No. 10-1764

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SIMON GLIK,
Plaintiff-Appellee,

v.

JOHN CUNNIFFE, in his individual capacity; PETER SAVALIS, in his individual capacity; JEROME HALL-BREWSTER, in his individual capacity; CITY OF BOSTON,
Defendants-Appellants.

Appeal from the U.S. District Court for the District of Massachusetts
Civil Action No. 10-cv-10150-LTS

BRIEF OF PLAINTIFF-APPELLEE SIMON GLIK

Sarah Wunsch
ACLU of Massachusetts
211 Congress Street, 3rd floor
Boston, MA 02110
(617) 482-3170, ext. 323

Howard Friedman
David Milton
Law Offices of Howard Friedman, P.C.
90 Canal Street, 5th Floor
Boston, MA 02114-2022
(617) 742-4100

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JURISDICTIONAL STATEMENT

Plaintiff agrees with Defendants that this Court has jurisdiction over the interlocutory appeals of the individual police officers, Defendants-Appellants Cunniffe, Savalis, and Hall-Brewster (the "individual Defendants"), from the district court's denial of their motion to dismiss Plaintiff's First and Fourth Amendment claims on qualified immunity grounds. However, this Court lacks jurisdiction to review the district court's denial of the individual Defendants' motion to dismiss Plaintiff's state law malicious prosecution claim, which is a nonappealable interlocutory order. *See Garnier v. Rodriguez,* 506 F.3d 22, 25 (1st Cir. 2007). The Court should dismiss Defendants' appeal concerning the malicious prosecution claim.

The Court should also dismiss for lack of jurisdiction Defendant City of Boston's appeal. Defendants incorrectly state that the City is not a party to this appeal. Defs.' Br. 4 n.1. The City filed a notice of appeal in the district court, J.A. 3, and has appeared in this Court. Defendants now acknowledge the Court lacks jurisdiction to review the denial of the City's motion to dismiss Plaintiff's municipal liability claim under 42 U.S.C. § 1983. Defs.' Br. 4 n.1.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Should this Court follow the traditional two-step sequence for determining qualified immunity and rule first on the merits of the important, recurrent constitutional question of whether individuals have the right to openly record the police in public?

2. Did the district court correctly deny Defendants' motion to dismiss Plaintiff's First Amendment claim on qualified immunity grounds, because (a) the complaint states a claim for violation of the First Amendment right to openly record police officers in public acting in the course of their duties and (b) this right was clearly established in the First Circuit at the time of Plaintiff's arrest?

3. Did the district court correctly deny Defendants' motion to dismiss Plaintiff's Fourth Amendment claim for false arrest on qualified immunity grounds, because a reasonable police officer would have been aware that holding a cellphone in plain sight to make an audiovisual recording on Boston Common did not constitute "secretly record[ing]" in violation of the Massachusetts wiretap statute, Mass. Gen. Laws ch. 272, § 99(B)(4)?

STATEMENT OF THE CASE

On October 1, 2007, Plaintiff Simon Glik held out his cellphone and made an audiovisual recording of three Boston police officers, Defendants John Cunniffe, Peter J. Savalis, and Jerome Hall-Brewster, making an arrest on Boston Common. J.A. 7. Though Plaintiff held the cellphone in plain view and did not interfere with the arrest, Defendants arrested Plaintiff for violating the Massachusetts wiretap statute, Mass. Gen. Laws ch. 272, § 99, as well as aiding the escape of a prisoner, Mass. Gen. Laws ch. 268, § 17, and disturbing the peace, Mass. Gen. Laws ch. 272 § 53. J.A. 9-11. The Commonwealth voluntarily dismissed the aiding the escape charge, and the Boston Municipal Court dismissed the remaining two charges by written decision dated February 1, 2008. J.A. 11, 17-20.

Plaintiff brought suit under 42 U.S.C. § 1983 against the three officers and the City of Boston on February 1, 2010. J.A. 1. The complaint alleges that the individual Defendants violated the First and Fourth Amendments by arresting him for openly recording police officers carrying out their duties in public, and that the City's policies and customs caused these violations. J.A. 1, 14-15. The complaint also brings state law claims against the individual officers for malicious prosecution and violation of the Massachusetts Civil Rights Act, Mass. Gen. Laws. ch. 12, § 11I. J.A. 14-15.

All Defendants moved to dismiss the complaint in its entirety on April 22, 2010. J.A. 2. Defendants argued that the complaint failed to state a claim for violation of the First Amendment because no right to document police conduct exists. Defs.' Mem. Supp. Mot. Dismiss 5. The individual Defendants also asserted qualified immunity on the grounds that any such First Amendment right was not clearly established. *Id.* at 9. Defendants also argued for qualified immunity with respect to Plaintiff's Fourth Amendment claim on the grounds that there was probable cause to arrest him under the wiretap statute, *id.* at 6, or in the alternative, a reasonable officer could have mistakenly believed there was, *id.* at 14.

The district court denied the motion in its entirety from the bench on June 8, 2010. Defs.' Br. AD 9. The court stated that "in the First Circuit, this First Amendment right publicly to record the activities of police officers on public business is clearly established." Defs.' Br. AD 8. The court rejected Defendants' argument that a violation of the Massachusetts wiretap statute occurs unless the person being recorded has "actual knowledge" of the recording, stating that he or she is "presumed to know if someone is holding the [recording] device out." Defs.' Br. AD 8-9.

All Defendants filed a notice of appeal. J.A. 3. The City of Boston now concedes that the Court lacks jurisdiction over its appeal. Defs.' Br. 4 n.1.

STATEMENT OF FACTS

On October 1, 2007, Plaintiff Simon Glik, an attorney, was walking on Tremont Street from Park Street toward Boylston Street, on the sidewalk next to the Boston Common. J.A. 8, 9. He saw three Boston police officers, Defendants John Cunniffe, Peter J. Savalis, and Jerome Hall-Brewster, arresting a young man near a park bench. J.A. 9. Plaintiff heard another young man standing nearby say something like, "You are hurting him, stop." J.A. 9. Plaintiff was concerned the officers were using excessive force. J.A. 9.

Plaintiff stopped near the bench and took out his cell phone so that he could document the conduct of the police officers. J.A. 9. His phone recorded video with sound. J.A. 7, 10. Plaintiff stood about ten feet away and recorded the incident. J.A. 9. He did not interfere with the officers' actions. J.A. 9.

After the suspect was in handcuffs, one of the Defendants said to Plaintiff, "I think you have taken enough pictures." J.A. 10. Plaintiff responded, "I am recording this. I saw you punch him." J.A. 10. One of the Defendants then approached Plaintiff and asked if the phone recorded audio. J.A. 10. Plaintiff said that it did. J.A. 10. Defendants arrested Plaintiff and took him into custody. J.A. 10.

Plaintiff was charged with violating the wiretap statute, Mass. Gen. Laws ch. 272, § 99, aiding the escape of a prisoner, Mass. Gen. Laws ch. 268, § 17, and disturbing the peace, Mass. Gen. Laws ch. 272 § 53. J.A. 11. The

Commonwealth voluntarily dismissed the aiding an escape charge for lack of probable cause. J.A. 11.

On February 1, 2008, a judge of the Boston Municipal Court dismissed the remaining charges for lack of probable cause. J.A. 11. The court dismissed the illegal wiretapping charge because the statute and case law require that the unlawful recording be secret and the police officers admitted Mr. Glik was publicly and openly recording them. J.A. 11, 18-19. The court dismissed the charge of disturbing the peace, ruling that while the "officers were unhappy they were being recorded during an arrest . . . their discomfort does not make a lawful exercise of a First Amendment right a crime." J.A. 11, 20.

SUMMARY OF ARGUMENT

1. In this qualified immunity appeal, the Court should exercise its discretion under *Pearson v. Callahan,* 555 U.S. 223, 129 S. Ct. 808 (2009), to decide first whether the complaint alleges a First Amendment violation. Assuming *arguendo* that Plaintiff's First Amendment right to openly record the police carrying out their duties in public was not clearly established, the Court should affirm the existence of such a right in order to provide guidance to individuals and the police.

2. The complaint states a First Amendment claim. A long line of cases, including this Court's opinion in *Iacobucci v. Boulter,* 193 F.3d 14, 25 (1st

Cir. 1999), has recognized the First Amendment right to document, through photography and video, the activities of public officials on public property. Because Plaintiff openly recorded police officers in a public place where he had a right to be, and he did not interfere with any police activities, the First Amendment protected his recording.

Defendants arrested Plaintiff for videotaping them because they were concerned that his footage would portray them in a bad light. By punishing Plaintiff because of the content of his recording, and because of his perceived criticism of them, Defendants violated the First Amendment.

Denial of qualified immunity was proper because the First Amendment right to openly record the police in public was clearly established at the time of Plaintiff's arrest. In *Iacobucci v. Boulter,* 193 F.3d 14 (1st Cir. 1999), this Court stated that an individual had a First Amendment right to film a group of public officials engaged in conversation in a public area of a public building. Several other circuit courts and numerous district courts had also recognized a right to record matters of public interest, including the right to videotape the police. *See, e.g., Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

Recent decisions from other jurisdictions, decided after Plaintiff's arrest, finding that the law is not clearly established in other circuits, have no bearing on the state of the law in the First Circuit at the time of Plaintiff's arrest.

3. The complaint states a claim for false arrest. Defendants lacked probable cause to arrest Plaintiff because holding a cellphone in plain sight to make a recording does not violate the Massachusetts wiretap statute, which prohibits only "secret[]" recording. Mass. Gen. Laws ch. 272, § 99(B)(4); *see Commonwealth v. Hyde,* 434 Mass. 594, 605, 750 N.E.2d 963, 971 (2001). Nor was there probable cause to believe that Plaintiff – who openly held out his cellphone on Boston Common – had "willfully" made a secret recording, another element of the crime. Mass. Gen. Laws ch. 272, § 99(C)(1); *see Commonwealth v. Ennis,* 439 Mass. 64, 68-69, 785 N.E.2d 677, 681 (2003).

The district court properly denied qualified immunity on Plaintiff's Fourth Amendment claim because *Hyde* and *Ennis,* and the wide body of First Amendment law discussed in Section II, gave fair warning to Defendants that arresting Plaintiff for openly recording them on Boston Common was unlawful.

ARGUMENT

I. PROPER DEVELOPMENT OF THE LAW REQUIRES THAT THE COURT RULE ON THE IMPORTANT, RECURRENT CONSTITUTIONAL QUESTION PRESENTED

The complaint raises the important and recurrent constitutional issue of whether individuals have the First Amendment right to openly record the police in public. Recording the police is commonplace given the proliferation

of handheld videotaping devices, including cellphones.[1] Assuming *arguendo* there is no settled constitutional rule to guide police and individuals in this area, it is important to establish one.

Defendants urge this Court to skip the first part of the test for qualified immunity, namely, whether the allegations of the complaint state a constitutional violation. Defendants seek a ruling limited to a finding that the First Amendment right in question was not clearly established. None of the reasons advanced by Defendants for refusing to decide the constitutional issue is persuasive.

Even though the Supreme Court in *Pearson v. Callahan,* 555 U.S. 223, 129 S. Ct. 808 (2009), gave courts discretion to decide first whether the alleged violation of law was clearly established, the Court reaffirmed that that the sequence set forth in *Saucier v. Katz,* 533 U.S. 194 (2001), is "often appropriate" and "promotes the development of constitutional precedent." *Pearson,* 129 S. Ct. at 818. Defendants cite to four recent opinions bypassing the "violation" question and granting qualified immunity based on a finding that the right to record the police, as defined in those cases, was not clearly established. Defs.'

[1] *See, e.g.,* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record,* 159 U. Pa. L. Rev. 335, 350 (2011) ("[P]olice abuse captured by the cameras of bystanding videographers, followed by public broadcast of the footage, has become a regular feature of our public life and the underpinning for effective demands for redress.")(collecting examples).

Br. 20, 22, 25-26. If other courts were to continue in this vein, the right would *never* be clearly established.

The district court in this case reached the issue. Judge Young stated, "[I]n the First Circuit, this First Amendment right publicly to record the activities of police officers on public business is established." Defs.' Br. AD 8. Implicit in this statement is that the complaint states a claim for violation of this right. If it did not, the district court would have been obliged to grant Defendants' motion to dismiss.

Although this case is at the pleadings stage, it is not a case "where the precise factual basis for the plaintiff's claim or claims [is] hard to identify." *Pearson,* 129 S. Ct. at 819. The complaint details the factual basis for Plaintiff's claims with specificity, describing the encounter between Plaintiff and Defendants from beginning to end. J.A. 10-11.

Because people commonly videotape the police, this is not a case "where the constitutional questions presented are heavily fact-bound, minimizing their precedential value." *Maldonodo v. Fontanes,* 568 F.3d 263, 270 (1st Cir. 2009). Defendants concede as much by citing to cases with facts they claim are "strikingly similar," Defs.' Br. 22, and "nearly identical," Defs.' Br. 26, to the facts of this case.

Because the complaint raises a recurrent First Amendment issue with significance beyond this case, this Court should decide the constitutional question first.

II. THE DISTRICT COURT CORRECTLY DENIED DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDMENT CLAIM

A. Defendants Violated the First Amendment by Arresting Plaintiff for Openly Recording Police Officers Carrying Out Their Duties in a Public Place

Plaintiff had a First Amendment right to openly make an audiovisual recording of what he perceived to be police misconduct on Boston Common. Protecting citizens' ability to scrutinize the actions of public servants lies at the heart of the First Amendment. For this reason, a long line of cases has recognized the First Amendment right "to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). Many of these cases involved photographing or videotaping police.

The Supreme Court has repeatedly emphasized "the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana,* 379 U.S. 64, 77 (1964); *accord, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (recognizing the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"). The flow of information concerning alleged government

wrongdoing receives special protection as a core value of the First Amendment. *See e.g., Gentile v. State Bar of Nev.,* 501 U.S. 1030, 1034-35 (1991) (noting heightened protection for "dissemination of information relating to alleged government misconduct"); *City of Houston v. Hill,* 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.").

The Court has also recognized the right to gather news and receive information. *See, e.g., First Nat'l Bank v. Bellotti,* 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969) ("The Constitution protects the right to receive information and ideas").

From these basic principles, numerous lower courts, including the First Circuit and several other circuit courts, have recognized the right to record matters of public interest. *See, e.g., Iacobucci v. Boulter,* 193 F.3d 14, 25 (1st Cir. 1999) (filming public officials having a conversation in a public area of a public building "was done in the exercise of [Plaintiff's] First Amendment rights"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing

"First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"); *Fordyce v. City of Seattle,* 55 F.3d 436, 439 (9th Cir. 1995) (recognizing "First Amendment right to film matters of public interest"); *Schell v. City of Chicago,* 407 F.2d 1084, 1086 (7th Cir. 1969) (recognizing constitutional protection for photography of 1968 Democratic Convention and "attendant street activities"); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94 (D. Mass. 2002) ("At base, plaintiffs had a constitutionally protected right to record matters of public interest.").[2] Many of these cases, including *Iacobucci, Smith, Schell,* and *Demarest,* involved videotaping or photographing public officials in general or police officers in particular. Several involved videotape with audio. *See Iacobucci,* 193 F.3d at 18; *Fordyce,* 55 F.3d at 439; *Demarest*, 188 F. Supp. 2d at 86.

The cases cited by Defendants upholding prohibitions on videotaping certain government proceedings are inapposite. Defs.' Br. 28-29. None of those

[2] *See also Alliance to End Repression v. City of Chicago,* 2000 U.S. Dist. LEXIS 6342, at *63 (N.D. Ill. May 8, 2000) (recognizing "taking photographs of the police" as protected by the First Amendment); *Connell v. Hudson,* 733 F. Supp. 465, 470-71 (D.N.H. 1990) ("According to principles of jurisprudence long respected in this nation, Chief Brackett could not lawfully interfere with Nick Connell's picture-taking activities unless Connell unreasonably interfered with police and emergency functions."); *Lambert v. Polk County*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("It is not just news organizations... who have First Amendment rights to make and display videotapes of events – all of us ... have that right."); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (recognizing "constitutional right to have access to and to make use of the public streets, roads and highways ... for the purpose of observing and recording in writing and photographically the events which occur therein").

cases involved restrictions on expressive activity in a traditional public forum. *See Rice v. Kempker,* 374 F.3d 675, 678 (8th Cir. 2004) (no right to videotape an execution); *Whiteland Woods, L.P., v. Twp. of West Whiteland,* 193 F.3d 177, 184 (3d Cir. 1999) (planning commission meeting); *United States v. Kerley,* 753 F.2d 617, 621 (7th Cir. 1985) (criminal trial), and *Westmoreland v. Columbia Broad. Sys., Inc.,* 752 F.2d 16, 23 (2d Cir. 1984) (civil trial). In traditional public fora like streets and parks, the government has the highest burden to justify limitations on speech. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). Courts in the public proceedings cases have identified a number of government interests weighing against videotaping. *See, e.g., Westmoreland,* 752 F.2d at 23 (describing various administrative and due process concerns raised by televising trials); *Kerley,* 753 F.2d at 622 (noting judges', jurors', and witnesses' "interest in decorum and concentration"). These concerns do not exist on the streets and in other unconfined areas that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n,* 460 U.S. at 45. Further, courts upholding prohibitions on the right to videotape public proceedings have found, based on the records before them, that such bans do not substantially interfere with the public's ability to gain accurate information about the proceedings. *E.g., Whiteland Woods,* 193 F.3d at 183; *Kerley,* 753 F.2d at

621-22; *but see Tarus v. Borough of Pine Hill,* 189 N.J. 497, 511-12, 916 A.2d 1036, 1045 (2007).

By contrast, a ban on openly videotaping in streets and parks and other public areas would dramatically curtail the public's and the media's ability to gain information about matters of public interest.[3] While stenotypes, pen and paper, and artists' sketch pads may adequately document court proceedings, they are inadequate to capture the sights and sounds of outdoor public forums. History speaks eloquently of the "uniquely valuable" information, *Whiteland Woods*, 193 F.3d at 183, provided by videotapes of spontaneous events. *See, e.g., Demarest,* 188 F. Supp. 2d at 96 (noting that recording ban at issue would have prevented the filming of the "Bloody Sunday" attack in Selma, Alabama, in 1965, footage of which "touched a nerve deeper than anything that had come before") (citation omitted).[4] The unique quality of video has led courts to recognize its importance as evidence in cases concerning police-citizen encounters. *See, e.g., Scott v. Harris*, 550 U.S. 372, 378 (2007) (relying on videotape of car chase to determine reasonableness of officer's conduct);

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[3] The rights of the institutional media to gather newsworthy information are no greater than those of the general public. *See Smith,* 212 F.3d at 1333. Thus any restriction on an individual's right to film matters of public interest would apply equally to a television news crew, for example.

[4] Spontaneously captured videos provided essential images of 9/11, the shootings at Virginia Tech, and the death of Saddam Hussein. Kreimer, *supra* note 1, at 349.

Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) ("Videotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence.").[5]

The First Amendment protects the right to openly record the police because the behavior of police officers is a matter of great public concern. Police officers are vested with substantial powers, including the authority to use force and to deprive individuals of their freedom. While most police officers act lawfully, police abuse of authority carries great potential for harm. *See Rotkiewicz v. Sadowsky,* 431 Mass. 748, 754, 730 N.E.2d 282, 288-89 (2000) (stressing importance of public discussion about police officers for this reason). Protecting individuals' right to document police activities through videotape helps ensure that police remain accountable to the public they serve.

As public servants performing public functions in a public area, whose actions and words were perceptible to everyone who passed by, Defendants cannot reasonably claim any harm from being recorded. On the contrary, the allegations of the complaint require the inference that Defendants arrested Plaintiff solely because of the content of his recording and because of his perceived criticism of them. J.A. 10 ¶ 17 ("I am recording this. I saw you punch him."). It is apparent that Defendants would not have arrested Plaintiff if he

[5] *See also, e.g.,* Jim Dwyer, *Videos Challenge Hundreds of Convention Arrests,* N.Y. Times, April 12, 2005, at A1.

had videotaped one of the officers making a heroic rescue or receiving an award, or if Plaintiff had said of their actions in this case, "I am recording this. You did a great job." Such content- and viewpoint-based discrimination against protected expression violates core First Amendment principles. *E.g., Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *see also City of Houston v. Hill,* 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.").

Because Plaintiff openly recorded Defendants' public actions in a public place where he had a right to be, and did not interfere with any police activities or otherwise violate any law, his arrest for this recording violated the First Amendment.

B. This Court's Decision in *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999), and a Wealth of Other Authority Had Clearly Established the Right to Record Matters of Public Interest, Including Police Officers in the Course of Their Duties, at the Time of Plaintiff's Arrest

Under the "clearly established" step of the qualified immunity analysis, "the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional." *Maldonado v. Fontanes,* 568 F.3d 263, 269 (1st Cir. 2009). The

inquiry into the state of the law "encompasses not only Supreme Court precedent, but all available case law," *Suboh v. Dist. Attorney's Office,* 298 F.3d 81, 93 (1st Cir. 2002), including "authorities both in circuit and out of circuit." *Bergeron v. Cabral,* 560 F.3d 1, 11 (1st Cir. 2009). "The law is considered clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct at issue." *Guillemard-Ginorio v. Contreras-Gomez,* 585 F.3d 508, 527 (1st Cir. 2009) (citation and quotation marks omitted).

1. *Iacobucci* recognized a First Amendment right to record public officials on public property

In *Iacobucci v. Boulter,* 193 F.3d 14 (1st Cir. 1999), this Court stated that an individual had a First Amendment right to videotape a group of public officials engaged in conversation in a public area of a public building. *Id.* at 25. Because the Massachusetts disorderly conduct statute does not apply to expressive activities "implicating the lawful exercise of a First Amendment right," *id.* at 24, the Court held that it did not provide a basis to arrest the plaintiff for filming officials talking in the hallway outside the public meeting room, *id.* at 25. The Court stated that "Iacobucci's activities were peaceful, not performed in derogation of any law, and *done in the exercise of his First Amendment rights.*" *Id.* (emphasis added).

Defendants misread the opinion, arguing that it merely recognized the plaintiff's First Amendment right of access to the public meeting and his statutory right to videotape the meeting. Defs.' Br. 18. The filming the Court is describing in the above statement did not occur during a public meeting, but in what the Court called the "hallway episode" outside the meeting room. *Id.* at 24. The Court's recognition of the plaintiff's First Amendment right to film the hallway conversation is separate from the plaintiff's First Amendment right of access to the public meeting, which the Court did not discuss. Nor does the First Amendment right to record depend on the plaintiff's statutory rights under the Massachusetts Open Meeting Law.

Iacobucci, decided eight years before Plaintiff's arrest, gave fair warning to Defendants that they could not arrest Plaintiff for videotaping them on Boston Common. Like the plaintiff in *Iacobucci,* Plaintiff here "was in a public area….; he had a right to be there; he filmed the group from a comfortable remove; and he neither spoke to nor molested them in any way." *Iacobucci,* 193 F.3d at 25.

2. A consensus of persuasive authority within and outside this circuit had clearly established the right to record matters of public interest at the time of Plaintiff's arrest

Iacobucci is supported by a wide body of authority. As the cases cited in Section IIA demonstrate, numerous courts had recognized a First Amendment right to record matters of public interest at the time of Plaintiff's arrest in 2007.

See Section IIA, *supra,* at 12-13 & n.2 *(*citing cases from the Eleventh, Ninth, and Seventh Circuits, the district courts of Massachusetts and New Hampshire, and from three other district courts). Several of these cases recognized a right to videotape or photograph the police in the performance of their duties. *Smith,* 212 F.3d at 1333; *Schell,* 407 F.2d at 1086; *Alliance to End Repression,* 2000 U.S. Dist. LEXIS 6342, at *63.

This authority gave the officers fair warning that it was unlawful to arrest someone for peacefully filming them engaging in their official duties in a public park.[6]

3. Cases decided after Plaintiff's arrest, from outside the First Circuit, finding that the law is not clearly established in other circuits, have no bearing on this case

a. The cases cited by Defendants do not hold that there is no First Amendment right to record the police

None of the cases cited by Defendants held that the First Amendment does not protect the right to record police officers in the course of their duties.

[6] Except for a single conclusory sentence, Defs.' Br. 30, Defendants do not separately address the second aspect of the second prong of the qualified immunity test, whether a reasonable defendant would have understood, in the specific factual context of this case, that his conduct violated Plaintiff's constitutional rights. *Maldonado v. Fontanes,* 568 F.3d 263, 269 (1st Cir. 2009). Given the facts alleged in the complaint, nothing in the record would support a finding that the officers could have reasonably believed their actions were lawful. *See Limone v. Condon,* 372 F.3d 39, 48 (1st Cir. 2004) ("On an appeal from an order denying a motion to dismiss – a situation in which the court of appeals is required to credit the allegations of the complaint – the first two steps [of the qualified immunity test] will frequently go a long way toward resolving the third.").

All of the cases, which were decided post-*Pearson*, determined only that any such right, as they defined it, was not clearly established within their respective circuits. *Kelly v. Borough of Carlisle,* 622 F.3d 248, 263 (3d Cir. 2010), *Szymecki v. Houck,* 353 Fed. Appx. 852, 853 (4th Cir. 2009)(per curiam), *Matheny v. County of Allegheny,* No. 09-1070, 2010 U.S. Dist. Lexis 24189, at *12-13 & n.3 (W.D. Pa. Mar. 16, 2010), and *Gravolet v. Tassin,* No. 08-3646, 2009 U.S. Dist. LEXIS 45876, at *12 (E.D. La. June 2, 2009). These cases do not create a "circuit split," Defs.' Br. 25, on the substance of the First Amendment question.

In any event, such a split would be irrelevant to the "clearly established" inquiry in this case, since *Iacobucci* clearly established the law in *this* circuit. *See Newman v. Massachusetts,* 884 F.2d 19, 25 (1st Cir. 1989) (finding constitutional right at issue clearly established in First Circuit despite split in authority among other circuits).

b. Post-2007 cases do not affect what a reasonable police officer would have known in 2007

Kelly, Szymecki, Matheny, and *Gravolet* are additionally irrelevant to the "clearly established" inquiry in this case because they were all decided after Plaintiff's arrest in 2007. Subsequent legal developments have no bearing on what a reasonable official should have known at the time he or she acted. *Brosseau v. Haugen,* 543 U.S. 194, 200 n.4 (2004) (per curiam); *Hatch v. Dep't for Children,* 274 F.3d 12, 22 (1st Cir. 2001).

c. The Third Circuit's analysis of the "right to videotape police officers during traffic stops" in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), is inapplicable and unpersuasive

The Third Circuit's opinion in *Kelly* did not hold, as Defendants argue, that there was no clearly established "First Amendment right to videotape police officers exercising their duties in a public place." Defs.' Br. 20. The court repeatedly worded its holding more narrowly, stating that what was not clearly established was the "right to videotape police officers during a traffic stop." *Kelly,* 622 F.3d at 262 (stating this twice), 263 ("right to videotape police officers during traffic stops"); *see also id.* at 262 (finding no clear rule "to obtain information by videotaping under the circumstances presented here"). By its own carefully limited terms, *Kelly* does not apply to the arrest of Plaintiff, which did not occur during a traffic stop.

More fundamentally, the court's narrow definition of the right at issue contravenes its own recognition that "[i]n determining whether a right is clearly established, it is not necessary that the exact set of factual circumstances has been considered previously." *Id.* at 259 (citing *Hope v. Pelzer,* 536 U.S. 730, 739 (2002)). The First Circuit has repeatedly heeded the Supreme Court's instruction that "general statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific

conduct in question." *DeMayo v. Nugent,* 517 F.3d 11, 18 (1st Cir. 2008) (citing *United States v. Lanier,* 520 U.S. 259, 271 (1997), and collecting First Circuit cases finding a right clearly established despite the novel factual context of the violation at issue).

In this case, the clearly established right at issue is the right to observe and document matters of public concern in a public place, a right that applies with obvious clarity to the right to videotape police officers making an arrest on Boston Common. The clarity of the right derives from the long line of Supreme Court decisions emphasizing the fundamental importance of the free flow of information and from the numerous cases around the country recognizing the right to peacefully record matters of public interest, including the activities of police officers.

The Third Circuit's cursory dismissal of several of these cases as "insufficiently analogous" to the videotaping of a traffic stop misses the point. *Kelly,* 622 F.3d at 261 (citing *Fordyce, Demarest,* and *Lambert).* While these cases did not involve recording police officers, nothing in *Fordyce, Demarest,* or *Lambert* suggests that the courts' recognition of the right to videotape matters of public concern was limited to their specific factual contexts. On the contrary, courts' recognition of a First Amendment right to record in a variety of factual contexts suggests the deep-seated nature of the right. *Cf. Connell v. Hudson,* 733 F. Supp. 465, 470-71 (D.N.H. 1990) (finding right to photograph

accident scene "[a]ccording to principles of jurisprudence long respected in this nation"). So does the fact that "many of these cases recognize such a right only in passing." *Kelly,* 622 F.3d at 261. If the right were not obvious, it would require more discussion.[7]

The fact that the right to record matters of public concern is subject to time, place, and manner restrictions, and that there may be situations in which the recording is not constitutionally protected, does not vitiate the core of authority protecting the right. The First Circuit has repeatedly recognized this principle. *E.g., DeMayo,* 517 F.3d at 18; *Suboh,* 298 F.3d 97. In *DeMayo,* the Court found that a warrantless entry into a home violated clearly established law despite the defendants' claim that "the precise quantum or nature of evidence that gives rise to exigent circumstances is not fully fleshed out in the case law." 517 F.3d at 18. The Court found that the evolving contours of the right in question did not undermine its core protections. *Id.; see also Suboh, 298*

[7] The other cases city by Defendants failed to consider the body of authority relevant to the "clearly established" inquiry in this case and are otherwise distinguishable. *Szymecki* held only that the right to record police activities was not clearly established in the Fourth Circuit, based on a qualified immunity test more restrictive than the First Circuit's. 353 Fed. Appx. at 853. In *Gravolet,* the district court found probable cause to arrest the plaintiff for stalking a female police officer, and it properly held that the plaintiff's use of a video camera did not immunize him from this charge. 2009 U.S. Dist. LEXIS 45876, at *9. The *Matheny* court made an arbitrary and unwarranted distinction between audio and video, 2010 U.S. Dist. LEXIS 24189, at *15, which is at odds with the later rulings in *Iacobucci, Fordyce,* and *Demarest*, all of which involved audiovisual recordings of nonconsenting speakers. *See Iacobucci,* 193 F.3d at 18, *Fordyce,* 55 F.3d at 439, and *Demarest*, 188 F. Supp. 2d at 86.

F.3d at 97 (finding that "[w]hatever the exact contours of the right [in question], this case falls well within the area of clarity") (internal citation omitted).

In this case, nothing in the record on Defendants' motion to dismiss suggests any basis for arresting Plaintiff for filming the officers. Whatever the exact boundaries of the "broad First Amendment right to document matters of public interest" that Defendants appear to acknowledge, Defs.' Br. 28, it surely protects peacefully and openly filming the police engaging in potential misconduct in broad daylight on Boston Common.

III. THE DISTRICT COURT PROPERLY DENIED DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FOURTH AMENDMENT CLAIM

Qualified immunity does not shield Defendants from liability under the Fourth Amendment because no reasonable officer could have believed Plaintiff violated the Massachusetts wiretap statute, Mass. Gen. Laws ch. 272, § 99, by openly recording them with his cellphone on Boston Common. The statute forbids only "secret" recording, *id.* § 99(B)(4), which does not include holding a recording device in plain sight and does not turn on the subjective awareness of the individual being recorded. Decisions of the Massachusetts Supreme Judicial Court ("SJC"), including *Commonwealth v. Hyde,* 434 Mass. 594, 605, 750 N.E.2d 963, 971 (2001), confirm this common sense understanding of the statute. In any event, the complaint alleges that Defendants *were* aware that they were

being recorded. J.A. 11, 18. On this motion to dismiss, the Court must disregard Defendants' assertions to the contrary.

A. Plaintiff States a Fourth Amendment Claim Because Holding a Cellphone in Plain View Did Not Give Rise to Probable Cause to Arrest Him for "Secretly" Recording

An arrest without probable cause violates the Fourth Amendment. *Beck v. Ohio,* 379 U.S. 89, 91 (1964); *Santiago v. Fenton,* 891 F.2d 373, 383 (1st Cir. 1989).

In this case, there was no probable cause to believe that Plaintiff had violated the Massachusetts wiretap statute, Mass. Gen. Laws ch. 272, § 99. By its plain terms, the statute prohibits only secret audio recording. The statute makes it a crime to "*secretly* hear [or] *secretly* record … the contents of any wire or oral communication." *Id.* § 99(B)(4)(emphasis added).[8] The statute further requires that such secret hearing or recording be done "willfully." *Id.* § 99 (C)(1).

In 2001, the SJC confirmed that the language of the statute means what it says. *Commonwealth v. Hyde*, 434 Mass. 594, 750 N.E.2d 963 (2001). The court affirmed that the statute prohibited "*secret* electronic recording" and held that it made no exception for surreptitious recording of police officers. *Id.* at 595, 750

[8] To fall within the statute, the hearing or recording must be done with an "intercepting device," which is "any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication." *Id.* § 99(B)(3).

N.E.2d at 964 (emphasis added). In upholding Michael Hyde's conviction for secretly recording his conversation with the police during a traffic stop, the court stated that "the problem here could have been avoided if … the defendant had simply informed the police of his intention to tape record the encounter, *or even held the tape recorder in plain sight*." *Id.* at 605, 750 N.E.2d at 971 (emphasis added). As the court explained, "[h]ad he done so, his recording would not have been secret, and so would not have violated G.L. c. 272 § 99." *Id.*

Simon Glik did exactly what the SJC in *Hyde* said was permitted: he held his recording device in plain sight. There was nothing secret about the recording. The police officers admitted that the recording was done openly and publicly. J.A. 11, 18. Under the circumstances, there was no probable cause to believe that Mr. Glik had "secretly" recorded the officers.

Nor was there probable cause to believe that Plaintiff had "willfully" committed an interception, another element of the crime. Mass. Gen. Laws ch. 272, § 99(C)(1); *see Commonwealth v. Ennis,* 439 Mass. 64, 68-69, 785 N.E.2d 677, 681 (2003) (offense requires that recording be done secretly and "willfully"). The fact that Plaintiff was holding the recording device in plain view, on a busy public sidewalk – along Boston Common, a quintessentially public place – and that he readily acknowledged that he was recording sound when asked, negate probable cause to believe that he willfully made a secret recording of any of the

officers' communications. *See Ennis,* 439 Mass. at 69-70, 785 N.E.2d at 682 (party making recording did not act willfully where there was no evidence of intent to conceal the fact that the call was being recorded; "Certainly the department did not 'secretly record' any part of the resulting conversation willfully.").

There is no merit to Defendants' argument that the recording was "secret" because they supposedly "did not have actual knowledge of Glik's audio recording until he had completed it." Defs.' Br. 35. Besides being an inappropriate factual assertion on a motion to dismiss, the officers' claimed lack of subjective knowledge is irrelevant. By holding the recording device in plain view, Plaintiff did not act secretly (much less willfully so). After *Hyde*, a majority of the justices of the SJC confirmed that whether a recording is secret does not depend on the subjective awareness of the party being recorded. In *Commonwealth v. Rivera,* 445 Mass. 119, 833 N.E.2d 1113 (2005), four members of the court, including Justice Greaney, the author of *Hyde*, separately concurred to clarify that a store surveillance camera in plain view of anyone in the store does not violate the statute even though it records sound as well as images. *See id.* at 134, 833 N.E.2d at 1125 (Cowin, J., concurring) ("That the defendant did not know the camera also included an audio component does not convert this otherwise open recording into the type of 'secret' interception prohibited by the Massachusetts wiretap statute."); *id.* at 142, 833 N.E.2d at

1130 (Cordy, J., concurring, joined by Greaney and Ireland, JJ.) ("Just because a robber with a gun may not realize that the surveillance camera pointed directly at him is recording both his image and his voice does not, in my view, make the recording a 'secret' one within the meaning and intent of the statute.").[9]

Commonwealth v. Jackson, 370 Mass. 502, 349 N.E.2d 337 (1976), is not to the contrary. In that case, the SJC held that recording a telephone conversation is "secret" within the meaning of the statute unless the caller being recorded has "actual knowledge" that the call is being taped. *Id.* at 507, 349 N.E.2d at 340. Because the recording took place during a telephone call, the caller in *Jackson* – unlike the officers in this case – could not have seen the intercepting device. *Id.* at 504, 349 N.E.2d at 339. Even still, the court did not require that the recorded party be explicitly informed of the recording, but held that knowledge may be implied by "objective factors" rather than by "speculating as to the caller's subjective state of mind." *Id.* at 507, 349 N.E.2d at 341. Justice Cowin's concurrence in *Rivera* relied on *Jackson* for this point, reasoning that because "audio recording devices were part of video cameras within plain view of any person entering the store, including the defendant[,] [t]he defendant can be presumed to have had actual awareness of the existence of the devices and that he was under surveillance." *Rivera,* 445 Mass. at 134, 833 N.E.2d at 1125

[9] The three remaining justices signed only the court's main opinion, which disposed of the case on another ground and did not address whether the audio recording was lawful. *Id.* at 123, 833 N.E.2d at 1117-18.

(Cowin, J., concurring). The district court in this case also held that knowledge is presumed when the recording device is in plain view. Def. Br. AD 8-9.[10]

Defendants' interpretation of the statute would lead to absurd results. If subjective knowledge were required, then a news crew using a ten-foot boom microphone to record sound at a public event such as a fire would be committing a felony merely because one of the firefighters had his or her back turned to the microphone. Under Defendants' view, unless every firefighter on the scene and all passersby saw the microphone, the news crew would be subject to arrest for illegal wiretapping.[11] Such a sweeping restriction on the right of the media and the public at large to gather information violates the First Amendment and basic principles of a free society. *See Section IIA, supra.*

Even assuming, *arguendo*, that the subjective knowledge of the party being recorded were required to avoid violating the statue, this would not provide grounds to grant Defendants' motion to dismiss. The complaint alleges

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[10] Defendants' citation to *Gouin v. Gouin*, 249 F. Supp. 2d 62, 79 (D. Mass. 2003), is also unavailing. Defs.' Br. 33. In denying the plaintiff's motion to dismiss the defendant officers' counterclaim for a civil violation of the wiretap statute, the court had to accept as true the allegation that the recording was done secretly. *Id.*

[11] Further, if the statute turned on police officers' subjective knowledge of the recording, then police would have "a strong incentive to deny knowledge of a recording when an instance of police misconduct occurred." Lisa A. Skehill, *Note: Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers,* 43 Suffolk U. L. Rev. 981, 1012 (2009).

that the police officers admitted that the recording was done openly and publicly. J.A. 11. Read in the light most favorable to Plaintiff, the complaint does not concede that Defendants lacked knowledge that Plaintiff was recording sound. J.A. 10. At a minimum, Defendants' assertion of ignorance raises factual questions inappropriate for resolution at this stage.

Defendants' contention that because "the primary function of a cellular phone … is undoubtedly to make phone calls," Defs.' Br. 37, Plaintiff's use of his cellphone to make an audiovisual recording was "in reality clandestine," Defs.' Br. 38, lacks merit. As Defendants concede, the capability of cellphones to make audio and audiovisual recordings is "obvious[]," a fact that negates any contention that Plaintiff's use of this capability was secretive. Defs.' Br. 37. It also negates the comparison of cellphones to "pens, glasses, watches, keychains, hats" or other objects that may have an embedded sound-recording device. Defs.' Br. 38. Unlike the recording capabilities of a cellphone, any such capabilities that may exist in hats and watches are not ubiquitous and well-known.

Defendants' purported distinction between the "primary function" of a cellphone and its recording capabilities is irrelevant under Massachusetts wiretap law. The statute prohibits secret "hear[ing]" as well as secret recording. Mass. Gen. Laws ch. 272, § 99(B)(4). Cellphones, like all phones, transmit sound from one place to another: they permit "hearing" of oral

communications. Thus, it makes no difference whether an individual in Plaintiff's shoes was using his phone to make an audiovisual recording of the officers or whether he was holding it out "to allow someone on the other end of the phone" to hear the sounds of the arrest. Defs.' Br. 37-38. Either use of the phone would be an illegal interception if it were done secretly, but since holding such a device in plain sight is not secret, neither use violates the statute.

Because Plaintiff's audio recording was not secret, there was no probable cause to arrest him for illegal wiretapping. The complaint thus states a claim for false arrest.

B. The Officers Had Fair Warning That They Could Not Lawfully Arrest Plaintiff for Violating the Massachusetts Wiretap Statute

No reasonable officer could have believed, under the circumstances alleged in the complaint, that probable cause existed to arrest Plaintiff for illegal wiretapping. It was clearly established by 2007 that recording audio while holding a recording device in plain view did not violate the Massachusetts wiretapping statute.

Reasonable police officers must know the law. *See Hall v. Ochs,* 817 F.2d 920, 924 (1st Cir. 1987). This includes criminal statutes as well as decisional law interpreting those statutes. *See, e.g., Iacobucci,* 193 F.3d at 24-25; *Sheehy v. Town of Plymouth,* 191 F.3d 15, 22-23 (1st Cir. 1999). In *Iacobucci*, the First Circuit held

that a reasonable police officer would have been aware of the caselaw regarding disorderly conduct as well as the statutory language of the state's open meeting law. 193 F.3d at 24-25. The Court denied qualified immunity because these authorities made it sufficiently clear that the plaintiff could not be arrested for disorderly conduct. *Id.* at 24.

In this case, a reasonable police officer would have understood, in light of *Hyde, Ennis,* and *Rivera,* that there was no probable cause to believe Plaintiff violated the wiretap law. The opinion of the Boston Municipal Court, which easily concluded that "[t]his was not a secret recording," J.A. 19, supports a finding that the law was clearly established at the time of Plaintiff's arrest. The wide body of First Amendment law recognizing the right to record the actions of public officials on public property gave the officers further notice that they could not arrest Plaintiff for filming them unless he interfered with them in some way. The criminal court readily recognized this as well. J.A. 19-20.

Because Defendants had fair warning that Plaintiff's recording was lawful and constitutionally protected, they are not entitled to qualified immunity with respect to Plaintiff's Fourth Amendment false arrest claim.

IV. THIS COURT LACKS JURISDICTION TO CONSIDER DEFENDANTS' APPEAL AS TO PLAINTIFF'S STATE LAW MALICIOUS PROSECUTION CLAIM

Because qualified immunity is not an available defense to Plaintiff's malicious prosecution claim under Massachusetts law, the district court's denial of Defendants' motion to dismiss this claim is not appealable. *See Garnier v. Rodriguez,* 506 F.3d 22, 25 (1st Cir. 2007) ("[W]hen presented with an interlocutory appeal from an order denying summary judgment on the ground of qualified immunity, we have so far refrained from endorsing any form of pendent appellate jurisdiction over otherwise nonappealable interlocutory orders.")(citation omitted). The Court should dismiss the appeal as to this claim. In the alternative, the Court should affirm the district court's denial of Defendants' motion on the grounds that Defendants lacked probable cause to initiate criminal proceedings against Plaintiff. *See* Section IIIA, *supra.*

CONCLUSION

For the foregoing reasons, the Court should affirm the order of the district court denying the individual Defendants' motion to dismiss Plaintiff's First Amendment and Fourth Amendment claims; dismiss these Defendants' appeal as to Plaintiff's malicious prosecution claim, and the entire appeal of Defendant City of Boston, for lack of jurisdiction; and remand the case to the district court for further proceedings.

RESPECTFULLY SUBMITTED,

For the Plaintiffs,

/s/David Milton
Howard Friedman, First Circuit No. 70615
David Milton, First Circuit No. 125026
Law Offices of Howard Friedman, P.C.
90 Canal Street, Fifth floor
Boston, MA 02114-2022
617-742-4100
hfriedman@civil-rights-law.com
dmilton@civil-rights-law.com

/s/Sarah Wunsch
Sarah Wunsch, First Circuit No. 28628
American Civil Liberties Union of Massachusetts
211 Congress Street, 3rd floor
Boston, MA 02110
617-482-3170, ext. 323
swunsch@aclum.org

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I, David Milton, as counsel for the Plaintiff-Appellee Simon Glik, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), as follows:

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,467 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Garamond 14-point type.

Attorney for Plaintiff-Appellee,

/s/ David Milton

David Milton, First Circuit No. 125026
Law Offices of Howard Friedman P.C.
90 Canal Street, 5th Floor
Boston, MA 02114-2022
617-742-4100

Dated: January 18, 2011

CERTIFICATE OF SERVICE

I certify that on this day I caused the above document to be served upon the attorneys of record for Defendants – Lisa Skehill Maki and Ian Prior -- via Notice of Docket Activity generated by the Court's electronic filing system. All attorneys of record for Defendants are ECF Filers and will receive service via their respective email addresses, which are lisa.maki@cityofboston.gov and ian.prior@cityofboston.gov.

Attorney for Plaintiff-Appellee,

/s/ David Milton

David Milton, First Circuit No. 125026
Law Offices of Howard Friedman P.C.
90 Canal Street, 5th Floor
Boston, MA 02114-2022
T (617) 742-4100

Dated: January 18, 2011