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

On Appeal from the United States District Court
For the District of Massachusetts
Civil Action No. 10-cv-10150-LTS

BRIEF OF APPELLANTS JOHN CUNNIFFE, PETER SAVALIS, AND JEROME HALL-BREWSTER

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. §§ 1331 and 1367, the United States District Court for the District of Massachusetts had subject matter jurisdiction over the Appellee, Simon Glik's (hereinafter "Glik") Federal Civil Rights Act claim alleging violations of his First and Fourth Amendment rights, as well as his pendant state law claims under the Massachusetts Civil Rights Act and his malicious prosecution claim. See Joint Appendix, at page _ (hereinafter "*JA* _."). The Defendants-Appellants, Boston Police Officers John Cunniffe ("Cunniffe"), Peter Savalis ("Savalis"), and Jerome Hall-Brewster ("Hall-Brewster") (collectively referred to as the "Officers"), moved to dismiss Glik's Complaint, which was denied by the District Court on June 9, 2010. See Appellants-Defendants' Addendum, at page 1 (hereinafter "*AD* _.")

The Officers timely filed a notice of appeal on June 23, 2010. *JA 21-22*. The Appellate Court has jurisdiction based on 28 U.S.C. §§ 1291 and 1292, the "collateral order" doctrine, Rules 3 and 4 of the Federal Rules of Appellate Procedure, and this Court's decisions in Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 77 (1st Cir. 2006) and Rivera-Ramos v. Roman, 156 F.3d 276, 279 (1st Cir. 1998), which permit an immediate interlocutory appeal of a District Court order denying qualified immunity.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in denying the Officers qualified immunity by finding that there was a clearly established First Amendment right in the First Circuit to videotape police officers carrying out their public duties.

2. Whether the District Court erred in denying the Officers qualified immunity because reasonable police officers, similarly situated to the Officers, would not have understood that they were violating Glik's clearly established First Amendment rights by arresting him for using a cellular phone to make an audio/visual recording of them.

3. Whether the District Court erred in denying the Officers qualified immunity because reasonable police officers, similarly situated to the Officers, would not have understood that they were violating Glik's clearly established Fourth Amendment rights by arresting Glik for using a cellular phone camcorder to make an audio/visual recording of them without their knowledge or consent.

STATEMENT OF THE CASE

This case involves an incident that occurred in the Boston Common during the early evening hours of Monday, October 1, 2007, in which the Officers were attempting to arrest an individual for the distribution of illegal drugs. *JA 9*. Upon effecting the arrest of the drug suspect, Glik informed the Officers that he had been using a camcorder application in his cellular phone to make an audio and visual recording of them making the arrest. *JA 10*. Upon learning of this, Officer Savalis arrested Glik and charged him with (1) unlawfully intercepting oral communications in violation of the Massachusetts Wiretap Act, codified as Massachusetts General Laws, Chapter 272, Section 99; (2) aiding in the escape of a prisoner in violation of Massachusetts General Laws, Chapter 268, Section 17; and (3) disturbing the peace in violation of Massachusetts General Laws, Chapter 272, Section 53. *JA 10-11*.

The prosecution for the Commonwealth of Massachusetts voluntarily dismissed the charge of aiding in the escape of a prisoner but went forward on the other two charges of disturbing the peace and unlawful interception of oral communications. *JA 11*. On February 1, 2008, the Boston Municipal Court dismissed the remaining two charges for lack of probable cause. *JA 11*. The Court reasoned that Glik's recording of the arrest was not in violation of the Massachusetts Wiretap Act because Glik had openly held out his cellular phone

while recording the Officers during their arrest of the drug suspect and thus, the recording was not secret. *JA 11*.

Glik subsequently filed this lawsuit on February 1, 2010. *JA 1*. Count I and II of his Complaint alleged that the Officers were liable under 42 U.S.C. § 1983 (the Federal Civil Rights Act) and M.G.L. c. 12, § 11I (the Massachusetts Civil Rights Act), respectively, for violating his First and Fourth Amendment Rights by arresting him for recording the Officers' activities. *JA 14-15*. Count III of Glik's Complaint asserted that the Officers are liable for malicious prosecution.[1] *JA 15*.

On April 22, 2010, the Officers filed a motion to dismiss Glik's Complaint. *JA 2*. As grounds for their motion, the Officers argued that they were entitled to qualified immunity as Glik did not have a clearly established First Amendment right to use a camcorder application in his cellular phone to record police activity. The Officers further argued that arrest of Glik was lawful under the Massachusetts Wiretap Act and thus did not violate his Fourth Amendment rights or, at the very least, were entitled to qualified immunity because they were reasonably mistaken in their arrest of Glik pursuant to the Massachusetts Wiretap Act.

On June 8, 2010, the District Court heard oral argument on the Officers'

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[1] Glik also brought a 42 U.S.C. § 1983 municipal liability claim against the City of Boston. *JA 19*. The City is not currently a party to this appeal as it does not have the right to an immediate interlocutory appeal on the basis of qualified immunity. Walden v. City of Providence, 596 F.3d 38, 55 n.23 (1st Cir. 2010) (citing Owen v. City of Independence, 445 U.S. 622, 638 (1980)).

motion to dismiss. *JA 3.* Ruling from the bench, the Court held that the right to record police officers is a clearly established First Amendment right in the First Circuit. *JA 3.* Based on that finding, the District Court issued an Order on June 9, 2010 denying the Officers' motion to dismiss. *JA 3.* The Court did not include a written decision with its June 9, 2010 Order.[2] *AD 1.* The Officers appeal from the District Court's June 9, 2010 Order denying their motion to dismiss. *JA 21-22.*

[2] Because the District Court did not include a written opinion explaining its decision to deny the Officers' motion to dismiss, the Officers will base their argument in the instant brief as if the District Court adopted the arguments advanced by Glik in his opposition to the Defendants' motion to dismiss and at the motion to dismiss hearing.

STATEMENT OF FACTS

On October 1, 2007, while walking on the Tremont Street sidewalk between Park Street and Boylston Street, in Boston, Massachusetts, Glik observed the Officers engaged in the arrest of a drug suspect near a park bench in the Boston Common. *JA 9.* Upon seeing the arrest in progress, Glik took out his cellular phone and, while standing ten feet away from the officers, recorded the arrest using the camcorder application in his cellular phone. *JA 9.* Glik recorded three separate segments of the ongoing arrest. *JA 9.* At no time did Glik speak to the officers before the drug suspect was handcuffed. *JA 9.*

After the drug suspect was placed in handcuffs, one of the Officers approached Glik and stated, "I think you have taken enough pictures," to which Glik responded, "I am recording this. I saw you punch him." *JA 10.* One of the other Officers then asked Glik if his phone was recording audio. *JA 10.* Glik confirmed that his phone had indeed been recording audio, and as a result, Officer Savalis placed Glik under arrest for: (1) unlawfully intercepting their oral communications in violation of Massachusetts General Laws, Chapter 272, Section 99; (2) aiding in the escape of a prisoner in violation of Massachusetts General Laws, Chapter 268, Section 17; and (3) disturbing the peace in violation of Massachusetts General Laws, Chapter 272, Section 53. *JA 10-11.*

STANDARD OF REVIEW

Whether an officer is entitled to qualified immunity is a question of law to be determined by the court. See Jarrett v. Town of Yarmouth, 309 F.3d 54, 61 (1st Cir. 2003). As this question is on appeal following the denial of the Officers' motion to dismiss, this Court reviews the District Court's decision *de novo*, "accepting as true all well-pleaded facts in the complaint and drawing all reasonable inferences in the plaintiff['s] favor." Uphoff Figueroa v. Alejandro, 597 F.3d 423, 429 (1st Cir. 2010) (quoting Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 325 (1st Cir.2009)). In order to survive a motion to dismiss under Rule 12(b)(6), Glik must "plead [ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Sanchez v. Pereira-Castillo, 590 F.3d 31, 48 (1st Cir. 2009) (quoting Ashcroft v. Iqbal, ---U.S. ----, 129 S. Ct. 1937, 1949 (2009)). In other words, Glik must offer "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," in order to claim "a plausible entitlement to relief." Id. (quoting Iqbal, 129 S. Ct. at 1949).

SUMMARY OF THE ARGUMENT

The District Court properly exercised its discretion under Pearson v. Callahan, 129 S. Ct. 808 (2009), by analyzing the facts under the second "clearly established" prong of the qualified immunity analysis without determining the existence of a constitutional violation.

The District Court erred in denying Officers qualified immunity, by finding that there is a clearly established First Amendment right to record police officers carrying out their public duties. Not one First Circuit or Supreme Court case has held that such a clearly established constitutional right exists, nor has there been a consensus of circuit court cases to sufficiently alert the Officers of such a right. Moreover, in the event that such a right was clearly established at the time, the District Court erred by denying the Officers qualified immunity based on the fact that an officer facing similar circumstances would not reasonably be expected to understand that his actions violated that right.

With respect to Glik's Fourth Amendment claim, the District Court erred when it denied the Officers qualified immunity because a reasonable interpretation of the Massachusetts Wiretap Act, Massachusetts General Laws, Chapter 272, Section 99, and the cases interpreting it, would not have placed a reasonable officer facing similar circumstances on notice that his actions would violate an individual's Fourth Amendment right. In particular, a reasonable officer facing a

similar factual scenario would have believed that he had probable cause to arrest Glik for a violation of the Massachusetts Wiretap Act, or, at the very least, an officer facing similar circumstances would be reasonably mistaken in believing he had probable cause to arrest.

Based on the presence of probable cause under the Fourth Amendment to arrest Glik for violating the Massachusetts Wiretap Act, Glik's malicious prosecution claim fails as a matter of law.

For all of these reasons, which are more thoroughly discussed within, this Court should reverse the decision of the District Court denying the Officers qualified immunity.

ARGUMENT

I. THE COURT SHOULD BEGIN ITS ANALYSIS WITH THE SECOND PRONG OF THE QUALIFIED IMMUNITY ANALYSIS - WHETHER THE RIGHTS AT ISSUE WERE CLEARLY ESTABLISHED AT THE TIME OF THE INCIDENT.

Qualified immunity is a legal doctrine that shields government officials from liability from civil damages in a 42 U.S.C. § 1983 action[3] "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, government officials are entitled to qualified immunity unless (1) the facts that a plaintiff has alleged or shown make out a violation of a constitutional right; and (2) the right at issue was clearly established at the time of the defendant's misconduct. Pearson v. Callahan, 129 S. Ct. 808, 816 (2009). "A right is 'clearly established' if, at the time of the alleged violation, '[t]he contours of the right * * * [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Giragosian v. Bettencourt,

[3] Glik also brought a cause of action under the Massachusetts Civil Rights Act, Massachusetts General Laws, Chapter 12, Section 11I (hereinafter referred to as the "MCRA"). *JA 14-15.* The MCRA is coextensive with 42 U.S.C. § 1983. Bell v. Mazza, 474 N.E.2d 1111, 1114 (Mass. 1985). Like § 1983, it is not an independent cause of action, and does not create any substantive civil rights; it merely provides a mechanism whereby one can obtain relief from interference of rights conferred by federal or state law. Howcroft v. City of Peabody, 747 N.E.2d 729, 744-45 (Mass.App.Ct. 2001). Consequently, qualified immunity under the MCRA is analyzed and applied in the same manner as it is under 42 U.S.C. § 1983. Duarte v. Healy, 537 N.E.2d 1230 (Mass. 1989).

614 F.3d 25, 29 (1st Cir. 2010) (quoting Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009)).

A constitutional right is "clearly established if courts have ruled that materially similar conduct was unconstitutional, or if there is a previously identified general constitutional principle that applies with obvious clarity to the specific conduct at issue." Jennings v. Jones, 499 F.3d 2, 16 (1st Cir.2007) (internal quotations omitted). In order to show that an asserted right was clearly established, a plaintiff must look to cases from this circuit and other circuits and "must identify 'cases of controlling authority * * * at the time of the incident * * * [or] a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" Bergeron v. Cabral, 560 F.3d 1, 11 (1st Cir. 2009) (quoting Wilson v. Layne, 562 U.S. 603, 617 (1999)).[4]

Traditionally, the application of the qualified immunity analysis was done in

[4] This Court has looked to federal district court decisions from this circuit and others to help answer the question of whether a consensus of cases of persuasive authority exists. See Hatch v. Dep't for Children Youth and Their Families, 274 F.3d 12, 23 (1st Cir. 2001). This Circuit has not yet directly held, as the Sixth and Fourth Circuits have, that courts should look to the decisions of the state's highest court to determine whether a right is clearly established. See Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988); Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980). Nevertheless, in Iacobucci v. Boulter, 193 F.3d 14, 24 (1st Cir. 1999), this Court relied on decisions from the Massachusetts Supreme Judicial Court to determine whether a right was clearly established. Thus, in this brief, the Officers will also look to decisions of that Supreme Judicial Court for aid in determining whether the Constitutional right asserted by Glik has been clearly established.

sequential order, with the requirement that courts first decide whether an official's alleged conduct violated a Constitutional right. Pearson, 129 S. Ct. at 816 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). In Pearson, however, the Supreme Court unanimously acknowledged that in many cases the strict sequential analysis mandated by Saucier was unworkable. Id. at 819. Specifically, the Court noted that in cases where constitutional questions are heavily fact-bound, the discussion of the first prong in a qualified immunity analysis would result in a "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case" and have little if any precedential value for future cases.[5] Id. at 818-19. Consequently, while preserving the substance of the

[5] In his opposition to the Defendants' motion to dismiss, Glik argued that the Court should apply the qualified immunity analysis in the Saucier sequential order. *AD 22*. In support of that premise, he quoted Pearson for the assertion that "the development of constitutional precedent" * * * is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *AD 22*. Glik, however, neglected to provide the proper context for that quotation (Glik also mistakenly cited to page 821; the quotation is actually located on page 818). *AD 22*. Read in its full context, it is evident that while the Supreme Court maintains that Saucier may still have some value, it also held that the Saucier analysis was unwieldy and should no longer be mandatory. The Court also went on to allay fears that without the first prong of Saucier there would be a dearth of constitutional law by highlighting that the development of constitutional law is not entirely dependant on § 1983 actions where qualified immunity is available, because constitutional law is developed in criminal cases and in § 1983 municipal liability cases. Pearson, 129 S. Ct. at 821-22. Moreover, any development of constitutional law through individual § 1983 actions is so fact-specific that any constitutional development is insignificant. Id. at 819. (and cases cited).

qualified immunity analysis, the Supreme Court held that the rigid sequential order of analysis required by Saucier was no longer mandatory and that the district courts should be permitted wide discretion in deciding which of the questions to address first. Id. at 818.

Moreover, in making the order of the two-part test permissive in nature, the Supreme Court specifically highlighted the utility in bypassing the first prong of the qualified immunity analysis where the defense is asserted at the pleadings stage. Id. at 819. This Court has also recognized such an advantage in skipping the first prong, noting that "where the answer to the first prong of the immunity question may depend on the further development of the facts, it may be wise to avoid the first step." Maldonado, 568 F.3d at 270 (citing Buchanan v. Maine, 469 F.3d 158, 168 (1st Cir.2006)).[6]

The instant case is a compelling example of why this Court should bypass the constitutional question of the first prong of the qualified immunity analysis and begin its analysis instead, on the "clearly established" prong. There are three reasons for this.

First, it appears from the motion to dismiss hearing transcript that the

[6] In further support of his argument that the Court should apply the qualified immunity analysis in the Saucier sequential order, Glik argued that such an application was warranted because "the defendants have moved to dismiss for failure to state a cognizable claim." This argument is diametrically opposed to the Supreme Court's advice in Pearson and this Court's suggestion in Maldonado that it is advantageous to bypass the first prong early in the pleadings stage.

District Court decided the issue by limiting its inquiry to the second question of whether the constitutional right asserted was clearly established. *AD 8.* As this decision was within the District Court's discretion, this Court should confine its analysis to whether the District Court's second prong analysis was correct—whether Glik's asserted Constitutional right was clearly established—not whether the District Court made the proper decision in starting its analysis with the second prong.

Second, this case has yet to pass the pleadings stage and the answer to whether there was a constitutional violation would depend on further development of the facts. This case exemplifies the scenario in which both this Court and the Supreme Court foresaw the need to bypass the first prong.

Finally, beginning its inquiry by proceeding directly to the question of whether the right was clearly established would allow the Court to circumvent the more difficult and fact-dependent question of whether a constitutional violation existed. This option would be more judicially efficient and would eliminate the risk of creating constitutional precedent that may be confusing or of little value to future cases—the very problems that Pearson cautioned against when abandoning the rigid Saucier test.

Accordingly, the Court should begin and end its analysis of the Officers' qualified immunity defense with the second prong. As demonstrated further

below, the application of this analysis will make it abundantly clear that the Officers' activities did not violate Glik's clearly established constitutional rights, thereby obviating the need to ever consider the first prong.

II. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY ON GLIK'S CLAIM THAT THEY VIOLATED HIS FIRST AMENDMENT RIGHTS.

Glik asserts that his October 1, 2007 arrest "was a direct interference with [his] right to observe and document the conduct of law enforcement officers carrying out their duties in a public place."[7] *AD 19.*

Contrary to Glik's position, his recording of the Officers was not protected by the First Amendment, and alternatively, this asserted constitutional right has not been clearly established by this Court, nor is there a consensus of cases of persuasive authority such that a reasonable officer would have believed that his or her actions were unlawful.

[7] The First Amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend., I. The First Amendment applies to the states and their political subdivisions under the Due Process Clause of the Fourteenth Amendment. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).

A. Neither The Supreme Court Nor The First Circuit Have Recognized A First Amendment Right To Record Police Officers Carrying Out Their Duties In A Public Place.

The first step in determining whether Glik had a clearly established First Amendment right to record the Officers' police activities is to look to precedent from the Supreme Court and this Circuit that existed at the time of the alleged incident—October 1, 2007. See Hatch v. Dep't for Children, Youth and Their Families, 274 F.3d 12, 20 (1st Cir.2001); Martinez-Rodriguez v. Colon-Pizarro, 54 F.3d 980, 988 (1st Cir.1995). There was not then, nor is there now, any Supreme Court or First Circuit case that clearly establishes Glik's asserted First Amendment right. Seemingly, Glik recognized this fact in his argument to the District Court as he did not cite a single Supreme Court or First Circuit case that held there to be a First Amendment right to record police officers carrying out their duties in a public place. *AD 11-31.*

Unable to unearth a Supreme Court or First Circuit decision to support his assertion that there is a First Amendment right to record police officers carrying out their official responsibilities, Glik argued that this Court's decision in Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999) recognized a right to record matters of public concern and that such a right encompassed, with obvious clarity, Glik's conduct on October 1, 2007. *AD 19-20.*

Glik's reliance on Iacobucci is misplaced. In that case, the plaintiff,

Iacobucci, attempted to videotape an open meeting of the Pembroke Historic District Commission for the purpose of a weekly news program that he produced and broadcasted via a cable television outlet. Id. at 17. During the meeting, the chairman of the commission asked Iacobucci to move his camera from an occupied conference table to a spot across the room or be subject to possible arrest. Id. When Iacobucci refused to do so, he was arrested and charged with disorderly conduct and disrupting a public assembly. Id. at 18. The criminal charges were ultimately dismissed, and subsequently Iacobucci brought a § 1983 action alleging false arrest and excessive force. Id. The case reached this Court after the defendant appealed a jury verdict in favor of Iacobucci. Id.

In addressing whether there was a valid false arrest clam for disorderly conduct, this Court relied on precedent from the Massachusetts Supreme Judicial Court and held that disorderly conduct can never encompass activities implicating a lawful exercise of First Amendment rights. Id. at 24. This Court went on to state that Iacobucci was exercising his First Amendment right and was effectively falsely arrested for disorderly conduct. Id. In that case, however, Iacobucci was engaging in a First Amendment right because he was acting within his rights as conferred by the Massachusetts Open Meetings Law, Massachusetts General Law, Chapter 39, Section 23B, which requires that '"[a]ll meetings of a governmental body * * * be open to the public,' and confers a right to videotape such meetings

on 'any person in attendance.'" Id. (quoting M.G.L. c. 39, § 23B). Further, as this Court made clear, the right to videotape is not unfettered, it must be done within the mandates of the statute, and it does not apply to chance or social meetings. Id.

Glik appears to assume that the First Amendment right that protected Iacobucci from arrest for disorderly conduct was the right to videotape a matter of public concern. *AD 19-21.* There is absolutely nothing in this Court's opinion that even implies such a right. A plain reading of the opinion makes clear that Iacobucci's lawful exercise of a First Amendment right concerned his right of access to a place open to the public, as was the meeting of the Pembroke Historic District Commission. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980) (holding that the right of access to places open to the public is grounded in the rights of free assembly and of a free press).

Iacobucci's right to videotape the meeting, however, was an additional statutory right provided by Massachusetts General Laws, Chapter 39, Section 23B. See Iacobucci, 193 F.3d at 24 (noting that "entitlement to videotape a public meeting" is conferred by the Open Meeting Law). Thus, accessing the meeting was done in the exercise of Iacobucci's First Amendment rights and videotaping the meeting was done in the exercise of his statutory rights. As a result, the officers had no probable cause to arrest Iacobucci, thus their actions constituted a violation of the Fourth Amendment. This is a far cry from Glik's supposition that

the Court held that Iacobucci had a clearly established First Amendment right to record the meeting.[8]

In sum, contrary to Glik's assertion, Iacobuccu, does nothing to advance his contention that he had a clearly established First Amendment right to record the Officers. It is evident that, to date, there is no clearly established First Amendment right to record police officers carrying out their public duties in this Circuit. The District Court erred when it denied the Officers' qualified immunity defense and found that there was a clearly established First Amendment right in this Circuit to record the activities of police officers conducting public business. Accordingly, the decision of the District Court must be reversed.

B. There Is No Consensus of Cases of Persuasive Authority Such That A Reasonable Officer Would Believe That His/Her Actions Were Unlawful.

Glik is unable to show that there is a consensus of cases of persuasive authority, beyond the decisions of the Supreme Court and First Circuit, that hold

[8] Glik's misinterpretation of Iacobucci highlights the fact that he has blurred his First Amendment argument with his Fourth Amendment argument. *AD 14-21*. There is no dispute that Glik had a First Amendment right to be in the Boston Common just as Iacobucci had a right to be at the meeting. Glik's asserted right to use his cell phone to record the Officers, if such a right existed, would have to be provided statutorily, as was the case in Iacobucci. Thus, the appropriate inquiry in this case is whether Glik's recording of the Officers was allowed under Massachusetts Wiretap Act, Massachusetts General Laws, Chapter 272, Section 99, and the case law interpreting its meaning. This is a Fourth Amendment inquiry and will be further discussed infra, in Section III of this brief.

that there is a First Amendment right to videotape police officers performing their duties in a public place. Further, Glik's assertion that there is a general "right to record matters of public concern" is itself not clearly established and certainly not contoured enough to defeat the Officers' defense of qualified immunity.

i. The Third Circuit and the Fourth Circuit Have Both Held That There Is No Clearly Established First Amendment Right to Record Police Activities.

Not one federal circuit case supports Glik's theory that a First Amendment right to record police activity in a public place has been clearly established. On the other hand, the Officers' position is amply supported by two recent cases from other federal circuits that hold that such a right is not clearly established.

In Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010), the Third Circuit held that it was not clearly established that a citizen had a First Amendment right to videotape police officers exercising their duties in a public place. In Kelly, the plaintiff was arrested on May 24, 2007 (less than five months before Glik was arrested) for videotaping a police officer who had pulled over the vehicle in which Kelly, the plaintiff, was a passenger. Id. at 252. The officers charged Kelly with violating the Pennsylvania Wiretapping Act. Id. After the local district attorney dropped the charges, Kelly filed a § 1983 action against the individual officers and the town, alleging that the officers violated his First and Fourth Amendment rights when they arrested him. Id. The officers moved for summary judgment on

qualified immunity grounds,[9] and the district court granted their motion, holding that the officer was entitled to qualified immunity on Kelly's § 1983 claim. Id. at 252-53.

The Third Circuit Court of Appeals affirmed the district court's decision. Kelly, 622 F.3d at 253. When analyzing whether Kelly had a clearly established First Amendment right to record the officer, the Third Circuit looked to its own decisions, as well as the decisions from other federal circuits and federal district courts. Id. at 260. In affirming the district court's finding that there was no clearly established First Amendment right to videotape police officers performing their duties in public, the Third Circuit conducted an in-depth review of the following cases: Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995); Demarest v. Athol/Orange Cmty. Television, Inc., 188 F.Supp.2d 82 (D.Mass. 2002); and Lambert v. Polk County, 723 F.Supp. 128 (S.D. Iowa 1989). Based on its review, the Third Circuit determined that, while those cases recognized a general right to record matters of public concern, they did so only in passing. Id. at 261. Further, the Court held that such a general right was "insufficiently analogous" to a right to videotape a police officer in the performance of his duties such that he would be on notice of a clearly

[9] The town also moved for, and was granted, summary judgment, but as that is not relevant to the discussion of qualified immunity, the Officers do not address that portion of the decision.

established right. Id. at 262.

Noteworthy is that, in support of his assertion that he had a clearly established First Amendment right to record the Officers within his opposition to Defendants' motion to dismiss, Glik relied on Smith, Fordyce, Demarest, and Lambert,[10] the very cases that the Third Circuit examined and then dismissed as holding that there is a clearly established First Amendment right to videotape police officers in the performance of their duties. The Third Circuit's decision in Kelly provides compelling persuasive value as the facts are strikingly similar to the present case—a private citizen videotaping an on-duty police officer—and the Third Circuit conducted an exhaustive review of the cases cited and relied upon by Glik in support of his theory.

Similarly, in Szymecki v. Houck, 353 Fed.Appx. 852 (4th Cir. 2009), the Fourth Circuit explicitly held that there is no clearly established First Amendment right to record police activity on public property. The facts of that case are as

[10] Glik also relied on Alliance to End Repression v. City of Chicago, 2000 U.S. Dist. LEXIS 6342 (N.D. Ill. May 8, 2000); Cornell v. Hudson, 733 F.Supp. 465 (D.N.H. 1990); and Channel 10, Inc. v. Gunnarson, 337 F.Supp. 634 (D.Minn. 1972) to support his theory that there is a First Amendment right to videotape the police. *AD 11-31*.

follows.[11] On June 10, 2007 Szymecki, the Plaintiff, was using her cellular phone to record a police officer who was arresting her husband for carrying a handgun at a local festival. *AD 33.* The officer told Szymecki to put the phone away or that she would go to jail. *AD 33.* He then ordered her to leave the festival grounds, which she did. *AD 33.* Following the incident, Szymecki filed a § 1983 action against the officer alleging that he had violated her First Amendment right to videotape the actions of police officers. *AD 34.* The district court granted summary judgment on the grounds that the officer was entitled to qualified immunity based on the absence of a clearly established First Amendment right to videotape police officers. *AD 40.* Remarkably, the Fourth Circuit dispensed with oral arguments in affirming the district court's decision. Szymecki, 353 Fed.Appx. at 853.

Finally, the Eleventh Circuit is the only other federal circuit that has addressed the issue of whether there is a clearly established First Amendment right to record police activity. Smith, 212 F.3d at 1333. In Smith, the plaintiff claimed that the defendant police officers violated his First Amendment right to videotape police activities. Id. The district court granted the officers' motion for summary judgment and the Eleventh Circuit affirmed. Id. In doing so, however, the Court

[11] The Fourth Circuit did not include a description of the facts in its opinion. Therefore, in order to provide the Court with the pertinent factual background, the Officers refer to their addendum, which contains the unpublished district court opinion that the Fourth Circuit affirmed. *AD 32-40.*

did acknowledge a "First Amendment right subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." Id. Nevertheless, the Court found that the officers did not violate Smith's rights. Id.

As stated supra, the Third Circuit's decision in Kelly considered and discussed the Smith decision at length. Indeed, the Third Circuit correctly pointed out that "the Eleventh Circuit provided few details regarding the facts of the case, making it difficult to determine the context of the First Amendment right it recognized." Kelly, 622 F.3d at 260.[12]

Moreover, while the Fourth Circuit did not discuss the Smith decision, the Szymecki Court did. Specifically, it noted that while Smith may have found that "an individual might have a right to video record police conduct, subject to reasonable time, place, and manner restrictions, [that] does not mean that the Court found that this specific right was clearly established." *AD 40.*

Thus, Glik's reliance on Smith is unavailing. To the extent that the Eleventh Circuit recognized a First Amendment right, the contours of the right were not sufficiently clear such that a reasonable official would understand that what he is doing violates that right. Moreover, if the Third Circuit Court of Appeals could not glean from Smith the parameters of the declared First Amendment right, it

[12] Indeed, not only does the Eleventh Circuit provide scant factual information, but there is no published district court opinion nor are the lower court filings and orders readily available on PACER.

would be unreasonable to expect a police officer to do so. Wilson v. Layne, 562 U.S. 603, 618 (1999) (officers not liable for choosing "wrong side" of federal circuit court split). Furthermore, the fact that one federal circuit may recognize an ill-defined right does not mean that there is a consensus that such a right exists—especially where there is a clear split in authority, as exists here. See Savard v. Rhode Island, 338 F.3d 23, 32 (1st Cir. 2003) (constitutional right not clearly established where there is a split in authority).

Given the split amongst the federal circuits that have addressed the issue and the Third and Fourth Circuit holdings that there is no clearly established First Amendment right to record police activities, it would be unreasonable to require the Officers to understand that such a right is clearly established. Consequently, there can be no doubt that the Officers are entitled to qualified immunity on Glik's First Amendment claim.

ii. The Western District Of Pennsylvania And The Eastern District Of Louisiana Have Also Held That There Is No Clearly Established First Amendment Right To Record Police Activities.

The absence of a clearly established First Amendment right to videotape police officers carrying out public duties is further recognized by several recent federal district court opinions involving similar factual scenarios in which an individual videotaped a police officer with a cell phone.

In Matheny v. County of Allegheny, No. 09-1070, 2010 WL 1007859

(W.D.Pa. March 16, 2010), the Court held that there was no clearly established First Amendment right to videotape or record police activity in the course of their official duties. The facts of that case are nearly identical to the facts in this one. On April 29, 2009 Matheny, the plaintiff, used his cellular phone to record a conversation between the defendant police officer and a third party. Id. at * 1. The officer asked Matheny if he had recorded him and, more specifically, whether he had made both audio and visual recording of the incident. Id. When Matheny stated that he had, the officer arrested him for violating the Pennsylvania Wiretapping Act. Id. Matheny sued the police officer alleging that he violated his clearly established First Amendment right to record police activities. Id. at *4. In allowing the officer's motion to dismiss on the basis of qualified immunity, the Court held that the right to videotape police activities was neither clearly established by controlling authority, nor was there a consensus of cases that would lead a reasonable officer to believe that the right was clearly established. Id. at *5.

Likewise, in Gravolet v. Tassin, No. 08-3646, 2009 WL 1565864 (E.D.La. June 2, 2009), the Court found that there was no clearly established right to videotape police officers. In that case, Tassin, the defendant police officer, arrested Gravolet for drunk driving on May 26, 2007. Id. at *1. Angry about his arrest, Gravolet videotaped Tassin while on duty on three separate occasions the following month. Id. After Tassin noticed Gravolet videotaping her while

conducting a traffic stop, she arrested him for stalking. Id. Gravolet filed a § 1983 suit, alleging that Tassin had violated his First Amendment right to videotape her. Id. In allowing Tassin's motion for summary judgment, the Court held that the right to videotape police activities was not clearly established in the Fifth Circuit and found that "given the uncertainty in the caselaw and the lack of guidance from the Fifth Circuit, this Court is unable to find as a matter of law that there was a 'clearly established right to videotape police officers' at the time of the arrest under these circumstances." Id. at *4.

The inclusion of these federal district court decisions within the legal landscape of Kelly and Szymecki further bolsters the Officers' argument that Glik's asserted right was not clearly established and as such, the Officers are entitled to qualified immunity.

iii. The District Court Cases Relied Upon By Glik Are Not Analogous To His Case And Do Not Hold That There Is A Clearly Established Right To Record Police Activity.

In opposition to the Officer's motion to dismiss, Glik referenced the following district court cases that have recognized a general right to record matters of public interest: Demarest, supra page 22 (subject to time, place, and manner restrictions, there is a general First Amendment right to record matters of public concern); Alliance to End Repression v. City of Chicago, 2000 U.S. Dist. Lexis 6342 (N.D. Ill. May 8, 2000) (photographing the police may be First Amendment

conduct); Connell v. Hudson, 733 F.Supp. 465 (D.N.H. 1990) (recognizing that, subject to reasonable restrictions, the media had a First Amendment right to gather news); Lambert, supra page 22 (dicta in parenthetical stating that there is a general right to "videotape events"); and Channel 10, Inc. supra page 24 (holding member of the media had First Amendment right of access to public places to gather news, write about, and photograph the events that occur in those places). *AD 11-31*.

As the Third Circuit held in Kelly, however, the general right to document matters of public concern is not sufficiently analogous to a right to videotape a police officer in the performance of his duties such that he would be on notice of a clearly established right. 622 F.3d at 262. Although there may be a broad First Amendment right to document matters of public interest, the contours of that right have not been defined by the Supreme Court or any other federal circuit courts in such a way as to explicitly include videotaping police officers within that broader right.

Furthermore, despite the Ninth Circuit's decision in Fordyce and the handful of district court cases relied upon by Glik, the majority of federal circuit courts of appeal have held that there is no general right to videotape matters of public concern. Compare Rice v. Kempker, 374 F.3d 674, 678 (8th Cir. 2004) ("neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the

public."); and Whiteland Woods v. Township of West Whiteland, 193 F.3d 177, 184 (3rd Cir.1999) (holding that public has no right to videotape planning commission meetings that were required to be public); and United States v. Kerley, 753 F.2d 617, 621 (7th Cir.1985) (holding that public has no right to videotape a trial even when the defendant wishes it to be videotaped); and Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16, 23 (2d Cir.1984) ("There is a long leap, however, between a public right under the First Amendment to attend trial and a public right under the First Amendment to see a given trial televised."); with Fordyce, 55 F.3d at 439 (recognizing general First Amendment right to film matters of public concern).

Moreover, the fact that the Massachusetts Wiretap Act proscribes audio/visual recordings that are done without the consent or knowledge of another, regardless of whether the person recorded is a public official carrying out her public duties, lends further credence that there is no clearly established First Amendment right to videotape police officers carrying out their public duties.

Based on the wealth of federal circuit court of appeals' decisions that hold, unequivocally, that there is no clearly established right to videotape matters of public concern, it would stretch the bounds of reason to suggest that there is a clearly established sub-right to specifically videotape police activity. If there is no First Amendment right to videotape quintessential matters of public discourse,

such as Supreme Court arguments, criminal trials, or public meetings, then it must follow that there is no First Amendment right to videotape unassuming police officers engaged in an arrest.

Based on the absence of a clearly established First Amendment right to record police officers in carrying out their public duties, the Officers are entitled to qualified immunity. In the alternative, the Officers are entitled to qualified immunity on the grounds that if there is held to be such a clearly established constitutional right, the Officers were reasonably mistaken in their belief that their actions would not have violated that right.

III. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY ON GLIK'S CLAIM THAT THEY VIOLATED HIS FOURTH AMENDMENT RIGHTS.

The Officers are also entitled to qualified immunity of Glik's Fourth Amendment[13] claim as a reasonable police officer in the Officers' position would have believed that there was probable cause to arrest Glik for violating the Massachusetts Wiretap Act, Massachusetts General Laws, Chapter 272, Section 99 (hereinafter referred to as the "M.G.L. c. 272, § 99").

Police officers are entitled to qualified immunity if an objectively reasonable

[13] The Fourth Amendment protects "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend., IV.

officer would have believed that there was probable cause to arrest a suspect for a criminal offense. See Rivera v. Murphy, 979 F.2d 259, 262 (1st Cir. 1992). "Probable cause to arrest exists where the facts and circumstances within the police officer's knowledge and of which she had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the arrestee had committed or was committing an offense." Sheehy v. Town of Plymouth, 191 F.3d 15, 19 (1st Cir.1999). This test "does not require the officers' conclusion to be ironclad, or even highly probable. Their conclusion that probable cause exists need only be reasonable." Id. (quoting Acosta v. Ames Dep't Stores, Inc., 386 F.3d 5, 11 (1st Cir.2004)). The officers are therefore entitled to qualified immunity "so long as the presence of probable cause is at least arguable." Ricci v. Urso, 974 F.2d 5, 7 (1st Cir.1992). Consequently, police officers are protected by qualified immunity from reasonable mistakes as to whether probable cause exists. Rivera v. Murphy, 979 F.2d 259, 263 (1st Cir. 1992) (internal citation omitted).

In this case, whether the Officers are entitled to qualified immunity requires an analysis of the cases interpreting M.G.L. c. 272, § 99, which provides, in relevant part:

> Except as otherwise specifically provided in this section any person who willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or

> imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.
>
> The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person *given prior authority by all parties to such communication*; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein. (emphasis added).

The Massachusetts Supreme Judicial Court's decision in Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001) provides guidance on what actions constitute a criminal violation of M.G.L. c. 272, § 99. In that case Hyde, the criminal defendant, was pulled over by two Abington police officers for a routine traffic stop. Id. at 964. During the stop, and unbeknownst to the officers, Hyde had activated a hand-held tape recorder and recorded the entire encounter. Id. at 965. The exchange between Hyde and the police officers became heated, but eventually the officers let Hyde go without a citation. Id. Six days later, Hyde went to the Abington Police Department and filed a formal complaint for what he believed to be unprofessional treatment during the traffic stop. Id. To substantiate his

complaint, he produced the tape he had made during the stop. Id. As a result of the recording, Hyde was arrested and prosecuted on the grounds that he violated M.G.L. c. 272, § 99. Id. Hyde was tried and convicted by a jury. Id.

On appeal, the Supreme Judicial Court held that M.G.L. c. 272, § 99 prohibited all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when made without their permission or knowledge." Id. at 967. (emphasis added). Because Hyde had recorded the police officers without their knowledge or permission, the Court determined that Hyde had indeed violated the statute. Id.

The Court also noted that had Hyde "simply informed the police of his intention to tape record the encounter, or even held the tape recorder in plain sight * * * his recording would not have been secret, and so would not have violated [M.]G.L. c. 272, § 99." Id. at 971. In support of that statement, the Hyde Court cited and relied on its earlier decision in Commonwealth v. Jackson, which held that a recording is secret and violates M.G.L. c. 272, § 99 unless the party being recorded has "actual knowledge of the recording." 349 N.E.2d 337, 340 (Mass. 1974) (emphasis added). See also Gouin v. Gouin, 249 F.Supp.2d 62, 79 (D.Mass. 2003) aff'd 07-1604 (1st Cir. 2007) (recording police officers without their knowledge is a violation of M.G.L. c. 272, § 99). Therefore, it is clear that a police officer has probable cause to arrest an individual for recording another

individual when (1) he has not received permission to do so, or (2) the person who is being recorded does not have actual knowledge of the recording.

Based on the allegations made in the Complaint in this case, a reasonable police officer would think that there was probable cause to arrest Glik. According to Glik, he did not take any steps, other than holding his phone away from his body, to alert the Officers that he was recording them. *JA 9.* Glik further admits that he recorded them from ten feet away while they were struggling with a criminal suspect. *JA 9.* Once the Officers had completed that arrest, one of the Officers approached Glik and stated, "I think you have taken enough pictures," to which Glik responded, "I am recording this. I saw you punch him." *JA 10.* One of the other Officers then asked if Glik's phone was recording audio, to which Glik answered yes. Based on that answer, Officer Savalis placed Glik under arrest. *JA 10.*

It should be abundantly clear from these facts that Glik willfully made an audio recording of the Officers without their actual knowledge. According to Glik's own assertions, he stood quietly behind three police officers who were engaged in a difficult arrest. *JA 9.* Other than hold his cellular phone away from his body, Glik did nothing to inform the Officers of the recording. *JA 9.* Thus, Glik willfully recorded them without their knowledge in violation of M.G.L. c. 272, § 99.

Like Hyde, Glik could have simply announced his intent to record, effectively placing the officers on notice of the recording, which would have made it lawful. Instead, based on Glik's actions, or lack thereof, and the use of a cellular phone with an unapparent recording feature, Officers initially thought he was photographing them.[14] *JA 10.* He was not placed under arrest at that point. *JA 10.* Indeed, the Officers did not place Glik under arrest until after he told the Officers that he had been recording them. *JA 10.* Based on that exchange, there is no doubt that the Officers did not have actual knowledge of Glik's audio recording until after he had completed it. By that point, he had already violated M.G.L. c. 272, § 99.

Consequently, the Officers had probable cause to believe that Glik had violated M.G.L. c. 272, § 99. Alternatively, the officers were reasonably mistaken as to believe they had probable cause to arrest Glik based on their belief that it was a violation of M.G.L. c. 272, § 99 to record them without their knowledge or consent. In either circumstance, the Officers are entitled to qualified immunity.

[14] Any contention that Glik's recording was not a "willful interception," as defined by M.G.L. c. 272, § 99, simply because Glik admitted to making the recording when asked by the Officers is inconsequential. The Officers needed only probable cause to believe that Glik willfully recorded them without their knowledge or consent, they were not required to ascertain, with certainty, Glik's specific intent in order to have probable cause to arrest.

A. Glik's Suggested Interpretation Of M.G.L. c. 272, § 99 Would Render The Statute Meaningless.

In his opposition to the Defendants-Appellants' motion to dismiss, Glik claimed that he was not secretly recording the Officers because he was holding his cellular phone out in plain view. *AD 15.* According to Glik, "[o]penly holding up a machine that transmits oral communications is no different, for purposes of state wiretapping law, than openly holding up a machine that record[s] [sic]." *AD 18.* Not only does this notion want for a single case in support, but it also cuts directly against the very foundation of the Massachusetts Wiretap Act—to prevent secret recordings with high-tech recording devices. Hyde, 750 N.E.2d at 974 (noting Legislature's remark that the "uncontrolled development and unrestricted use of modern electronic devices" posed grave dangers to the "privacy of all citizens of the commonwealth.") (emphasis added).

Glik attempts to hang his hat on the premise that his case is different than Hyde because unlike Hyde, who concealed his tape recorder, Glik held his recording device in plain view. *AD 15.* Glik's recording, however, was akin to Hyde's because in both cases the police officers were unaware of the fact that they were being recorded. Where the cases diverge is the way in which Hyde could have avoided criminal liability, but Glik could not—by holding his recording device in plain view. That is because holding a tape recorder, while sitting in the drivers' seat of a car inches away from a police officer who is looking directly into

that car with a flashlight, is diametrically opposed to holding out a cellular phone (in 2007), while standing ten feet behind police officers whose attention is focused solely on struggling with a suspected drug dealer who is attempting to swallow a plastic bag of heroin in a crowded public park. Quite simply, the "plain view" exception announced in Hyde presumes that whoever is being recorded will actually see the recording device which will in turn alert them to the fact he or she is being recorded. To interpret the Hyde decision any other way would be absurd.

Furthermore, the primary function of a tape recorder is to make audio recordings. That is common knowledge, and has been since M.G.L. c. 272, § 99 was written. Hyde, 750 N.E.2d at 974 n.7 (stating hand-held tape recorders were commonly used in 1967 when M.G.L. c. 272 § 99 was drafted). The primary function of a cellular phone, even in 2010, is undoubtedly to make phone calls. Obviously, nowadays, there are several other secondary functions that many cellular phones can perform—text messaging, video games, web surfing, emailing, visual phone calls, photography, video recording, audio recording, and audio/video recording, etc.

Holding a cellular phone in plain view may indicate that the holder is making an audio recording, but there are countless other reasons that an individual may hold out a cell phone. That person could be taking a photograph, searching for a cellular signal, reading text messages, making a video without sound, holding

up the phone to allow someone on the other end of the phone to see or hear something, straining to view the screen due to far-sightedness, and countless other possibilities.

Glik avers that, despite the clear requirement of actual knowledge as set forth in Jackson and Hyde, that requiring subjective knowledge is an impracticable way to interpret M.G.L. c. 272 § 99. *AD 16-17.* That argument ignores the very purpose behind the statute's origin—which was to prevent recordings that may occur in plain view, but in reality are clandestine. Hyde, page 974, supra. Glik refuses to acknowledge the fact that technology has advanced to such a degree in the past several decades that recording devices can be embedded in virtually anything – pens, glasses, watches, keychains, hats, etc. Any single one of those items can be used to record someone, be in plain sight of that individual, and yet still be secret.

Based on Glik's suggested interpretation of M.G.L. c. 272, § 99, holding in plain view any device that can record is the same as holding in plain view a device that only records. *AD 18-19.* Moreover, it dispenses with any requirement that the person being recorded has to actually see the device and know of its recording feature. As such, Glik argues that it is irrelevant whether a person has actual knowledge that he or she is being recorded. In essence, this interpretation would eviscerate the protections of M.G.L. c. 272, § 99, as people would be able to record

others, without their actual knowledge, by utilizing a device with unapparent recording capabilities as long as that device remains in plain view.

Certainly, despite Glik's proffered interpretation of M.G.L. c. 272, § 99, he would not be agreeable to police officers utilizing such sophisticated recording devices, in plain view of course, with indistinct recording capabilities in their own investigations. Under Glik's interpretation, Massachusetts police officers would be able to record civilians with state of the art recording technology that can be held in plain view without alerting citizens of its recording capabilities and thus, avoid the warrant requirements of M.G.L. c. 272, § 99.[15]

In sum, the proper interpretation of M.G.L. c. 272, § 99 is clear as set forth by Jackson, Hyde, and Gouin – it is a violation of that statute to make an audio recording of someone if that person does not have actual knowledge of the recording. It is clear from the face of the Complaint that Officers did not have actual knowledge of the recording until after it had been made. Consequently, the Officers had a reasonable basis to find probable cause, or at the very least were reasonably mistaken as to their finding of probable cause, to arrest Glik and are thus entitled to qualified immunity on Glik's Fourth Amendment claim of false arrest.

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[15] M.G.L. c. 272, § 99 allows law enforcement officers to record others without their knowledge as long as they have reasonable suspicion that the individual they are recording is engaged in a designated offense with a nexus to organized crime. Under Glik's suggested interpretation, this requirement would be obsolete.

IV. GLIK'S MALICIOUS PROSECUTION CLAIM FAILS BECAUSE THE OFFICERS HAD PROBABLE CAUSE TO ARREST HIM FOR VIOLATING M.G.L. c. 272, § 99.

Glik also failed to plead a viable state law malicious prosecution claim. The elements of a common law cause of action for malicious prosecution are: (1) the commencement or continuation of a criminal proceeding against the eventual plaintiff at the behest of the eventual defendants; (2) the termination of the proceedings in favor of the accused; (3) an absence of probable cause for the charges; and (4) actual malice. Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir. 2001) (citing Correllas v. Viveiros, 572 N.E.2d 7, 10 (Mass. 1991)); See also Santiago v. Fenton, 891 F.2d 373 (1st Cir. 1989); Foley v. Polaroid Corp., 508 N.E.2d 72, 82-83 (Mass. 1987). An essential element of Glik's malicious prosecution claim, therefore, is that the Officers lacked probable cause to arrest him. See Wynne v. Rosen, 464 N.E.2d 1348, 1350 ((Mass. 1984).

As discussed supra, in Section III, the Officers had probable cause to bring a criminal proceeding against Glik and he is therefore unable to prove the essential element of his malicious prosecution claim.

CONCLUSION

For the reasons stated within the above Argument, the Defendants-Appellants, John Cunniffe, Peter Savalis, and Jerome Hall-Brewster respectfully request that this Court reverse the District Court's denial of their Motion to Dismiss and enter judgment as a matter of law in their favor on the basis of qualified immunity.

Respectfully submitted,
DEFENDANTS, JOHN CUNNIFFE, PETER SAVALIS, and JEROME HALL-BREWSTER
By their attorneys:

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Date December 13, 2010

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

I, Lisa Skehill Maki, as counsel for the Defendants-Appellants John Cunniffe, Peter Savalis, and Jerome Hall-Brewster hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing Brief of Appellants complies with the type-volume limitations as set forth within the requirements of Fed. R. Civ. P. 28.1(e)(2). Specifically, in reliance on the word count function of Microsoft Word, the word processing software used to create this Brief, excluding those portions of the Brief exempted from the count by Fed. R. App. P. 32(a)(7)(B)(iii), the Brief contains 8,603 words.

Date: December 13, 2010

/s/ Lisa Skehill Maki

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CERTIFICATE OF SERVICE

I, Lisa Skehill Maki, counsel for the Defendants-Appellants, hereby certify that on the below entered date, I served via electronic filing one (1) copy of the Brief of Defendants-Appellants John Cunniffe, Peter Savalis, and Jerome Hall-Brewster upon the Court. I further certify that I served one copy of the Brief of Defendants-Appellants John Cunniffe, Peter Savalis, and Jerome Hall-Brewster upon all attorneys of record for the Plaintiff-Appellee via electronic mail to, DMilton@civil-rights-law.com, Hfriedman@civil-rights-law.com, and swunsch@aclum.org.

Date: December 13, 2010

/s/ Ian D. Prior
Ian D. Prior

/s/ Lisa Skehill Maki
Lisa Skehill Maki

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

On Appeal from the United States District Court
For the District of Massachusetts
Civil Action No. 10-cv-10150-LTS

ADDENDUM TO BRIEF OF APPELLANTS JOHN CUNNIFFE, PETER SAVALIS, and JEROME HALL-BREWSTER

ADDENDUM TABLE OF CONTENTS

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United States District Court

District of Massachusetts

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ELECTRONIC Clerk's Notes for proceedings held before Judge William G. Young: Motion Hearing held on 6/8/2010 re [14] MOTION to Dismiss filed by Jerome Hall-Brewster, John Cunniffe, City of Boston, Peter J. Savalis ;The Court hears argument from the plaintiff and defendants. After hearing the Court rules denying [14] Motion to Dismiss; TheCourt holds a 16.1 conference and sets a schedule.(Final Pretrial Conference set for NO SOONER THAN 5/2/2011 02:00 PM before Judge William G. Young., Jury Trial set for RUNNING TRIAL LIST AS OF 6/6/2011 09:00 AM before Judge William G. Young.).The parties have 2 weeks to file a joint case management proposal. (Court Reporter: Donald Womack at womack@megatran.com.)(Attorneys present: Plaintiff's Counsel Milton, Freisman,Wunsch, Defendant's Counsel Skehill, Prior) (Smith, Bonnie)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 10-10150-WGY

SIMON GLIK,

Plaintiff,

v.

JOHN CUNNIFFE, et al.,

Defendants..

MOTION HEARING

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

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- and -

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CITY OF BOSTON LAW DEPARTMENT (By Lisa A. Skehill and Ian D. Prior, Assistant Corporation Counsel), One City Hall Plaza, Room 615, Boston, Massachusetts 02201, on behalf of the Defendants

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June 8, 2010

THE CLERK: Calling Civil Action 10-10150, Glik v. Boston.

THE COURT: Would counsel identify themselves.

MR. MILTON: David Milton, Law Offices of Howard Friedman, for the plaintiff.

MR. FRIEDMAN: Howard Friedman for the plaintiff.

MS. WUNSCH: Sarah Wunsch for the plaintiff.

MS. SKEHILL: Lisa Skehill for the City of Boston, John Cunniffe, Jerome Hall-Brewster, and Peter Savalis.

MR. PRIOR: Your Honor, Ian Prior for the defendants.

THE COURT: All right. This is a motion to dismiss. I think where you come closest is on qualified immunity because their allegations, I have to take these allegations as true.

MS. SKEHILL: Taking --

THE COURT: Go ahead.

MS. SKEHILL: Taking the plaintiff's allegations as true, your Honor --

THE COURT: Which I have to do.

MS. SKEHILL: -- I think it shows, it demonstrates that the plaintiff has no reasonable expectation to prove that he was deprived of a constitutional right here. Under Commonwealth v. Jackson, an SJC decision, it stated that nonsecret recordings, the only way that they can be

nonsecret is if the person being recorded has actual knowledge.

Now, I stumbled upon this case last night and there's nothing that the plaintiff has pled in his complaint or that we believe that he would be able to prove that any of the people that he recorded had actual knowledge.

THE COURT: Well, they arrested him thinking that they were being recorded.

MS. SKEHILL: After a period of recording without their actual knowledge. Once he admitted that he was in fact recording them he admitted that he had violated the anti-wiretapping statute. But prior to that they had no actual knowledge whatsoever that he was recording them as the facts in the complaint state as such.

THE COURT: All right. Now, suppose they get by that. We'll just assume they get by that. What do you say to qualified immunity?

MS. SKEHILL: At the very least the defendants are entitled to qualified immunity because there is no clearly established right to openly record individuals without either their consent or actual knowledge.

THE COURT: Well, isn't that established here in the First Circuit?

MS. SKEHILL: I don't believe so.

THE COURT: There may be some --

MS. SKEHILL: To openly record? No, I don't believe it characterizes openly record. In fact, the First Circuit just upheld a decision of the district court, Gouin v. Gouin, in 2005 that awarded the City of Boston damages in which a civil rights plaintiff tape recorded the officers while they were arresting him with a mini-handheld tape recorder that was held out in the open. They thought initially that it was a cell phone and did not realize that it was a tape recorder until they got back to the booking station, and they were awarded damages because they did not know at the time that there was recording going on. So, the defendants were awarded damages on their counterclaim and that decision was upheld by the First Circuit in 2007.

THE COURT: All right, let's hear from the plaintiffs. What do you say to that?

MR. MILTON: The First Circuit's opinion of Gouin v. Gouin was not cited in the defendants' brief, nor in any event is it apposite. The cases that we cite, there's a laundry list of cases including First Circuit and District of Massachusetts, Massachusetts cases upholding a First Amendment right to record matters of public concern in a public place where you have the right to be in as long as you're doing so unobtrusively and in a nondisruptive manner. So I think that --

THE COURT: So in effect, in effect, I have to

declare the state statute unconstitutional as applied?

MR. MILTON: No, your Honor, because the state statute does not apply. And that --

THE COURT: And why not?

MR. MILTON: And that is crystal clear from the Commonwealth v. Hyde decision which held that the state statute reaches secret recording of police officers, but in explaining that holding the SJC said the outcome would have been different and there would not have been a violation of the statute had Michael Hyde held the recording device in plain sight. Had he done so, the SJC said, the recording would not have been secret. And Simon Glik did exactly what the SJC had ruled six years earlier was permitted, he held his recording device in plain sight. And he did not -- nothing he did was secret.

And if I can address the issue of actual knowledge. The SJC has made clear both in Hyde and in the Rivera case from 2005 that actual knowledge can be -- actual knowledge is not the standard. The standard is whether or not the recording is done secretly. In the Rivera case four justices of the SJC said that a surveillance camera in a convenience store that is recording audio and video is not a violation of the wiretap statute regardless of whether the, in this case the gun robber holding up a convenience store is aware, regardless of whether he has actual knowledge,

that this video camera in plain sight is recording him.

THE COURT: Let me ask counsel for the city. Have you got this case that's not in your brief?

MS. SKEHILL: I'm sorry, the Commonwealth v. Jackson case? Yes.

THE COURT: Well, that and the other --

MS. SKEHILL: The Gouin v. Gouin case. I have them both.

THE COURT: The Gouin case. May I see them.

MS. SKEHILL: Yes.

(Pause in proceedings.)

THE COURT: Well, this Gouin case is simply the orders of the magistrate judge, it doesn't give you the factual recitation. Where is --

MS. SKEHILL: I gave you a copy of the motion for summary judgment.

THE COURT: Yes. Where is the --

MS. SKEHILL: I have the First Circuit docket.

THE COURT: The First Circuit docket?

MS. SKEHILL: Upholding the decision of the magistrate judge's allowance of the defendant's motion for summary judgment.

MR. MILTON: Neither of these were cited in the brief and we would like a copy.

THE COURT: I understand that but I -- well, I have

no way to reason from these cases, or from Gouin anyway, because I have no, I have no framework.

MS. SKEHILL: I apologize, your Honor. I just discovered them yesterday.

THE COURT: Oh, I appreciate that. I appreciate that.

It seems to me at least with respect to a motion to dismiss that the plaintiff has the better of it here. And it also seems to me that in the First Circuit, not nationwide, in the First Circuit this right, this First Amendment right publicly to record the activities of police officers on public business is established.

MS. SKEHILL: Your Honor, if I may, the cases cited by the plaintiff are narrowly stated as videotaping or photographing. There's nothing that has been expanded to say that there's established First Amendment right to record the oral communications of others.

Now, his cite to Commonwealth v. Hyde, when the SJC says that he could have held it out in plain sight, I think what they were trying to say is holding it out in plain sight when police officers are looking into a car and there's just one person sitting in the driver's seat and he holds out a tape recorder, it would have given them actual knowledge that they were being taped.

THE COURT: I don't think actual knowledge is --

they're presumed to know if someone is holding the device out. The motion to dismiss is denied.

Now, we need to figure out when the case is going to go to trial, and I'll give you two weeks to file a joint proposed case management schedule.

When do you want to go to trial? Plaintiff?

MR. MILTON: One year.

THE COURT: That will take us to June 2011. Satisfactory to the city?

MS. SKEHILL: Yes, your Honor.

THE COURT: All right. It's on the running trial list, June 2011, and two weeks to file a joint proposed case management schedule.

MR. MILTON: Thank you, your Honor.

THE COURT: That's the order.

(Whereupon the matter concluded.)

C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ DONALD E. WOMACK 8-10-2010

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SIMON GLIK, Plaintiff, v. JOHN CUNNIFFE, et al., Defendants.	Civil Action No. 1:10-cv-10150-WGY

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This case concerns the fundamental right of citizens to openly record police activity in a public place. On October 1, 2007, Plaintiff Simon Glik witnessed an arrest on Boston Common and openly recorded the incident with his cell phone. Using the excuse that Mr. Glik recorded audio without their permission, Defendant police officers arrested Mr. Glik and charged him with violating the Massachusetts wiretap statute, as well as aiding the escape of a prisoner and breach of the peace. The arrest violated clearly established First and Fourth Amendment principles. Any reasonable police officer would have been aware that there was no probable cause for the arrest because Massachusetts law does not prohibit openly recording sound. Any reasonable police officer would have known that documenting police conduct in public in a nondisruptive manner is expressive activity protected by the First Amendment.

Defendants' motion to dismiss misconstrues the Massachusetts wiretap law and ignores the substantial body of law – including cases from the First Circuit and District of Massachusetts – establishing a First Amendment right to record police conduct. Defendants also ask the Court

to construe the allegations of the Complaint in the light most favorable to them. The Court should deny Defendants' motion in its entirety.

STATEMENT OF FACTS

The Amended Complaint ("Complaint," "AC") alleges the following facts.

On October 1, 2007, Attorney Simon Glik was walking on Tremont Street from Park Street toward Boylston Street, on the sidewalk next to the Boston Common. AC ¶¶ 4, 9. He saw three Boston police officers he now knows to be Defendants John Cunniffe, Peter J. Savalis, and Jerome Hall-Brewster arresting a young man near a park bench. AC ¶ 10. Mr. Glik heard another young man standing nearby say something like, "You are hurting him, stop." AC ¶ 11. Mr. Glik was concerned that the police officers were using excessive force to make the arrest. AC ¶ 12.

Mr. Glik stopped near the bench and took out his cell phone so that he could document the conduct of the police officers. AC ¶ 13. His phone recorded video with sound. AC ¶¶ 1, 17-18. Mr. Glik stood about ten feet away and recorded the incident. AC ¶ 14. He believes he recorded three short segments. AC ¶ 14. He did not interfere with the officers' actions during the arrest. AC ¶ 16.

After the suspect was in handcuffs, one of the Defendants said to Mr. Glik, "I think you have taken enough pictures." AC ¶ 17. Mr. Glik responded, "I am recording this. I saw you punch him." AC ¶ 17. One of the Defendants then approached Mr. Glik and asked if the phone recorded audio. AC ¶ 18. Mr. Glik said that it did. AC ¶ 18. One of the Defendants handcuffed Mr. Glik. AC ¶ 18. Defendants arrested Mr. Glik and took him into custody. AC ¶ 18.

Plaintiff was charged with violating the wiretap statute, M.G.L. c. 272 § 99; aiding in the escape of a prisoner, M.G.L. c. 268 § 17; and disturbing the peace, M.G.L. c. 272 § 53. AC ¶ 25.

The suspect did not escape from the police officers, nor did Mr. Glik aid in any attempted escape. AC ¶ 20. The Commonwealth voluntarily dismissed the aiding an escape charge for lack of probable cause. AC ¶ 29.

On February 1, 2008, Judge Summerville of the Boston Municipal Court dismissed the remaining charges for lack of probable cause. AC ¶ 30. He 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. AC ¶ 30. The judge dismissed the charge of disturbing the peace because 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." AC ¶ 30.

When Mr. Glik received his cell phone back from the Police Department, some of the video he had recorded of Defendants had been erased. AC ¶ 41. Mr. Glik suffered financial and emotional injuries as a result of Defendants' actions. AC ¶¶ 39-41.

Boston police officers have arrested other people for violation of the state wiretap statute for openly recording audio using cell phones both before and after Plaintiff's arrest. AC ¶ 31. The City of Boston failed to train its officers that only secret audio recordings of a police officer are unlawful under the wiretap statute. AC ¶ 32. Nor did the City of Boston properly supervise police officers to assure that they complied with this statute. AC ¶ 33. The City of Boston did not discipline police officers for making illegal arrests of people for openly recording police conduct. AC ¶ 37. As a result of these failures, it was highly likely that Boston police officers would unconstitutionally arrest people for openly recording police conduct. AC ¶ 32.

ARGUMENT

To survive a motion to dismiss, a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Rule 8 "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id. Iqbal* did not change the longstanding rule that courts must still draw every reasonable inference in the plaintiff's favor when considering a motion to dismiss. *See Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 325 (1st Cir. 2009). Qualified immunity should not be granted at the motion to dismiss stage where the defense relies on arguments "inconsistent with the factual allegations of the complaint," which must be taken as true. *See Maldonado v. Fontanes,* 568 F.3d 263, 271 (1st Cir. 2009).

Each count of the Complaint easily meets this standard.

I. PLAINTIFF STATES A CLAIM FOR FALSE ARREST

An arrest must be supported by probable cause. *Beck v. Ohio,* 379 U.S. 89, 91 (1964). An arrest without probable cause violates the Fourth Amendment protection against unreasonable seizures. *Santiago v. Fenton,* 891 F.2d 373, 388 (1st Cir. 1989). Probable cause exists if "the facts and circumstances within the police officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the defendant had committed or was committing an offense." *Rivera v. Murphy,* 979 F.2d 259, 263 (1st Cir. 1992).

In this case, there was no probable cause to believe that Mr. Glik had violated the

Massachusetts wiretap statute, M.G.L. ch. 272 § 99.[1] 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." M.G.L. ch. 272 § 99(B)(4)(emphasis added). The statute further requires that such secret hearing or recording be done "willfully." *Id.* at (C)(1).

In 2001, the Massachusetts Supreme Judicial Court confirmed that the language of the statute means what it says. *Commonwealth v. Hyde*, 434 Mass. 594 (2001). The court affirmed that the statute prohibited "*secret* electronic recording" and made no exception for surreptitious recording of police officers. *Id.* at 595 (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 (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.*

In this case, Simon Glik did exactly what the *Hyde* Court 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. AC ¶ 30. 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 Mr. Glik had "willfully" committed an interception, another element of the crime. M.G.L. c. 272 § 99(C)(1); *see Commonwealth v. Ennis,* 439 Mass. 64, 68-69 (2003) (offense requires that recording be done secretly and "willfully"). The fact that Mr. Glik was holding the recording device in plain view, on a busy

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1 Defendants do not argue that there was probable cause to arrest Mr. Glik for any other crime.

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 (party making recording did not act willfully, and thus did not violate the statute, 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 the "audio recording of the officers was done without their knowledge." Defs. Mem. at 12. The officers' claimed subjective knowledge is irrelevant. By holding the recording device in plain view, Mr. Glik 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 (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 (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 (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.").[2]

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. Such a sweeping restriction on the right of the media and the public at large violates First Amendment.[3] *See Section II, infra.*

Even assuming, *arguendo*, that the subjective knowledge of the party being recorded was required to avoid violating the statue, this would not provide grounds to grant Defendants' motion to dismiss. The Complaint does *not* concede that the Defendants lacked knowledge that Plaintiff was recording sound, or that Defendants believed that Plaintiff was "simply taking pictures." Defs. Mem. at 12. On the contrary, the fact that one of the officers immediately asked Mr. Glik if his phone recorded audio after learning that Mr. Glik was recording implies that he was well aware that cell phones had this capability. That the officers' question about *audio* was in response to Mr. Glik's statement about what he had *seen* – "I am recording this. I saw you punch him," AC ¶ 17 – strengthens the implication.[4]

Besides being inappropriate on a motion to dismiss, Defendants' allegation that the audio

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2 The three remaining justices joined only the Court's only main opinion, which disposed of the case on another ground and did not address whether the audio recording was lawful. *Id.* at 123.

3 The general public's right to gather information is coextensive with that of the media. *See, e.g., Smith v. City of Cumming,* 212 F.3d 1332, 1333 (11th Cir. 2000).

4 If as Defendants argue the statute turns on police officers' subjective knowledge of the recording, then police 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)

recording function of Mr. Glik's cell phone was "clandestine" or not "readily-discernable" is meritless. Defendants acknowledge that "[c]ell phones primarily *transmit* oral communications." Defs. Mem. at 12-13. Openly holding up a machine that transmits oral communications is no different, for purposes of the state wiretap law, than openly holding up a machine that records. The statute prohibits secret "hearing" as well as secret recording. M.G.L. ch. 272 § 99(B)(3)-(4).

At any rate, the Court may take judicial notice that by October 2007, cell phone video and audio recordings were commonplace. *See, e.g., Requa v. Kent Sch. Dist. No. 415,* 492 F.Supp.2d 1272, 1274 (W.D. Wash. 2007) (noting with regard to audiovisual footage of unknown origin taken in 2006 that "[g]iven the state of technology, the images could have been captured on a small, handheld video recorder or even a cell phone").[5] Well before October 2007, audiovisual recordings made from cell phones had gained international attention and helped to document significant world and national events.[6] In January 2007, an unauthorized cell phone recording of Saddam Hussein's execution, which contained both sound and video, generated international controversy.[7] In November 2006, the FBI investigated the Los Angeles police after a cell phone recording capturing the police punching a suspect in the face as he cried "Let go of me! I can't breathe! I can't breathe!" was posted on YouTube.[8] Given the ubiquity of cell phones with video

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5 *See also, e.g., Torres v. McDonald,* 2009 U.S. Dist. LEXIS 109610, at *75 (E.D. Cal. Nov. 24, 2009) (describing 2005 investigation in which "[p]olice were able to obtain information from Lawrence's cell phone which consisted of photographs, sound bites, and videos of Lawrence hanging out with other [gang] members").

6 *See, e.g.,* David Bauder, "Cell-Phone Videos Transforming TV News," Washington Post, Jan. 7, 2007 (available at http://www.washingtonpost.com/wp-dyn/content/article/2007/01/07/AR2007010700473.html); Katie Couric, "Smile, You're on the Phone," Couric & Co. blog on cbsnews.com, Feb. 22, 2007 (available at www.cbsnews.com/8301-500803_162-2506240-500803.html). All web addresses cited herein were last visited on May 14, 2010.

7 See John Burns and James Glanz, "Iraq to Review Hussein's Execution," *New York Times,* Jan. 3, 2007 (available at www.nytimes.com/2007/01/03/world/middleeast/03iraq.html?_r=1).

8 Sonya Geis and Hamil R. Harris, "Beating of L.A. Suspect Sparks Outcry," *Washington Post*, Nov. 11, 2006 (available at /www.washingtonpost.com/wp-dyn/content/article/2006/11/10/AR2006111001666.html); "Police beating video from L.A. demonstrates the power of YouTube again," *USA Today,* Nov. 10, 2006 (available at http://www.usatoday.com/news/nation/2006-11-10-lapd-arrest_x.htm).

and sound recording capabilities in 2007, there is no serious argument that the audio recording device in such phones was "concealed." Defs. Mem. at 12.[9]

Because Mr. Glik'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.

II. PLAINTIFF STATES A FIRST AMENDMENT CLAIM

The Complaint states a claim that Defendants violated Mr. Glik's First Amendment rights. By arresting him, Defendants stopped Mr. Glik from being able to make an audiovisual recording of police conduct while he stood in the Boston Common and openly recorded their use of force. The arrest was a direct interference with Mr. Glik's right to observe and document the conduct of law enforcement officers carrying out their duties in a public place.

Plaintiff "had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). The right to record police activity stems from a long line of cases holding "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Id.* (collecting cases). That this right, like all First Amendment rights, is subject to reasonable restrictions does not mean there is no constitutional right in specific circumstances.

Numerous courts, including the First Circuit and the District of Massachusetts, have recognized the right to record matters of public interest. *See, e.g., Iacobucci v. Boulter,* 193 F.3d 14, 25 & n. 6 (1st Cir. 1999) (filming a conversation in a public area of a public building "was

9 At a minimum, Defendants' assertion of ignorance raises many factual questions, inappropriate for resolution at this stage, concerning their knowledge of and experience with cell phones as well as what a reasonable police officer in 2007 would have understood about cell phones' recording capabilities.

done in the exercise of [Plaintiff's] First Amendment rights"); *Fordyce v. City of Seattle,* 55 F.3d 436, 439 (9th Cir. 1995); (recognizing "First Amendment right to film matters of public interest"); *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."); *Alliance to End Repression v. City of Chicago,* 2000 U.S. Dist. LEXIS 6342, at *63 (N.D. Ill. May 8, 2000) (right to take photographs of police is protected by the First Amendment); *Connell v. Hudson,* 733 F. Supp. 465, 470-471 (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").

As *Iacobucci*, *Demarest, Smith, Fordyce,* and *Lambert* demonstrate, videotape is no different from still cameras for First Amendment purposes. In *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Penn. 2005), the plaintiff sued after being arrested for videotaping state troopers' actions in public. Robinson stood on property where he had a right to be and he did not interfere with the troopers' work. *Id.* at 539. The court held that

> [v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence ... In sum, there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the defendants ....

Id. at 541.

Nothing in the above opinions recognizing a broad right to record matters of public interest suggests that this right includes only pictures, not sound. The First Amendment right does not change with the addition of audio to video recording. Silent movies have been gone for decades. Sound recording has long been a standard feature of video cameras, and was a feature of the video cameras in cases cited above. *See, e.g., Iacobucci,* 193 F.3d at 18, 24; *Demarest,* 188 F. Supp. 2d at 86; *Fordyce,* 55 F.3d at 439.

The cases cited by Defendants do not stand for the proposition that no constitutional right exists to document police conduct in public. Defs. Mem. at 5. Neither *Gouin v. Gouin*, 249 F. Supp. 62, 79 (D. Mass. 2003), nor *Jean v. Mass. State Police,* 492 F.3d 24, 33 (2007), addressed whether there is a First Amendment right to photograph or videotape police conduct, and nothing in either case suggests that there is not. Nor does *Hyde* address whether there is a First Amendment right to openly record police activity.

The fact that courts do not recognize an unfettered right to record the police is uncontested and irrelevant. All First Amendment rights are "fettered." As the cases described above demonstrate, there is a First Amendment right to record the police carrying out their duties in public places where the person recording is not interfering with the police, is allowed to be in the public place, and is making the recording openly – the very facts of this case.

III. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

In evaluating an assertion of qualified immunity on a motion to dismiss, the Court considers "(1) whether plaintiff's allegations, taken as true, establish the violation of a

constitutional right, and (2) whether the constitutional right was clearly established at the time of the challenged conduct." *Sanchez v. Pereira-Castillo,* 590 F.3d 31, 52 (1st Cir. 2009).[10] Under the second prong, "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." *Id.* In the First Circuit, the inquiry on whether an officer had fair warning "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 district court and appellate court opinions from elsewhere in the country. *See Hatch v. Dep't for Children,* 274 F.3d 12, 24 (1st Cir. 2001).

As discussed in Sections I and II, *supra,* Plaintiff has alleged violations of his First and Fourth Amendment rights. Because Defendants had fair notice that they were violating these rights when they arrested Plaintiff for recording them on October 1, 2007, they are not entitled to qualified immunity.

A. Qualified immunity is not warranted for Mr. Glik's false arrest claim

No reasonable officer could have believed, under the circumstances alleged in the Complaint, that probable cause existed to arrest Mr. Glik for illegal wiretapping.[11] It was clearly established by 2007 that holding a recording device in plain view did not violate the

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10 Although *Pearson v. Callahan*, 129 S.Ct. 808 (2009) makes optional the requirement, under *Saucier v. Katz*, 533 U.S. 194 (2001), that the court first determine if the facts alleged establish a constitutional violation, in this case the sequential approach is warranted for several reasons. First, the defendants have moved to dismiss for failure to state a cognizable claim. Second, the public interest is best served by deciding the questions at issue here, where the public increasingly documents police conduct in public places by means of cell phones that record audio as well as video and the right to do so is fundamental to a free society. As the *Pearson* majority noted, deciding whether a constitutional violation has been pleaded serves to promote "the development of constitutional precedent" and "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* at 821; *see also Limone v. Condon*, 372 F.3d 39, 44 (1st Cir. 2004) ("[P]roper development of the law of qualified immunity is advanced if courts treat these []questions sequentially.").

11 Defendants do not argue, nor do the allegations permit a finding, that there was probable cause to arrest Plaintiff for the other crimes he was charged with or for any other crimes.

Massachusetts wiretapping statute.

Mr. Glik had a clearly established right to be free from arrest without probable cause. *Rivera v. Murphy,* 979 F.2d 259, 263 (1st Cir. 1992). To ensure that this right is not violated, 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., Sheehy v. Town of Plymouth,* 191 F.3d 15, 22 (1st Cir. 1999) (examining disorderly person statute as interpreted by Massachusetts courts to determine whether arrest was reasonable).

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. *Iacobucci*, 193 F.3d at 24-25. The Court denied qualified immunity because in light of these authorities, Plaintiff's "constitutional right to act as he did without being arrested for disorderly conduct was sufficiently clear that a reasonable official would [have understood] that what he [was] doing violate[d] that right." *Id.* at 24.

Here, a reasonable police officer would have understood that the state wiretap statute prohibited only the secret recording of communications and that the SJC in *Hyde* had stated that holding a recording device in plain view negated secrecy. A reasonable police officer would have understood that arresting Mr. Glik for openly recording an arrest on Boston Common was unlawful.[12] The opinion of the Boston Municipal Court in Mr. Glik's case, which easily

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12 Nor could a police officer have reasonably believed, as Defendants suggest, that the statute required consent irrespective of their knowledge of the recording. Defs. Mem. at 14. The language of the wiretap statute plainly requires "prior authority" of the parties being recorded only when the person listening or recording does so "secretly." M.G.L. ch. 272 § 99 (B)(4). As *Hyde* makes clear, knowledge, irrespective of consent, negates the element of secrecy. Further, any belief that consent was required for open recording in public would be unreasonable in light of the clearly established First Amendment right to engage in such recording. See cases cited in Section II, *supra,* especially the 2002 *Demarest* case, which struck down a requirement that public cable access television producers obtain signed consent forms before airing voice or image recordings of any person, regardless of the

concluded that there was no probable cause to believe Mr. Glik had made a secret recording under the wiretap statute, further supports the conclusion that the law was clearly established at the time of Mr. Glik's arrest. *See Commonwealth v. Glik,* No. 0701 CR 6687 (Boston Mun. Ct. Jan. 31, 2008) (attached hereto as Ex. 1).

B. Qualified immunity is not warranted for Mr. Glik's First Amendment claim

1. The right to openly record police activity in public was clearly established

As discussed above, the facts of the Complaint establish a violation of First Amendment rights. These rights were clearly established at the time of Mr. Glik's arrest, as shown by the extensive case law from across the country, including from the First Circuit and the District of Massachusetts. These cases provided ample notice to police officers that audiovisual recording of their conduct in public places, done openly and in a manner that does not interfere with police activity, is protected by the First Amendment.

Defendants rely on three district court cases, two from Pennsylvania, to argue that the right to record police officers carrying out their official duties was not clearly established. Defs. Mem. at 9-10. None of these cases supports such a finding here.

Both *Kelly v. Borough of Carlisle,* 2009 U.S. Dist. LEXIS 37618 (M.D. Pa. May 4, 2009), currently on appeal to the Third Circuit, and *Matheny v. County of Allegheny,* 2010 U.S. Dist. LEXIS 24189 (W.D. Pa. Mar. 16, 2010), relied primarily on the lack of direct Supreme Court and Third Circuit authority in concluding that there was no clearly established First Amendment right to record the police. Though both courts cited limited authority outside the

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circumstances. 188 F. Supp. 2d at 94. The court found the restriction violated the First Amendment by placing "a suffocatingly impracticable burden on electronic news gathering" including recordings on city streets. *Id.*

Third Circuit, they failed to consider virtually any of the substantial body of caselaw cited by Plaintiff in this case. See Section II, *supra.* This caselaw includes decisions of the First Circuit and the District of Massachusetts.

Further, the *Matheny* court made an arbitrary and unwarranted distinction between audio and video. The court acknowledged that cases had found a right to videotape but stated that this right had not been recognized as extending to audio, relying on a sole 1989 decision. *Matheny,* 2010 U.S. Dist. LEXIS 24189, at *15 (citing *Jones v. Gaydula*, 1989 U.S. Dist. LEXIS 15419 (E.D. Pa. Dec. 22, 1989)). *Jones* gave no explanation or supporting authority for its one-sentence declaration that there is "no First Amendment right to tape record statements of an unwilling utterant." *Jones,* 1989 U.S. Dist. LEXIS 15419, at *6. This statement is at odds with the later rulings in *Iacobucci*; *Fordyce*; and *Demarest.*

The third case relied on by Defendants, *Gravolet v. Tassin*, 2009 U.S. Dist. LEXIS 45876 (E.D. La. June 2, 2009), is factually different from this case. The plaintiff had been arrested for stalking after repeatedly following a female police officer and videotaping her at a traffic stop. In granting qualified immunity for an arrest without probable cause, the court held that there was a reasonable basis to arrest the plaintiff under the stalking statute. The use of a video camera did not immunize the plaintiff from a stalking charge. Moreover, the court concluded only that there was no "clearly established right to videotape police officers … '*under these circumstances*'." *Id.* at *13. (emphasis added).

In this case, no reasonable officer could have believed that a person standing along the Common and holding up a cell phone lacked a First Amendment right to transmit or record the sights and sounds obvious to all present.

IV. PLAINTIFF STATES A CLAIM UNDER THE MASSACHUSETTS CIVIL RIGHTS ACT

To prevail under the Massachusetts Civil Rights Act, M.G.L. ch. 12, §§ 11H and 11I, a plaintiff must show that "(1) [his] exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by threats, intimidation, or coercion." *Davis v. Rennie,* 264 F.3d 86, 111 (1st Cir. 2001).

The Complaint alleges that Defendants interfered with Plaintiff's First Amendment right to record and display video of police officers making an arrest in public. Assuming the Court finds Plaintiff has stated a First Amendment claim, this satisfies the first and second prongs of the MCRA inquiry. The Complaint alleges that Defendants interfered with Plaintiff's First Amendment rights by the "intrinsically coercive" and intimidating act of arresting him. *Sarvis v. Boston Safe Dep. & Trust Co.,* 47 Mass. App. Ct. 86, 92-93 (Mass. App. Ct. 1999). This satisfies the third prong. *See id.*; *Batchelder v. Allied Stores Corp.,* 393 Mass. 819, 823 (1985); *Reprod. Rights Network v. President of the Univ. of Mass.,* 45 Mass. App. Ct. 495, 508 (1998).

V. PLAINTIFF STATES A CLAIM FOR MALICIOUS PROSECUTION

Under Massachusetts law, malicious prosecution requires "1) that the defendant initiated a criminal action against him; 2) that the criminal prosecution ended in [the plaintiff's] favor; 3) that there was no probable cause to initiate the criminal charge; and 4) that the defendant acted maliciously." *Santiago v. Fenton,* 891 F.2d 373, 387 (1st. Cir. 1989).

Defendants do not dispute that they initiated a criminal action against Mr. Glik or that it terminated in his favor. The issues are whether there was probable cause and whether Defendants acted maliciously.

There was no probable cause for any of the charges. As discussed in Section I, *supra*, there was no probable cause to charge Plaintiff with violating the wiretapping statute. As to aiding the escape of a prisoner, the Complaint alleges that the suspect did not escape from the police, that Mr. Glik did not help him try to escape, and that Mr. Glik stood at a distance and did not interfere with the officers' actions. AC ¶¶ 20, 16. The Commonwealth dismissed this charge for lack of probable cause. AC ¶ 29. As to disturbing the peace, the Complaint alleges that Mr. Glik did not breach the peace, AC ¶ 21, and that the Boston Municipal Court dismissed this charge for lack of probable cause. Nothing in the Complaint supports Defendants' contention that "the facts, as alleged by Plaintiff" show that he "attempt[ed] to interfere with their efforts to arrest a suspect," Defs. Mem. at 17, or that any officer could have reasonably believed that Plaintiff acted in a disorderly manner or aided in an escape.

The element of malice may be inferred from the lack of probable cause. *See, e.g., Chervin v. Travelers Ins. Co.*, 448 Mass. 95, 109 (Mass. 2006). Malice exists when police officers make an arrest to cover up an officer's misconduct. *Santiago*, 891 F.2d at 388.

The Complaint alleges that Defendants initiated a baseless criminal prosecution against Mr. Glik to punish him for exercising his First Amendment rights and to deter him and others from doing so again. The Complaint also alleges that the officers arrested Mr. Glik after he said he saw them punch a suspect, words that could be construed as implying a belief that the officers

had committed misconduct. These allegations are more than sufficient to survive a Rule 12(b)(6) motion. *See Gouin,* 249 F. Supp. 2d at 72 (malice is a question of fact).

VI. PLAINTIFF STATES A *MONELL* CLAIM AGAINST THE CITY OF BOSTON

In *Monell v. Dep't of Social Servs.,* 436 U.S. 658 (1978), the Supreme Court held that municipalities could be sued under Section 1983 if a "policy or custom" of the municipality caused a constitutional deprivation. *Id.* at 694. The municipal policy or custom must be the "moving force" behind the constitutional deprivation. *City of Canton Ohio v. Harris,* 489 U.S. 378, 385 (1989).

The qualified immunity defense does not apply to municipalities. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). Even if this Court were to find the individual police officer Defendants are protected by qualified immunity, the court must still analyze the City's liability.[13] When the Supreme Court abandoned the requirement in *Saucier* that a court must first decide if a constitutional right was violated when analyzing qualified immunity in §1983 damages cases, the Court did so in part because it was confident this would not impede development of the law. *Pearson* found that the constitutional issues could be presented in "criminal cases and § 1983 cases against a municipality" as well as in injunctive cases. *Pearson v. Callahan*, 129 S. Ct. 808, 821-22 (2009). If municipalities could not be liable when the law is

13 In *Joyce v. Town of Tewksbury,* 112 F.3d 19, 23 (1st Cir. 1997), the First Circuit recognized that a City may be liable for a civil rights violation even though the individual defendants are entitled to qualified immunity. *Joyce* does not stand for the proposition that a municipal failure to train claim must fail whenever an individual officer may have held a mistaken but reasonable view of the law. Joyce involved a truly novel Fourth Amendment issue. The failure to train allegation in this case concerns an interpretation of a state criminal statute by the state's highest court. The City's failure to provide *any* guidance to its officers as to how to apply a statute they regularly enforced suggests a deliberate indifference to whether they were enforcing it correctly. *See, e.g., Lischner v. Upper Darby Twp.*, 2007 U.S. Dist. LEXIS 7913, at *49 (E.D. Pa. Feb. 5, 2007) (allowing claim against township to proceed where failure to train officers on defiant trespass statute could have amounted to deliberate indifference in the face of likely constitutional violations, despite granting officer qualified immunity for mistaken application of statute).

not "clearly established," the development of constitutional law would be stymied.

In *City of Canton,* the Court held that a policy of failing to properly train police officers will support § 1983 liability "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 389. The Court held a city may be liable for failing to train police officers if the failure is "so likely to result in the violation of constitutional rights" that the policymakers of the city are deliberately indifferent to the need. As an illustration of the standard the court said if a city armed police officers but did not train those police officers on the constitutional limits on the use of deadly force the need would be so obvious that failure to train would be deliberately indifferent. *Id.* at 390 n.10. This is similar to the claim alleged here.

A failure to train claim does not require a pattern of constitutional violations when that result is "a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Id.* at 390; *Swain v. Spinney*, 117 F.3d 1, 11 (1st Cir. 1997). A complete failure to train which causes a constitutional deprivation can support a municipal liability claim. *See Young v. City of Providence*, 404 F.3d. 4, 28 (1st Cir. 2005) (failure to train on possible misidentification of off-duty officers responding to an incident, especially minority officers, may go to the jury even without evidence of prior incidents).

Simon Glik alleges the City failed to train its officers that only *secret* audio recordings of a police officer are unlawful under the wiretap statute and as a result of this failure, it was highly likely that Boston police officers would unconstitutionally arrest people for openly recording police conduct. Police officers should be knowledgeable of the elements of criminal laws generally; it is particularly important that police officer understand the right of a police officer to

arrest a person for a crime against the police officer. If the City did not train or instruct its police officers that the statute permitting them to arrest a person for recording their voice is limited, it was highly likely that police officers would arrest people for openly recording them in the course of their work just as they have regularly arrested people for secret recording.[14] Unlawfully arresting a person for openly recording police conduct deprives the person of his liberty, a serious harm. These arrests also foster a lack of trust in the community because it looks like the police officers fear public knowledge of the officers' public conduct.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion in its entirety.

RESPECTFULLY SUBMITTED,
For the Plaintiff,
By his attorneys,

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Dated: May 14, 2010

14 Arrests for secretly recording police officers are common in states that prohibit secret recording. *See* Skehill, *supra* note 4, at 986 n.40.

Certificate of Service

I certify that on this day a true copy of the above document was served upon the attorney of record for each party via ECF.

Date: May 14, 2010 /s/ David Milton
David Milton

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CHESTER SZYMECKI,

Plaintiff,

v.

THE CITY OF NORFOLK,

Defendant.

Civil No. 2:08cv142

DEBORAH SZYMECKI,

Consolidated Plaintiff,

v.

ASHLEY HOUCK,

Consolidated Defendant.

OPINION & ORDER

This matter is before the Court on Consolidated Defendant Sheriff's Deputy Ashley Houck's ("Defendant" or "Deputy Houck") motion for summary judgment ("Deputy Houck's Motion"). Doc. 57. The Court heard argument on Deputy Houck's Motion during the Final Pretrial Conference held on December 5, 2008. The Court took Deputy Houck's Motion under advisement.

A jury trial in this matter began on December 16, 2008. At the close of Consolidated Plaintiff Deborah Szymecki's ("Plaintiff" or "Mrs. Szymecki") case-in-chief, Deputy Houck renewed her motion for summary judgment. After hearing argument, the Court **FOUND** that qualified immunity applied to Deputy Houck and therefore **GRANTED** Deputy Houck's Motion.

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This opinion and order serves to more fully explain the Court's reasoning.

I. Factual Background[1]

Actions allegedly taken by Deputy Houck during the arrest of Mrs. Szymecki's husband on June 10, 2007 form the basis of Mrs. Szymecki's suit. On June 10, 2007, at approximately 2:00 p.m., Mrs. Szymecki, her husband ("Mr. Szymecki"), their three children, and two neighborhood children arrived at Town Point Park in Norfolk, Virginia to attend Harborfest, a local festival. Mr. Szymecki was carrying a holstered handgun on his right side.

At approximately 4:30 p.m., Mr. Szymecki was questioned by Norfolk Sheriff's Deputy Houck concerning his carrying of the handgun. Deputy Houck informed Mr. Szymecki that he would need to leave Harborfest to dispose of his handgun prior to returning because the Norfolk code prohibited the carrying of a handgun at the festival. Mr. Szymecki then "calmly explained" it was his clear right under Virginia law to carry the weapon, even if a local Norfolk ordinance said otherwise. Then, Deputy Houck called for backup and as many as seven Norfolk police officers arrived at the scene. These officers pushed Mr. Szymecki out of Town Point Park and across Waterside Drive.

Mrs. Szymecki alleges that after officers began to push her husband across Waterside Drive, she grasped her cell-phone in anticipation of taking video of her husband's arrest. Mrs. Szymecki claims that Deputy Houck "[i]mmediately . . . pushed her backwards and shouted to Mrs. Szymecki to 'put it away or go to jail' and ordered her to leave the festival grounds immediately and not to return." Then, Deputy Houck and a Norfolk police officer escorted Mrs. Szymecki off festival grounds.

[1] The material facts include those facts presented by the plaintiff, Deborah Szymecki, at the trial commencing on December 16, 2008 as well as any undisputed facts presented by the plaintiff and defendant in opposition to and in support of Ashley Houck's Motion for Summary Judgment prior to trial.

II. Procedural History[2]

On March 24, 2008, Mrs. Szymecki filed a complaint pursuant to 42 U.S.C. § 1983 ("§ 1983") against Deputy Houck alleging two constitutional violations: (1) Deputy Houck violated Mrs. Szymecki's First Amendment rights "by prohibiting her from filming an event in a public place that she wished to recount to others and possibly to the press at a later time"; and (2) Deputy Houck violated Mrs. Szymecki's "Fourth Amendment freedom against an unreasonable seizure of the person by prohibiting her from enjoying the relative safety and amusement of the Harborfest celebration during her husband's detention by Norfolk police." Docket No. 2:08cv 143; Doc. 1 at ¶¶ 11-12.

On July 8, 2008, Deputy Houck filed a motion that the Court later construed as a motion to dismiss. Docket No. 2:08cv143; Doc. 7. After the motion to dismiss was fully briefed, the Court entered an order granting in part and denying in part Deputy Houck's motion to dismiss. Doc. 35. The Court dismissed Mrs. Szymecki's Fourth Amendment violation claim but allowed Mrs. Szymecki's First Amendment violation claim to go forward.

On November 18, 2008, Deputy Houck filed the instant motion and a memorandum in support thereof. Docs. 57 (Motion) and 58 (Memorandum). Mrs. Szymecki filed a response in opposition to Deputy Houck's Motion on December 1, 2008. Doc. 74. Deputy Houck's rebuttal to Mrs. Szymecki's response was filed on December 4, 2008. Doc. 81. The Court heard argument on Deputy Houck's Motion at the Final Pretrial Conference. At that time, the Court chose to take Deputy Houck's Motion under advisement, in large part because Deputy Houck's Motion failed to comport with the requirements of Local Civil Rule 56(b).[3]

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[2] This section includes only those aspects of this case's procedural history relevant to the issue before the Court.

[3] Deputy Houck's Motion did not include a statement of undisputed facts.

A jury trial in this matter commenced on December 16, 2008. At the close of Mrs. Szymecki's case-in-chief, Deputy Houck renewed her motion for summary judgment, arguing that the affirmative defense of qualified immunity applied. Upon hearing argument on this issue from both parties, the Court **FOUND** that qualified immunity applied to Deputy Houck and, therefore, **GRANTED** Deputy Houck's motion for summary judgment.

III. Legal Standard

Summary judgment is appropriate only when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also, Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); Seabulk Offshore, Ltd. v. Am. Home Assurance Co., 377 F.3d 408, 418 (4th Cir. 2004); Terry's Floor Fashions v. Burlington Indus., 763 F.2d 604, 610 (4th Cir. 1985). The moving party has the initial burden to show the absence of an essential element of the nonmoving party's case and to demonstrate that the moving party is entitled to judgment as a matter of law. Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 185 (4th Cir. 2004); McLean v. Patten Cmtys., Inc., 332 F.3d 714, 718 (4th Cir. 2003); see Celotex Corp., 477 U.S. at 322-25. When the moving party has met its burden to show that the evidence is insufficient to support the nonmoving party's case, the burden then shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Honor, 383 F.3d at 185; McLean, 332 F.3d at 718-19. Such facts must be presented in the form of exhibits and sworn affidavits. Celotex Corp., 477 U.S. at 324; see also M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 163 (4th Cir. 1993). Failure by plaintiff to rebut defendants' motion with such evidence on his behalf will result in summary judgment

when appropriate. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322.

Although the court must draw all justifiable inferences in favor of the nonmoving party, in order to successfully defeat a motion for summary judgment, the nonmoving party must rely on more than conclusory allegations, "mere speculation," the "building of one inference upon another," the "mere existence of a scintilla of evidence," or the appearance of "some metaphysical doubt" concerning a material fact. See Anderson, 477 U.S. at 252; Matsushita, 475 U.S. at 586; Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649 (4th Cir. 2002); Stone v. Liberty Mut. Ins. Co., 105 F.3d 188, 191 (4th Cir. 1997); Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc., 330 F. Supp. 2d 668, 671 (E.D. Va. 2004). Rather, the evidence must be such that the fact-finder reasonably could find for the nonmoving party. See Anderson, 477 U.S. at 252

IV. Analysis

Mrs. Szymecki's sole remaining claim alleges a violation of her rights guaranteed by the First Amendment. Specifically, Mrs. Szymecki alleges that Deputy Houck violated her First Amendment rights when Deputy Houck told her to "put it away or go to jail" when Mrs. Szymecki allegedly attempted to use her cellular phone to record her husband's arrest. Mrs. Szymecki brings this claim pursuant to 42 U.S.C. § 1983 ("§ 1983"). Section 1983 creates a private cause of action against any person acting under the color of state law who violates the rights created by the Constitution and laws of the United States. See 42 U.S.C. § 1983.

In her motion for summary judgment, Deputy Houck argues that the affirmative defense of qualified immunity applies. The doctrine of "qualified immunity protects government

officials from civil damages in a § 1983 action 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Edwards v. City of Goldsboro, 178 F.3d 231, 250 (4th Cir. 1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The defense of qualified immunity may be raised at any stage of the proceedings. See Hunter v. Bryant, 502 U.S. 224, 227-28 (1991).

A two-step analysis is used to determine whether qualified immunity applies to a given defendant. The initial inquiry in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. Hope v. Pelzer, 536 U.S. 730, 736 (2002); Saucier v. Katz, 533 U.S. 194, 201 (2001). If a constitutional violation is established, the court must then determine whether the specific right was clearly established, such that "a reasonable official would understand that what he is doing violates that right." Saucier, 533 U.S. at 202 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

As to the second inquiry, the Court must first "identify the specific right that the plaintiff asserts was infringed by the challenged conduct with a high level of particularity." Edwards, 178 F.3d at 251. Then, the Court must determine whether that specific right was clearly established at the time of the claimed violation. Id. If it is determined that the specific right was clearly established at the time of the claimed violation, the Court may then consider whether a reasonable person in the official's position would have known that his conduct violated that right. Id. (citing Anderson, 483 U.S. at 639).

Applying the first step of the qualified immunity analysis to the facts before the Court, it is difficult to determine conclusively whether Mrs. Szymecki's allegations, if true, establish a constitutional violation. As the Court explained in its order on Deputy Houck's motion to dismiss, the Court found that "the First Amendment protects the video recording of the actions of police officers, subject to reasonable time, place, and manner restrictions." Doc. 35 at 7.

Further, the Court explained that "If [Mrs. Szymecki's] allegations are true, it is possible that Deputy Houck's actions violated Mrs. Szymecki's First Amendment rights." Id. at 8. The fact that it is "possible" that Deputy Houck's actions violated Mrs. Szymecki's rights does not mean that the Court finds that her actions did, in fact, violate the First Amendment; the Court previously held that the First Amendment protects the video recording of the actions of police officers, but noted that protection is subject to reasonable time, place and manner restrictions.

The evidence presented at trial was that provided by Mrs. Szymecki during her case-in-chief. On the basis of that evidence, the Court assumes without ruling, and for the purposes of this motion only, that Deputy Houck's actions were, in fact, constitutionally violative. Regardless, the second step of the qualified immunity analysis is dispositive on the issue.

Pursuant to the second step of the qualified immunity analysis, the Court must determine whether the specific right alleged to have been violated was "clearly established". To determine whether a right was clearly established for the purposes of this analysis, "'the 'contours of the right' must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional.'" Edwards, 178 F.3d at 251 (quoting Swanson v. Powers, 937 F.2d 965, 969 (4th Cir. 1991)). "In determining whether a right was clearly established at the time of the claimed violation, 'courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose...." Id. (quoting Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998) (en banc)). While the nonexistence of a case holding the defendant's identical conduct to be unlawful does not necessarily prevent the denial of qualified immunity, "'[i]f a right is recognized in some other circuit, but not this one, an official will ordinarily retain the immunity defense.'" See id. (quoting Jean, 155 F.3d at 709).

With the requisite level of particularity, the specific right that Mrs. Szymecki asserts was

infringed is the right to video record the actions of police officers. For the reasons explained below, the Court finds that this specific right was not clearly established and therefore the affirmative defense of qualified immunity applies.

In her response to Deputy Houck's motion to dismiss, Mrs. Szymecki relied on two decisions from courts outside of the Fourth Circuit to establish that the specific right to video record the actions of police officers is protected by the First Amendment: Robinson v. Fetterman, 378 F.Supp.2d 534 (E.D.Pa. 2005); and Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000).[4] Mrs. Szymecki did not cite any decision by the Supreme Court, any decision by the Court of Appeals for the Fourth Circuit, any decision by any district court within the Fourth Circuit, or any decision by the Supreme Court of Virginia to support this proposition. While the Court found that the reasoning provided in both Robinson and City of Cumming to be instructive, the fact that the Court found that an individual might have the right to video record police conduct, subject to reasonable time, place and manner restrictions, does not mean that the Court found that this specific right was clearly established. Instead, given that Mrs. Szymecki was unable to point to any Supreme Court, Fourth Circuit, or Supreme Court of Virginia precedent acknowledging the existence of this specific right, the Court determined that this right was not clearly established for the purposes of the qualified immunity analysis. Accordingly, because the specific right implicated in this matter was not clearly established at the time of the alleged constitutionally violative conduct, the Court **FINDS** that the affirmative defense of qualified immunity applies and, therefore, **GRANTS** Deputy Houck's motion for summary judgment.

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[4] During argument on Deputy Houck's motion after the close of plaintiff's case-in-chief, plaintiff's counsel stated that the only case he had to support the existence of this right was Robinson v. Fetterman.

V. Conclusion

For the reasons explained herein, Deputy Houck's Motion is **GRANTED**. Accordingly, Mrs. Szymecki's First Amendment retaliation claim, the only remaining allegation in her complaint, against Deputy Houck is **DISMISSED** with prejudice.

The Clerk is **REQUESTED** to send a copy of this order to all counsel of record.

It is so **ORDERED**.

/s/
Henry Coke Morgan, Jr.
Senior United States District Judge

HENRY COKE MORGAN, JR.
SENIOR UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
DATE: 12/17/08