glik* decision, Captain Robert Cunha of the MPD sent to all its sworn officers—including Sgts. LeVeille and Sanders—a training memorandum stating that the New Hampshire wiretapping statute "prohibits someone from secretly audio recording" the police. *See* Cunha Depo. Ex. 4/LeVeille Depo Ex. 17, Biss. Decl. at *Ex. B*.[4] Manchester's city prosecutors were also copied on this email attaching this training memorandum. The MPD was of this view that the secret recording of the police was unlawful and not constitutionally protected even if the recording was done while the officers were performing their official duties in public and where the

[4] *See also* Manchester Int. Resp. No. 5, Biss. Decl. at *Ex. GG* (referring to produced documents, including Cunha Depo. Ex. 4, concerning "guidelines, instructions, or other policy statement … concerning the wiretapping statute").

recording was not interfering with those duties. This policy was deliberately and consciously issued by Captain Robert Cunha, who was then a policymaker in charge of the MPD's legal division and office of professional standards. *See* Cunha Depo. 8:14-11:9, 15:4-17, 17:9-17 (describing role, and explaining that he would put out training to individual officers on legal matters), Biss. Decl. at *Ex. FF*; LeVeille Depo. 61:12-62:10 (Cunha was the "department expert in this matter" and took "the lead in all this type of stuff"), Biss. Decl. at *Ex. Q*. Captain Cunha described this document as a "training memo" that he had updated since the *Glik* decision. *See* Cunha Depo. Ex. 4/LeVeille Depo Ex. 17, Biss. Decl. at *Ex. B*. As the end of the document states: "The information contained in this document was designed to assist the Manchester PD in dealing with anti-police activities. It was created by the members of the Manchester PD after consultation with the agency's legal counsel in order to ensure the prosecutorial merit of the listed charging options." *Id.* Put another way, it was designed to help officers "do their jobs." *See* Cunha Depo. 22:7-12, Biss. Decl. at *Ex. FF*.[5]

Lt. Stephen Reardon—who has overseen MPD's legal division since late 2013—further explained in his June 7, 2016 affidavit that "[i]t was the MPD's understanding [at the time of the arrest] that it still violated the wiretap statute to secretly record another person without consent, and that included police officers; *the police officers in the department were advised of that in accordance with these two memorandums* [from April and August 2012] …." *See* Reardon Depo. Ex. 10 ¶ 4, Biss. Decl. at *Ex. HH* (emphasis added). He also reiterated this point at deposition:

> Q. BY MR. LEHMANN: …. At the time that Mr. Valentin was arrested, is it your understanding that the policy of the Manchester Police Department was that—was to construe the wiretapping statute as prohibiting someone from secretly audio recording you?
> A. Yes, sir.
>
> * * *
>
> Q. Is it your—is it your understanding that that [banning surreptitious interception] was the policy of the Manchester Police Department on the date of Mr. Valentin's arrest?

[5] This same policy was issued to all sworn officers—including Sgts. LeVeille and Sanders—on August 28, 2012. *See* Cunha Depo. Ex. 5/LeVeille Depo. Ex. 4, Biss. Decl. at *Ex. C* (page 1 of MPD training bulletin stating that the wiretapping statute "prohibits someone from secretly audio recording" the police.). After Capt. Cunha sent out this bulletin on August 28, 2012, then Chief David Mara responded with approval, stating "Great job, Bob." *See* Cunha Depo. Ex. 6, Biss. Decl. at *Ex. JJ*.

> A. Well, yes, I can say that that was the—that was my opinion, that was the opinion that was disclosed in these training documents that we've discussed, where it actually says it's unlawful for someone to secretly record you. We've seen that several times. We've actually—I'm aware of at least one other criminal case that was filed by the Manchester Police Department that was somewhat contemporaneous where an officer was recorded by phone without his knowledge. So yes, that would be an accurate statement.

Reardon Depo. 44:20-45:3, 67:18-68:8, 52:18-53:17 (acknowledging that this was the Department's understanding), 60:14-61:3 (same), Biss. Decl. at *Ex. II*. Sgt. LeVeille added at deposition, when referring to a similar bulletin provided on August 28, 2012, that (i) he "would agree that when they send these [bulletins] around, these are how, for the most part, they would expect you to handle … certain situations out there" and (ii) this was the MPD "telling [him] that the statute prohibits someone from secretly recording him." LeVeille Depo. 59:21-60:1, 8-11, Biss. Decl. at *Ex. Q*.

Defendants have acknowledged that Sgts. LeVeille and Sanders were acting pursuant to this memorandum when they arrested Plaintiff. In Defendants' Objection to Plaintiff's Motion to Amend, Defendants stated that "Officers LeVeille and Sanders were only following the department's understanding of the Wiretap Statute" as memorialized in these documents. *See* Sept. 5, 2016 Defs.' Memo. in Support of Obj. to Motion to Amend at p. 3, Docket No. 33-1 (citing April 2012 training memo.), Biss. Decl. at *Ex. KK*; *see also* June 8, 2016 Defs.' Memo in Support of Obj. to Mot. for Partial S.J. at p. 17, Docket No. 19-1 (citing Apr. 2012 training memorandum, stating that "it was [the officers'] belief that secretly recording police officers was a violation of the wiretap statute, which is in accord with their training as exhibited by the training memo just discussed"), Biss. Decl. at *Ex. LL*.

Defendant Officers Sanders and LeVeille echoed these sentiments in sworn affidavits and at deposition. *See* June 8, 2016 Sanders Decl. ¶ 10/Docket No. 19-2 ("I was aware of the *Glik* case through guidance by the Police Department, but I understood that case to stand for the proposition that a citizen has the right to video record police while in a public place in the performance of their

duties if the recording is done in an open manner."), Biss. Decl. at *Ex. MM*; June 8, 2016 LeVeille Decl. ¶ 10/Docket No. 19-3 (based, in part, on "guidance from the department," Sgt. LeVeille "believed that there was probable cause to arrest and charge Mr. Valentin under the wiretap statute because he was secretly recording his conversation with us"), Biss. Decl. at *Ex. NN*; LeVeille Depo. 48:9-10 (belief was based on, in part, his training), 149:8-150:18 (acknowledging that (i) his decision to arrest Plaintiff and his belief that secretly recording the police was prohibited were "informed by all the training and experience [he] had," which included this policy/training memorandum, and (ii) he believed he was following the "guidance [he] had received" and "the department's policy provided to [him]"), Biss. Decl. at *Ex. Q*; Sanders Depo. 47:4-14 (relying on training memo), 68:20-69:8 (relying on identical Aug. 28, 2012 training bulletin), Biss. Decl. at *Ex. I*.

B. *Glik* Protects All Recording That Meets its Criteria, Whether Done Openly or Secretly

This MPD policy permits the arrest of *all* persons who secretly record law enforcement officers, even if the officers are engaging in official duties in public and where the recording causes no interference with such duties. *See* Second Am. Compl. ¶¶ 141-145 (municipal policy First Amendment claim), 137-140 (municipal failure to train First Amendment claim). This view of the law is "manifestly incorrect." *See* Dismissal Order, at 3, Biss. Decl. at *Ex. H*.

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"). 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.

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 the Hillsborough County Superior Court correctly held, this right to record—or any other First Amendment right for that matter—does not turn on whether the person seeking to exercise it provides notice to the subject of her speech or expression. *See* Dismissal Order, at 5 ("[T]he 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."), Biss. Decl. at *Ex. H*. [6] *Glik*'s First Amendment holding broadly covers *all*

[6] This decision was cited favorably by prominent First Amendment scholar Eugene Volokh. *See* Eugene Volokh, Volokh Conspiracy,

recordings of police officers in public spaces without regard to the officer's awareness that a recording is being made. Whether done openly or secretly, the First Circuit explained that a citizen's right to record the police "in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." *Glik*, 655 F.3d at 85. The Court added: "[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. "The question of 'openness' did not enter into the First Amendment analysis in either case [*Glik* and *Gericke*]." *See* Dismissal Order, at 3, Biss. Decl. at *Ex. H*. The HCAO conceded this point in the underlying criminal case.[7] In sum, the MPD's novel suggestion that the existence of a right to record simply disappears into a coat pocket, along with the recording device, has no precedent in First Amendment jurisprudence. At least one court has declined to adopt this view. *Cf. Bacon v. McKeithen*, No. 5:14-cv-37, unpub op. at *9-10 (N.D. Fla. Aug. 28, 2014) (construing state wiretap statute to allow secret recording of police officers performing their duties in public because a contrary construction "would raise serious constitutional issues as to … protected speech"; rejecting qualified immunity), Biss. Decl. at *Ex. OO*.

The only explicit—and prudent—limitation on the right to record referenced in *Glik* and *Gericke* concern situations where the recording "interfere[s] with the police officers' performance of their duties." *Glik*, 655 F.3d at 84. As the *Gericke* Court explained: "[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

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"N.H. Authorities Argue that Secret Recording of Police is a Crime" *Washington Post* (May 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/09/n-h-authorities-argue-that-secret-recording-of-police-is-a-crime/.

[7] *See* Oct. 13, 2015 Oral Argument Transcript at 11:20-22 ("The openness discussion is contained in the *Glik* decision under their Fourth Amendment analysis, not First Amendment analysis."), Biss Decl. at *Ex. AA*.

interfering, or is about to interfere, with his duties." *Gericke*, 753 F.3d at 8 (emphasis added). Thus, this right to record police officers performing official functions in public places may *only* be subject to reasonable time, place, and manner restrictions that are necessary to avoid interference with legitimate law enforcement activities or protect officer safety.[8]

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

[8] The exercise of this First Amendment right has informed and expanded the public's understanding of encounters between police officers and civilians, as well as how the police exert their authority. 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. As these examples—as well as Plaintiff's arrest—indicate, when police officers make choices about how to exercise their power, the stakes are high. The rule in *Glik* and *Gericke* recognizes this by protecting such recordings to ensure government transparency and accountability. Yet the MPD's policy banning "secret" recordings of the police engaging in public duties would, as written, even criminalize a person who records from within the confines of a car a police interaction with another on a public street—including a shooting like the one that occurred in Baton Rouge in July 2016—when it is not clear to the officer that he is being recorded. *See* Alton Sterling video, *available* at https://www.youtube.com/watch?v=CaAik-EvI3o.

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.[9]

C. The Application of the Policy/Training Memorandum Violated Plaintiff's First Amendment Rights

The record demonstrates that the only reason Defendants arrested Plaintiff is because he "secretly" recorded Sgts. LeVeille and Sanders performing their official duties in public. But even if the recording can be viewed as "secret"—which is disputed by Plaintiff—Plaintiff must only prove the following elements under *Glik*/*Gericke*: (i) Sgts. LeVeille and Sanders were police officers in a public place; (ii) Sgt. LeVeille and Sanders were engaged in their official duties; (iii) Plaintiff was not interfering with Sgt. Sanders's or Sgt. LeVeille's official duties; and (iv) Sgts. Sanders and LeVeille arrested Plaintiff for recording their conversation under the color of law.

First, there is no dispute that the 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 Officer Defendants. *See* Sanders Depo. Ex. 20 (Valentin was outside "at the edge of the walkway and the street"), Biss. Decl. at Ex. D; Dismissal Order, at 3 ("The State does not dispute that defendant filmed police performing their duties in public."), Biss. Decl. at Ex. H; LeVeille Depo.

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[9] The Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Hyde*, 750 N.E. 2d 963 (Mass. 2001) does not support the MPD's position that the First Amendment fails to protect the secret recording of the police. *Hyde*'s focus was on the text of Massachusetts' wholly different wiretap statute, not whether there is a First Amendment right to secretly record the police in public. As the Superior Court noted, any reliance on *Hyde* is "misplaced." *See* Dismissal Order, at 5 ("The defendant's challenge in *Hyde* was based on statutory interpretation of Massachusetts' wiretap statute. The case did not address the First Amendment. Notably, *Hyde* was decided before *Glik* and *Gericke* clarified the First Circuit's position that the First Amendment protects the recording of police officers."), Biss. Decl. at Ex. H.

38:17-18 (recording was "out in front of the residence in the street"), 69:12-14 (recording was "on a public street"), Biss. Decl. at *Ex. Q*; Sanders Depo. 51:4-11 (same), Biss. Decl. at *Ex. I*.

Second, Plaintiff was recording the 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. As Sgt. LeVeille acknowledged at deposition, he was "engaged in official Manchester Police Department business at the time." LeVeille Depo. 69:9-11, Biss. Decl. at *Ex. Q*. In fact, the recorded exchange concerned the Officers' performance of their duties in executing a search warrant.

Third, Plaintiff's recording in no way impeded the Officer Defendants' ability to interact with an owner of a property being searched about the search being conducted—an activity that, again, falls squarely within an officer's duties. This is especially the case where the Officers elected to arrest the Plaintiff *after* this conversation had peacefully ended and where the Officers did not initially understand that they were being recorded. *See* LeVeille Depo. 80:3-5 (decision to arrest occurred when Plaintiff "was walking away"), Biss. Decl. at *Ex. Q*; Sanders Depo. 33:21-34:1 (same), Biss. Decl. at *Ex. I*. Indeed, when a homeowner comes upon a police search of his home, any reasonable police officer would expect than an explanation of the purpose of the search and the existence of a warrant would be necessary. The HCAO also conceded in the underlying criminal case that "[t]here is no issue of interference with the police by [Valentin], nor was there … other circumstances present that would have otherwise placed reasonable restrictions on [Valentin's] conduct." *See* Oct. 25, 2015 Email from A. Ouellette to A.G.'s Office, Biss. Decl. at *Ex. BB*; *see also* Dismissal Order, at 6 ("[T]he State … does not allege [Valentin's] filming interfered with police duties …."), Biss. Decl. at *Ex. H*. Nor is there a contention by the Defendants that Plaintiff's recording created a safety concern or implicated confidential information. *See* Dismissal Order, at 6, Biss. Decl. at *Ex. H* ("[T]he State points to no specific safety concerns caused by [Valentin's]

filming …. [T]he State does not allege [Valentin] actually filmed any confidential information or undercover officers.”). Further acknowledging this lack of interference, Sgt. LeVeille testified at deposition that his only problem with Plaintiff’s behavior was that he was engaging in “secret” recording. *See* LeVeille Depo. 67:20-68:1 (noting that Valentin’s secret recording is “what makes this different, and that’s why I acted the way I did”), 154:10-14 (“Q: [W]hen you were discussing the search warrant with Mr. Valentin, if he had held his phone up or just let you know that he was recording, would you have had any problem with that? A: No, I wouldn’t have arrested him.”), Biss. Decl. at *Ex. Q*.

Finally, there is no dispute that the Officer Defendants arrested Plaintiff for criminal wiretapping under RSA 570-A because he was recording the 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* LeVeille Arrest Affidavit, Biss. Decl. at *Ex. F*. Sgt. LeVeille matter-of-factly (and incorrectly) told Valentin that this was a crime. *Id.* The MPD’s press release reiterated this point. *See* Press Release, Biss. Decl. at *Ex. G*.

The satisfaction of these four elements of the First Amendment right to record in *Glik* ends this Court’s inquiry. MPD’s Policy and its application in this case violated Plaintiff’s First Amendment rights.

II. This Policy/Training Memorandum and its Application in this Case Violated the Fourth Amendment (Counts II and III – Policy and Failure to Train *Monell* Claims)

As explained in *Monell* Part I.A, *supra*, the MPD made clear in its policy/training memorandum to officers that the New Hampshire wiretapping statute “prohibits someone from secretly audio recording” the police. This policy/training memorandum and its application in this case to arrest Plaintiff and seize his phone also violates the Fourth Amendment because it incorrectly states that probable cause exists under New Hampshire’s wiretapping statute when someone is

"secretly" recording officers, which would include while they are publicly performing their official duties without interference. *See* Second Am. Compl. ¶¶ 165-169 (Count II municipal policy claim), 184-188 (Count III municipal policy claim), 160-164 (Count II failure to train claim), 180-183 (Count III failure to train claim).

Under New Hampshire's wiretapping statute, a person is guilty of a felony or a misdemeanor if he willfully or knowingly, respectively, intercepts an "oral communication" "without consent of all parties to the communication." *See* RSA 570-A:2, I(a) (felony), I-a (misdemeanor). An "oral communication" is limited to "any verbal communication uttered by a person *who has a reasonable expectation that the communication is not subject to interception*, under circumstances justifying the exception." RSA 570-A:1, II (emphasis added); *see also Fischer v. Hooper*, 143 N.H. 585, 590 (1999) (providing that the victim of intercepted oral communication must have a "reasonable expectation . . . that her communications will not be intercepted"). This limitation—which does not exist under Massachusetts' wiretap statute[10]—is similar to Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968. *See* 18 U.S.C. § 2510(2) (similarly defining an "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation …").[11] Thus, the MPD's policy of banning *all* secret recordings of the police is, as a matter of law, wrong

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[10] Massachusetts' wiretapping statute bans any "secret" recordings regardless of whether there is an expectation of privacy. *See Glik*, 655 F.3d at 86 ("As the Supreme Judicial Court has noted, [Massachusetts' wiretap statute] sweeps more broadly than comparable laws in other jurisdictions, in that its prohibition is not restricted to the recording of communications that are made with a reasonable expectation of privacy."); *see also* Cunha Depo. 98:5-7 (acknowledging differences in two statutes), Biss. Decl. at *Ex. FF*.

[11] As the First Circuit has explained in interpreting Title III's definition of "oral communication":

> We have held that "[t]he legislative history of [this statutory provision] shows that Congress intended this definition to parallel the 'reasonable expectation of privacy test' articulated by the Supreme Court in *Katz* [*v. United States*, 389 U.S. 347 (1967)]." *United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009) (quotation marks and citation omitted). Thus, "for Title III to apply, the court must conclude: (1) the defendant had an actual, subjective expectation of privacy – i.e., that his communications were not subject to interception; and (2) the defendant's expectation is one society would objectively consider reasonable." *United States v. Longoria*, 177 F.3d 1179, 1181-82 (10th Cir. 1999) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)) …. *We conclude that the most reasonable reading of the statute is that the meaning of "oral communication" was intended to parallel evolving Fourth Amendment jurisprudence on reasonable expectations of privacy in one's communications*."

United States v. Larios, 593 F.3d 82, 92 (1st Cir. 2010) (emphasis added).

because a person _can_ secretly record a police officer under the wiretapping statute if the officer does not have a reasonable expectation of privacy in the recorded communication. *See also* Cunha Depo. 101:13-18, 105:2-7 (acknowledging that this training memorandum does not list out the definition of "oral communication"), Biss. Decl. at _*Ex. FF*_.

The Officer Defendants had no objectively reasonable expectation of privacy in their recorded communication. This is for two independent reasons. First, when a police officer is performing his or her official duties, that officer has diminished privacy rights. *See Jean v. Mass. State Police*, 492 F.3d 24, 29-30 (1st Cir. 2007) ("[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy"; noting that a police officer's privacy interest "is virtually irrelevant here, where the intercepted communications involve a search by police officers of a private citizen's home in front of that individual, his wife, other members of the family, and at least eight law enforcement officers"). As the First Circuit has also explained, there is no expectation of privacy with respect to secretly recorded "person to person" communications made by the police of a suspect in the back of a cruiser, or in a motel room in certain circumstances. *See United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009) (no expectation of privacy with respect to secret recording in police cruiser); *United States v. Lario*s, 593 F.3d 82, 93 (1st Cir. 2010) (no expectation of privacy with respect to secret recording done by law enforcement in motel where person recorded was there for minutes to conduct a brief transaction with an undercover officer). Multiple courts outside the First Circuit have reached similar conclusions in similar cases interpreting Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[12] If there is no

[12] *See, e.g.*, *In re John Doe Trader Number One*, 894 F.2d 240, 246 (7th Cir. 1990) (statements made by trader on floor of mercantile exchange, which were secretly recorded by undercover agents posing as traders, were not protected "oral communications" as defined by 18 U.S.C. § 2510(2), since trader had no reasonable expectation that statements were private, even though exchange had membership requirement and rule prohibited tape recorders on trading floor); *Tancredi v. Malfitano*, 567 F. Supp. 2d 506, 512 (S.D.N.Y. 2008) (no reasonable expectation of privacy with respect to conversations held at front desk area of police department headquarters, which was common area for department employees, and which was also accessible to public at all hours of day).

expectation of privacy with respect to one-on-one communications with the police in the home of a suspect while it is being searched, in a patrol car, and in a motel during a transaction, then it is obvious that an expectation of privacy does not exist with respect to a communication like the one here occurring out in public. *See* LeVeille Depo at 71:9-19 (acknowledging that "[i]f the neighbor on the porch had been holding out their phone [recording Plaintiff's interaction with the Officer Defendants] … I would have not gone over and arrested that person"), Biss. Decl. at *Ex. Q*.[13]

Second, and relatedly, the Officer Defendants had no reasonable expectation of privacy because, as explained above in *Monell* Parts I.B-C, *supra*, Plaintiff was engaging in protected First Amendment activity under *Glik* and *Gericke*—that is, the Defendant Officers were performing official duties, they were in a public place out in the open, and the recording was done without interference. Thus, there was no probable cause to arrest Plaintiff or to seize his phone under the wiretapping statute, thereby violating the Fourth Amendment's prohibition of unreasonable searches and seizures. *See Acosta v. Ames Dep't Stores, Inc.*, 386 F.3d 5, 9 (1st Cir. 2004) ("When there is probable cause for an arrest, the Fourth Amendment's prohibition against unreasonable searches and seizures is not offended.").

III. Manchester's Seizure of Plaintiff's Phone for Four Months Without Obtaining a Warrant (Count III – Failure to Train *Monell* Claim)

Separately, the City of Manchester is also liable for the Officer Defendants' failure to timely secure a warrant to seize and search Plaintiff's phone. *See* Second Am. Compl. ¶¶ 180-183.

The Fourth Amendment requires that any delay between the seizure of a device without a warrant and the filing of a search warrant application be reasonable. *Commonwealth v. White*, 59 N.E.3d 369, 378-80 (Mass. 2016) (68-day delay unreasonable). Once a warrantless seizure has been

[13] Moreover, at the time the Defendants first entered Plaintiff's home, there was a sign on Plaintiff's window stating: "THESE PREMISES PROTECTED BY VIDEO SURVEILLANCE." *See* LeVeille Depo Ex. 13, Biss. Decl. at *Ex. PP*; LeVeille Depo. 128:21-129:2 (testifying that he would have no reason to contest any assertion that this sign was there on Plaintiff's property on the date of the search), Biss. Decl. at *Ex. Q*.

executed, the police "must make it a priority to secure a search warrant that complies with the Fourth Amendment. This will entail diligent work to present a warrant application to the judicial officer at the earliest reasonable time." *See United States v. Burgard*, 675 F.3d 1029, 1035 (7th Cir.), *cert. denied*, 133 S. Ct. 183 (2012). If the police fail to do so, the seizure, even if "reasonable at its inception because based upon probable cause," "may become unreasonable as a result of its duration." *Segura v. United States*, 468 U.S. 796, 812 (1984).

Here, Defendants did not obtain the overbroad search warrant to continue seizure of and to search Plaintiff's phone until July 8, 2015—a delay of approximately four (4) months or 128 days since the March 3, 2015 arrest. *See* LeVeille Depo. Ex. 11, Biss. Decl. at *Ex. Z*. Just as the 68-day delay was unreasonable in *White*, Defendants' 128-day seizure of the phone without seeking a warrant was plainly unreasonable. Defendants have offered no reasonable explanation for the delay, other than stating that they did it months later at the request of the HCAO after it decided to obtain an indictment. *See* LeVeille Depo at 116:7-16 (testifying that he obtained the warrant at the request of HCAO Attorney Andrew Ouellette), 151:5-152:1 (testifying that the delay was because the case was not originally going to be prosecuted), Biss. Decl. at *Ex. Q*; Sanders Depo. 78:4-22 (explaining delay by stating that there was "no exigency"), Biss. Decl. at *Ex. I*; Various Phone-related Emails, at PHONE001 (LeVeille instruction on May 20, 2015 that phone is not to be released despite no warrant or pending charge), 002-005 (HCAO June 17, 2015 instruction that phone be held), 009 (Attorney Blanchard June 18, 2015 email asking why a search warrant has not been secured yet), 013-14 (Plaintiff's criminal defense attorney complaining on July 2, 2015 about the over 120-day delay in returning phone), Biss. Decl. at *Ex. QQ*; June 1, 2015 A. Ouellette Meeting Notes (noting that phone had not yet been searched because they are "waiting for the legal issues to get sorted out"), Biss. Decl. at *Ex. U*. Even after the indictment was issued on June 18, 2015, Sgt. LeVeille did not secure a warrant until July 8, 2015 because he was "extremely busy." *Id.* at 015-17.

This behavior in seizing someone's property for four (4) months without any process evidences a callous disregard for property rights and creates grave concerns that the MPD is routinely seizing property without a warrant and without promptly securing judicial process after the seizure. As the MPD has conceded in this case, it has conducted no training on its officers' constitutional obligation to secure timely warrants when seizing property without a warrant, thereby causing injury to and exhibiting deliberate indifference to Plaintiff's property rights. *See* Pls.' Third Document Request and Defs.' Email Response (finding no training documents in response to document request), Biss. Decl. at Ex. RR; *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 9-10 (1st Cir. 2005) ("Deliberate indifference" will be found if there is a lack of adequate training "notwithstanding an obvious likelihood that inadequate training will result in the violation of constitutional rights.").[14]

CLAIMS AGAINST DEFENDANT POLICE OFFICERS/QUALIFIED IMMUNITY ANALYSIS

Qualified immunity does not insulate the Officer Defendants from liability in this case. 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). 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

[14] The training provided to MPD officers addressing "seizing phone/cameras" simply states that "once seized, a search warrant … will be required to retrieve the recording," but says nothing about the legal requirement for such a warrant to be sought without unreasonable delay. *See* Cunha Depo. Ex. 5/LeVeille Depo. Ex. 17, at Training Memo. p. 4, Biss. Decl. at *Ex. C*.

(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)). The analysis above addressing *Monell* liability establishes that the arrest violated Plaintiff's constitutional rights.

The analysis below will focus on the second qualified immunity element—namely, that these rights were clearly established at the time of the March 3, 2015 arrest, thereby preventing qualified immunity on each of Plaintiff's specific claims. These specific claims are: (i) a First Amendment claim; (ii) a Fourth Amendment false arrest claim; (iii) a First Amendment retaliatory arrest claim; and (iv) malicious prosecution and retaliatory prosecution claims. As part of this analysis, Plaintiff need not cite "a case directly on point," but rather "existing precedent must have placed the … constitutional question beyond debate." *Id.* (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

I. First Amendment Claim (Count I)

Plaintiff's central First Amendment claim against the Officer Defendants is that they violated clearly established First Amendment precedent at the time of the arrest. Second Am. Compl. ¶ 133. As explained above in *Monell* Part I.B, *supra*, the First Circuit had clearly established that individuals have a First Amendment right to audio or video record law enforcement officers—whether done openly or secretly—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 officers' performance of such duties. The First Circuit has articulated this simple rule in not one, but two opinions—*Glik* and *Gericke*—predating the March 3, 2015 arrest in which it rejected qualified immunity claims.

Defendants have claimed in this case that the First Amendment rule in *Glik*/*Gericke* does not clearly apply to public "one on one conversations" involving police officers that were secretly recorded. However, Defendants have not pointed to any case or any language in either *Glik*'s First

Amendment holding or the AG memorandum articulating such a limiting principle. *See* LeVeille Depo. 73:3-6, 104:20-105:3 (unable to cite a case explicitly limiting this right), Biss. Decl. at *Ex. Q*; Reardon Depo. 49:17-20 (acknowledging that AG memorandum does not contain this limitation), Biss. Decl. at *Ex. II*. This is because no such limiting principle exists. Again, the *only* 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.") (emphasis added). Whether it is open or secret, this right to record is critical because it "not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." *Glik*, 655 F.3d at 82-83. Granting judgment against the Officer Defendants here would simply affirm *Glik*'s recognition that the First Amendment protects the right to publicly record—whether openly or secretly—the police who are engaging in the "discharge of their [official] duties" in public. *Id.* at 85.

As the *Glik* and *Gericke* decisions themselves acknowledged, this First Amendment rule is broad and is not limited to the specific facts in those cases. *See Gericke v. Begin*, No. 11-cv-231-SM, 2012 U.S. Dist. LEXIS 148008, at *22 n. 4 (D.N.H. Oct. 15, 2012) (noting "broad holding in *Glik*"), *aff'd*, 753 F.3d 1 (1st Cir. 2014). In *Glik*, the First Circuit explicitly rejected the notion that this rule was not clearly established despite the fact that the cases cited by the plaintiff dealt with reporters, not private individuals. *Glik*, 655 F.3d at 83, 84-85. Similarly, in *Gericke*, police officers from the Town of Weare argued that it was not clearly established that the *Glik* decision applied to the recording of police during a "late-night traffic stop," which may create security risks. After all, the facts in *Glik* did not concern a nighttime traffic stop. However, the First Circuit rejected the

officers' argument:

> In *Glik,* we explained that gathering information about government officials in a form that can be readily disseminated "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, 86 S. Ct. 1434, 16 L.Ed.2d 484 (1966)). Protecting that right of information gathering "not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." *Id.* at 82-83 (citations omitted). First Amendment principles apply equally to the filming of a traffic stop and the filming of an arrest in a public park. In both instances, the subject of filming is "*police carrying out their duties in public*." *Id.* at 82. A traffic stop, no matter the additional circumstances, is inescapably *a police duty carried out in public*. Hence, a traffic stop does not extinguish an individual's right to film.

Gericke, 753 F.3d at 7 (emphasis added). The same result is required in this case. Because the Plaintiff was, without interference, recording the Officer Defendants "carrying out their duties in public," it was clearly established that his recording—whether done secretly or openly—was constitutionally protected under the First Amendment. Accordingly, the Defendant Officers are not entitled to qualified immunity and are liable under the First Amendment as a matter of law.

II. Fourth Amendment False Arrest Claim

Plaintiff is also entitled to judgment against the Officer Defendants as to his Fourth Amendment false arrest claim because no probable cause existed to arrest Plaintiff and seize his phone under the wiretapping statute. *See* Second Am. Compl. ¶¶ 77, 157. As explained above in *Monell* Part II, *supra*, this is for two independent reasons.

First, when a police officer is performing his or her official duties, that officer has a diminished expectation of privacy. This proposition has been clearly established by the First Circuit in *Jean v. Mass. State Police*, 492 F.3d 24, 29-30 (1st Cir. 2007), which held that an officer had no expectation of privacy as to secretly-recorded communications made within a suspect's home while engaging in a search. The First Circuit has also clearly held that there is no expectation of privacy with respect to one-on-one communications with the police in the back of a patrol car. *Dunbar*, 553 F.3d at 57; *see also Larios*, 593 F.3d at 93 (no expectation of privacy with respect to one-on-one

communications with an undercover officer in a motel room engaging in a brief transaction). Where no expectation of privacy exists with respect to person-to-person police communications in a patrol car, it is obvious that no such expectation of privacy exists when, as is the case here, the recording occurs out in public. Second, and relatedly, the Officer Defendants had no reasonable expectation of privacy given that Plaintiff was exercising a First Amendment right clearly established by the First Circuit.

Accordingly, the Officer Defendants had no reasonable expectation of privacy in this recorded communication—a required element to satisfy the definition of "oral communication" under the wiretapping statute. *See* RSA 570-A:1, II. As a result, the Defendant Officers are not entitled to qualified immunity and are liable under this Fourth Amendment false arrest/seizure claim.

III. First Amendment Retaliatory Arrest Claim

Plaintiff is also entitled to judgment as to his First Amendment retaliatory arrest claim. *See* Second Am. Compl. ¶ 135. To assert a First Amendment retaliatory arrest claim, the plaintiff must show that "he was engaged in activity protected by the First Amendment," and he must "show that the officer's intent or desire to curb the expression was the determining or motivating factor" for her actions, "in the sense that the officer would not have [taken those actions] 'but for' that determining factor." *Kean v. City of Manchester*, No. 14-cv-428-SM, 2016 U.S. Dist. LEXIS 13835, at *21 (D.N.H. Feb. 4, 2016). These elements are easily satisfied. There is no dispute that the Officer Defendants arrested Plaintiff solely for secretly recording them without their consent. But, as explained above in *Monell* Part I.B-C, *supra*, his recording was protected under clearly-established First Circuit precedent.

It is worth noting that, under this claim, it is unclear whether Plaintiff is required to prove the absence of probable cause under the wiretapping statute. *See, e.g., Turkowitz v. Town of Provincetown*, 914 F. Supp. 2d 62, 73 (D. Mass. 2012) ("Whether a plaintiff must establish that the

police lacked probable cause in order to state a claim for retaliatory arrest remains an open question."); *Human v. Colarusso*, No. 13-cv-296-SM, 2015 U.S. Dist. LEXIS 4866, at *14 n.2 (D.N.H. Jan. 15, 2015) (same). But even if probable cause was a necessary element of this claim—and it is not given the independent protections of the First Amendment[15]—there was no probable cause to arrest Plaintiff under the wiretapping statute because, as explained above in *Monell* Part II, *supra*, the Officer Defendants did not have a reasonable expectation of privacy in this recorded communication. *See* RSA 570-A:1, II.

IV. First Amendment Retaliatory Prosecution and Fourth Amendment Malicious Prosecution Claims

Plaintiff has raised a Fourth Amendment malicious prosecution claim and a First Amendment retaliatory prosecution claim. *See* Second Am. Compl. ¶ 170 (malicious prosecution claim), ¶ 135 (retaliatory prosecution claim).

Under a Fourth Amendment malicious prosecution claim, a plaintiff must establish that: "the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100 (1st Cir. 2013). Similarly, under a First Amendment retaliatory prosecution claim, a plaintiff must prove that her conduct was constitutionally protected and was a "substantial" or "motivating" factor for the retaliatory decision, and that there was no probable cause for the criminal charge. *Gericke v. Begin*, 753 F.3d 1, 6 (1st Cir. 2014). The elements of each of these claims is satisfied here. The Defendant Officers arrested Plaintiff precisely because he was recording the Officers in accordance with his First Amendment rights. This arrest was without probable cause under the wiretapping statute because, as explained above in *Monell* Parts I.B-C, II *supra*, the

[15] This First Amendment retaliatory arrest claim is distinct from Plaintiff's First Amendment claim that the arrest violated the provisions of *Glik* even if probable cause existed under RSA 570-A. *Compare* Second Am. Compl. ¶ 133 (First Amendment *Glik* claim) with ¶ 135 (First Amendment retaliation claim). Otherwise, the probable cause inquiry—to the extent it applies under a First Amendment retaliatory arrest claim—would swallow the independent protections provided by the First Amendment.

Officers had no expectation of privacy in their recorded communications. And the Superior Court terminated the criminal proceeding in Plaintiff's favor. Dismissal Order, at 3, Biss. Decl. at *Ex. H*.

The June 18, 2015 indictment in this case does not bar Plaintiffs' Fourth Amendment malicious prosecution and First Amendment retaliatory prosecution claims. An indictment does not have a severing effect to bar a malicious or retaliatory prosecution claim if there was impropriety in procuring the indictment. *See, e.g., Hernandez-Cuevas*, 723 F.3d at 99-100; *see also Ojo v. Lorenzo*, 164 N.H. 717, 727 (2013) ("an indictment defeats a claim for malicious prosecution unless the plaintiff alleges that the defendant engaged in impropriety when procuring the indictment"). Such impropriety exists, for example, if officers "unduly pressured the prosecutor to seek the indictment." *Hernandez-Cuevas*, 723 F.3d at 91 (quotations omitted); *see also Beck v. City of Upland*, 527 F.3d 853, 862-63 (9th Cir. 2008) (same).

Here, such impropriety occurred. The evidence in this case reveals that the Defendant Officers—particularly Sgt. LeVeille—exerted pressure in an effort to use the justice system to prosecute Plaintiff in violation of his clearly-established constitutional rights. Indeed, after Manchester's city prosecutor *nolle prossed* the felony wiretapping charge on May 15, 2015 because the HCAO decided not to indict Plaintiff (though HCAO has redacted the email conveying the reasons)[16], Sgt. LeVeille "couldn't let it go," was not happy about the decision, and called HCAO Attorney Andrew Ouellette. *See* May 18, 2015 Email from B. LeVeille to M. Sanclemente (describing call with HCAO Attorney Andrew Ouellette), Biss. Decl. at *Ex. R*; LeVeille Depo. Ex. 7/Reardon 11, Biss. Decl. at *Ex. S*; LeVeille Depo. 112:2-8 (describing phone call with Attorney Ouellette after learning about decision to not seek an indictment), Biss. Decl. at *Ex. Q*; Sanders Depo. 66:17, Biss. Decl. at *Ex. I*.[17] On May 18, 2015, Sgt. LeVeille also contacted his supervisor,

[16] *See* May 15, 2015 Email from A. Ouellette to J. Blanchard, Biss. Decl. at *Ex. SS* (redacted email where HCAO Attorney Ouellette likely explained why he was not going to prosecute).

[17] Plaintiff has not yet been able to depose HCAO Attorney Andrew Ouellette. Deposition discovery as to the HCAO has been stayed

Lt. Mark Sanclemente, about the prospect of setting up a meeting with the HCAO to "send a message that we are not okay with their decision" to not prosecute Plaintiff. S*ee* May 18, 2015 Email from B. LeVeille to M. Sanclemente (describing call with HCAO Attorney Andrew Ouellette), Biss. Decl. at *Ex. R*. Lt. Mark Sanclemente then contacted the HCAO and that Office agreed to bring the case to "case conferencing" among the lawyers within the HCAO. LeVeille Depo. Ex. 7/Reardon 11, Biss. Decl. at *Ex. S*. Sgt. LeVeille also had a second call with Attorney Ouellette in which he agreed to reconsider the indictment decision. *Id.* As Sgt. LeVeille explained at deposition: "I couldn't let it go. It was, I felt, a good arrest, and I disagreed with how it was being handled, and I was concerned that possibly the reason it was being handled the way it was is because it was a controversial topic …." LeVeille Depo. 103:17-104:19 (explaining why he "couldn't let it go"), Biss. Decl. at *Ex. Q*. The meeting sought by Sgt. LeVeille occurred on June 1, 2015, at which Sgt. LeVeille, Sgt. Sanders, and HCAO Attorney Ouellette participated. *See* June 1, 2015 A. Ouellette Meeting Notes, Biss. Decl. at *Ex. U*; LeVeille Depo. Ex. 9 (describing the June 1, 2015 meeting), Biss. Decl. at *Ex. T*. At or around the time of this June 1, 2015 meeting, the HCAO succumbed to this pressure and agreed to seek an indictment against Plaintiff.[18] Accordingly, the Officer Defendants are liable for malicious and retaliatory prosecution as a matter of law.

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until the Court resolves the pending Motion in Limine concerning the relevancy of such testimony. *See* Docket Nos. 48, 50, 58, 60.

[18] It also appears that the HCAO may not have instructed the grand jury of the First Amendment's independent protections concerning the right to record. *See* Sanders Depo. 74:2-19 (not recalling discussion of the First Amendment before the grand jury), Biss. Decl. at *Ex. I.*

Respectfully submitted,

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By and through his attorneys,

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CERTIFICATE OF SERVICE

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

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