UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 1:16-cv-11362

K. ERIC MARTIN and RENÉ PÉREZ,

Plaintiffs,

v.

WILLIAM EVANS, in his Official Capacity as Police Commissioner for the City of Boston, and DANIEL F. CONLEY, in his Official Capacity as District Attorney for Suffolk County,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT WILLIAM EVANS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

INTRODUCTION

Plaintiffs K. Eric Martin ("Martin") and René Pérez ("Pérez") (collectively, "Plaintiffs") are self-described civil rights activists who, through their Complaint for Declaratory and Injunctive Relief, dated June 30, 2016 ("Complaint"), mount a facial challenge to Mass. Gen. Laws c. 272, § 99 ("Section 99") and seek declaratory and injunctive relief to prevent the enforcement of the statute against persons secretly recording police officers. In making their allegations, Plaintiffs advance policy arguments more appropriately addressed to a state or federal legislature. Nowhere in the Complaint do Plaintiffs allege any cognizable injury, and as a result, Plaintiffs do not have standing to challenge Section 99. Neither does the Complaint allege any constitutional violation. Therefore, Defendant William Evans ("Commissioner

Evans") respectfully requests that the Court dismiss the Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' Complaint, filed June 30, 2016, contains one claim for relief against Commissioner Evans and District Attorney Daniel F. Conley ("District Attorney Conley"). Brought under 42 U.S.C. § 1983, the claim alleges violations of Plaintiffs' First and Fourteenth Amendment rights. Compl. ¶¶ 108-114. Plaintiffs demand a judgment declaring Section 99 unconstitutional as applied to the secret recording of police officers and permanent injunctions against enforcement of the law by Commissioner Evans and District Attorney Conley. Compl., Prayer for Relief.

Nevertheless, the Complaint does not make a single specific allegation that the Boston Police have ever arrested anyone for secretly recording officers. Nor is there any allegation whatsoever that Plaintiffs themselves were ever arrested or prosecuted for violating Section 99. See Compl. ¶¶ 106-07. Plaintiffs even go so far as to deny any intention to violate the statute. Compl. ¶¶ 8, 47, 71. To conceal these fatal flaws, Plaintiffs pad their Complaint with allegations that are unrelated and irrelevant to their claim but serve only as inflammatory rhetoric. E.g., Compl. ¶ 3 (referring to completely unrelated but highly publicized allegations of police misconduct in other jurisdictions).

As to the Boston Police, however, there is only a vague and nonspecific allegation that the Boston Police Department "enforces Section 99." Compl. ¶ 92. Plaintiffs purport to bolster this claim by citing a number of past arrests under Section 99, but these arrests were all made by different police departments. Compl. ¶¶ 33-39, 91 (describing arrests made by Abington, MBTA, Hadley, Chicopee, Shrewsbury, and Hardwick Police Departments). Likewise, Plaintiffs

make irrelevant allegations regarding open recording, as opposed to the secret recording at issue here. Compl. ¶¶ 20-21, 50, 55, 77-78, 82. While Plaintiffs allege that the Boston Police Department maintains training materials regarding the enforcement of Section 99, Plaintiffs admit that Section 99 as written forbids the secret recording of officers. Compl. ¶¶ 1, 93-105. Therefore, this amounts to no more than an allegation that the Boston Police Department has training materials that instruct officers on how to enforce a state criminal law as written. Unable to state a legal claim, Plaintiffs turn in their Complaint to policy arguments that the Boston Police ought to be secretly recorded. Compl. ¶¶ 23-27, 58. In sum, there are no factual allegations in the Complaint that the Boston Police are enforcing or will imminently enforce Section 99 against Plaintiffs or anyone else. Therefore, Plaintiffs lack standing and fail to state a claim against Commissioner Evans.

STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 12(b)(1), a court will dismiss a complaint where the court lacks subject matter jurisdiction. Fox v. Palmas Del Mar Props., 620 F. Supp. 2d 250, 257 (D.P.R. 2009). In deciding a motion to dismiss under Rule 12(b)(1), the Court "must accept as true all well-pleaded factual claims and indulge all reasonable inferences in plaintiff's favor." Id. (quoting Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998)). Once challenged through a motion to dismiss, however, "it is plaintiff's burden to establish that the court has jurisdiction." Id. (quoting Rolón v. Rafael Rosario & Assocs., 450 F. Supp. 2d 153, 156 (D.P.R. 2006)). The Court must "rigorously" enforce its jurisdictional limits. Id.

Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint or count therein must be dismissed where it fails to state a claim upon which relief can be granted. The Court must determine whether Plaintiffs' factual allegations plausibly give rise to an entitlement to relief. Ashcroft v.

Iqbal, 556 U.S. 662, 678-79 (2009). While the Court is obliged to accept Plaintiffs' well-pleaded facts as they appear in the Complaint, the Court is not required to accept Plaintiffs' legal conclusions, and mere recitals of the elements of a cause of action, supported only by conclusory statements, will not suffice. Id.; Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (finding that "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). A plaintiff must set forth in his complaint factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory. See Iqbal, 556 U.S. at 678-79.

Here, for the reasons outlined below, Plaintiffs fail to plead facts sufficient to establish standing to sue Commissioner Evans or to state a claim against him.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO SUE COMMISSIONER EVANS BECAUSE THEY FAIL TO ALLEGE ANY INJURY IN FACT, CAUSATION, OR REDRESSABILITY.

Plaintiffs lack standing to challenge Section 99 because they fail to allege any injury in fact, causation, or redressability. Article III of the U.S. Constitution limits the jurisdiction of federal courts to "cases" and "controversies." Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992); see also Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013). To satisfy the case-or-controversy requirement, the burden is on Plaintiffs to establish that they have standing to sue. Blum v. Holder, 744 F.3d 790, 795 (1st Cir. 2014). To show standing, Plaintiffs must demonstrate "such a personal stake in the outcome of the controversy as to warrant [their] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on their behalf." Id. at 796 (internal quotations omitted). Specifically, Plaintiffs must show an

injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Id. (quoting Clapper, 133 S. Ct. at 1147).

The purpose of the standing requirement is "to prevent the judicial process from being used to usurp the powers of the political branches." Clapper, 133 S. Ct. at 1147; see also Blum, 744 F.3d at 795-96 ("This requirement is founded in concern about the proper—and properly limited—role of the courts in a democratic society.") (internal quotations omitted).

A. Plaintiffs Lack Standing To Sue Commissioner Evans Because They Fail To Allege Any Injury In Fact.

Plaintiffs lack standing to challenge Section 99 because they fail to allege any injury in fact. An injury in fact is a constitutional requirement for establishing standing to sue. Lujan, 504 U.S. at 560. Establishing an injury in fact is "not [a] mere pleading requirement[] but rather an indispensable part of the plaintiff's case." Id. at 560-61. An injury in fact is an injury that is (1) concrete, (2) particularized, that is, affecting the plaintiff in a personal and individual way, and (3) actual or imminent, not conjectural or hypothetical. Lujan, 504 U.S. at 560.

1. Plaintiffs' Alleged Injuries Are Neither Concrete Nor Particularized.

Plaintiffs' alleged injuries are neither concrete nor particularized. The U.S. Supreme Court has held that establishing an injury in fact "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." Lujan, 504 U.S. at 563 (quoting Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972)). This is shown "through specific facts" that Plaintiffs would be "directly affected apart from their special interest in the subject." See id. (internal quotations omitted).

In contrast, a generalized interest in the constitutionality of a law is insufficient:

> [The U.S. Supreme Court has] consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and

> seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan, 504 U.S. at 573-74; see also id. at 574 ("[T]heir complaint . . . is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy[.]") (quoting Massachusetts v. Mellon, 262 U.S. 447, 488-89 (1923)). Plaintiffs' allegations are neither concrete nor particularized because the Plaintiffs have not been arrested pursuant to Section 99, Plaintiffs have expressed no intention (as opposed to mere desire) to violate Section 99, Compl. ¶¶ 8, 47, 71, and Plaintiffs' alleged injuries are common to all citizens of the Commonwealth of Massachusetts who are likewise subject to Section 99.

2. Plaintiffs' Alleged Injuries Are Neither Actual Nor Imminent.

Plaintiffs' alleged injuries are neither actual nor imminent. The U.S. Supreme Court has "repeatedly reiterated" that, to satisfy the standing requirement, the "threatened injury must be certainly impending to constitute injury in fact and that allegations of possible future injury are not sufficient." Clapper, 133 S. Ct. at 1147 (emphasis in original) (internal quotations omitted). In Clapper v. Amnesty Int'l USA, the U.S. Supreme Court rejected a lower standard of "objectively reasonable likelihood," and the Court's holding that standing requires a "certainly impending" injury has also been applied by the First Circuit in analyzing First Amendment challenges to criminal statutes. Blum, 744 F.3d at 798-99.

Plaintiffs cannot allege harm in their own reaction to a speculative risk of harm. Clapper, 133 S. Ct. at 1151 ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). That is, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific

present objective harm or a threat of specific future harm." Id. at 1152 (quoting Laird v. Tatum, 408 U.S. 1, 13-14 (1972)). Even so, the threatened enforcement of a law may create an Article III injury when it is "sufficiently imminent." Susan B. Anthony List v. Driehaus, 134 S. Ct. 2234, 2342 (2014).

Here, Plaintiffs allege as their injuries a fear of prosecution and a chilling effect upon their alleged First Amendment rights. Compl. ¶¶ 106-07. Although Plaintiffs allege that their fear of prosecution is "reasonabl[e]," the allegations do not support the reasonableness of this fear, which is therefore merely the allegation of a subjective chill. Id.; Cf. Clapper, 133 S. Ct. at 1152. For reasons outlined infra, at Section II, Plaintiffs' Complaint does not allege "an intention to engage in a course of conduct arguably affected with a constitutional interest." Cf. Driehaus, 134 S. Ct. at 2343. Briefly, there is no authority for the proposition that the secret recording forbidden by Section 99 is protected speech.

Moreover, Plaintiffs allege no imminent "threat of future enforcement" by Commissioner Evans. Cf. Driehaus 134 S. Ct. 2345. Rather, Plaintiffs allege without specific detail that "police officers in the Commonwealth regularly arrest . . . individuals under Section 99," and later, that "BPD also enforces Section 99 to prohibit the secret audio recording of police officers performing their duties in public." Compl. ¶¶ 32, 92. This allegation does not specify when or how often such enforcement occurred, and more importantly, it does not specify that any arrests were effected by Boston Police officers. On the contrary, where Plaintiffs provide specific examples of past arrests made pursuant to Section 99, these arrests were made by other departments and not by Boston Police officers. Compl. ¶¶ 33-39, 91 (describing arrests made by Abington, MBTA, Hadley, Chicopee, Shrewsbury, and Hardwick Police Departments). To the extent that Boston Police officers are mentioned in the Complaint, they are included in vague and

nonspecific allegations regarding open recording, and no arrests are alleged. Compl. ¶¶ 50, 55, 77-78, 82. There are no specific allegations in the Complaint that any Boston Police officers have made any arrests pursuant to Section 99.

For the above reasons, Plaintiffs' lack standing to sue Commissioner Evans because they fail to allege an actual or imminent injury and because they fail to allege any imminent threat that Commissioner Evans will enforce Section 99 against them. For all the foregoing reasons, Plaintiffs' lack standing to sue Commissioner Evans because they fail to allege an injury in fact.

B. Plaintiffs Lack Standing To Sue Commissioner Evans Because Plaintiffs Fail To Allege Causation Or Redressability.

In addition to requiring an injury in fact, standing requires "a causal connection between the injury and the conduct complained of." Fox, 620 F. Supp. 2d at 262 (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998)). Plaintiffs also "bear the burden of establishing a plausible showing of redressability" such that "[i]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. As to redressability, "[u]nless threatened injury is one of the gravamens of the complaint, injunctive relief should not be awarded because it cannot conceivably remedy any past wrong but is aimed at deterring those subject to it." Id. (internal marks and quotations omitted) (quoting Steel Co., 523 U.S. at 108).

Here, the harm alleged against Commissioner Evans is the enforcement of the state statute, but Plaintiffs have alleged no facts to support that the Boston Police will imminently enforce Section 99 against Plaintiffs or others. There is no threatened injury here, and thus no causation or redressability. Id. In effect, the Complaint asks for relief from Commissioner Evans for violations which are not alleged to have occurred. Moreover, Plaintiffs' real target is not any City policy but the state statute, Section 99. The injunction requested by Plaintiffs

against Commissioner Evans cannot remedy Plaintiffs' concerns, which are with the statute as written by the legislature. The relief Plaintiffs seek would force Commissioner Evans into a Hobson's choice between violating heretofore unannounced federal rights and violating state law.

II. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM AGAINST COMMISSIONER EVANS UNDER § 1983 BECAUSE PLAINTIFFS' COMPLAINT DOES NOT ALLEGE ANY VIOLATION OF THE FIRST AMENDMENT.

Plaintiffs' Complaint fails to state a claim against Commissioner Evans because it does not allege any violation of the First Amendment. First, Section 99 applies only to secret recordings. Second, nothing in the First Circuit's recent holding in Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011), suggests that it is impermissible under the First Amendment to proscribe secret recordings.

A. Section 99 Only Forbids Secret Recording.

The Supreme Judicial Court has explicitly held that only secret recordings violate Section 99. Commonwealth v. Jackson, 370 Mass. 502, 505 (1976). Moreover, the Supreme Judicial Court has applied this rule in precisely the situation that Plaintiffs claim to fear.[1] See Compl. ¶¶ 72. In Commonwealth v. Hyde, 434 Mass. 594, 594-95 (2001), the Supreme Judicial Court held that Section 99 prohibits a motorist from secretly recording a police officer during a routine traffic stop. The defendant appealing his sentence raised arguments similar to those raised by Plaintiffs in the instant case. That is, he argued "his prosecution was tantamount to holding him criminally liable for exercising his constitutional rights to 'petition [the government]

[1] As noted in Section I, supra, Plaintiffs' allegations are neither concrete nor particularized, and therefore, Commissioner Evans cannot address any specific allegation of misconduct made by Plaintiffs. Rather, Commissioner Evans is forced to answer for any and all situations in which conduct may be proscribed by Section 99.

for redress of his grievances and to hold police officers accountable for their behavior.'" Id. at 601-02. As the Supreme Judicial Court held, "[t]his argument has no merit . . . The defendant was not prosecuted for making the recording; he was prosecuted for doing so secretly." Id. at 602. It added that:

> The problem here could have been avoided if, at the outset of the traffic stop, the defendant had simply informed the police of his intention to tape record the encounter, or even held the tape recorder in plain sight. Had he done so, his recording would not have been secret, and so would not have violated G.L. c. 272, § 99.

Id. at 605. This distinction was also recognized by the First Circuit in Glik v. Cunniffe, 655 F.3d 78, 87 (1st Cir. 2011) (quoting Hyde, 434 Mass. at 605). Again, it is well settled law that Section 99 forbids only secret recording, while open recording is perfectly permissible. Hyde, 434 Mass. at 602-05. For their part, Plaintiffs do not appear to dispute this critical distinction. E.g., Compl. ¶ 1 ("The Massachusetts Wiretap Statute, Mass. Gen. Laws ch. 272, § 99 ('Section 99'), prohibits all secret recording . . .").

B. *Glik* Does Not Prohibit But Explicitly Countenances Proscriptions On Secret Recording.

Contrary to Plaintiffs' averments, the First Circuit's holding in Glik v. Cunniffe does not prohibit proscriptions on secret recording but explicitly countenances them. In Glik, the First Circuit held that the First Amendment protected the filming from a distance of police officers in the Boston Common by a citizen who neither spoke to nor disturbed the officers in any way. Glik, 655 F.3d at 84.[2] The Court's holding did not go beyond this set of facts, nor did it treat the issue of secret recording. See generally id.

[2] In reaching its holding, the First Circuit relied upon its brief prior statement in Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999), that a journalist engaged in "peaceful" open recording "not performed in derogation of any law" was "in the exercise of his First Amendment rights."

Indeed, the Glik Court explicitly and repeatedly rejected the argument that the recording at issue was secret, thereby distinguishing Glik from the allegations in the instant case. For example, in its procedural history, the First Circuit noted that the Boston Municipal Court "found no probable cause supporting the wiretap charge, because the law requires a secret recording and the officers admitted that Glik had used his cell phone openly and in plain view to obtain the video and audio recording." Glik, 655 F.3d at 80. More importantly, in assessing the allegedly unlawful arrest, the First Circuit determined:

> The complaint alleges that Glik "openly record[ed] the police officers" with his cell phone, and further that "the police officers admitted Mr. Glik was publicly and openly recording them." On its face, this conduct falls plainly outside the type of clandestine recording targeted by the wiretap statute . . . Moreover, not only does Hyde (along with the Rivera concurrences) indicate that the use of a recording device in "plain sight," as here, constitutes adequate objective evidence of actual knowledge of the recording, but here the police officers made clear through their conduct that they knew Glik was recording them.

Glik, 655 F.3d at 87. In rejecting the claim that the recordings were made in secret, the First Circuit explained that:

> Simply put, a straightforward reading of the statute and case law cannot support the suggestion that a recording made with a device known to record audio and held in plain view is "secret." We thus conclude, on the facts of the complaint, that Glik's recording was not "secret" within the meaning of Massachusetts's wiretap statute[.]

Glik, 655 F.3d at 88. In sum, the Court completely divorced its holding from any situation where Section 99 would apply, and its statements demonstrate that Section 99's prohibition on secret recording is still perfectly constitutional even after the Court's holding in Glik.[3]

[3] While the Glik Court limited its holding to open recording (which as noted above is completely permissible under Section 99), it also limited its holding in other relevant ways. Specifically, it stated that "the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions . . . We have no occasion to explore those limitations here, however." Glik, 655 F.3d at 84 (citations omitted). Even so, the Court's discussion suggested some such restrictions. In a particularly relevant example, the Glik Court distinguished a Third

Moreover, Glik does not protect conduct otherwise in violation of the law. Belsito Comm'ns, Inc. v. Decker, No. 10-cv-450-SM, 2016 WL 141664, at *8 (D.N.H. Jan. 12, 2016). In Decker, the court distinguished Glik, noting that the justification for the protection extended in Glik was the "right to gather news from any source by means within the law." Id. (emphasis in original) (quoting Glik, 655 F.3d at 82). Because the plaintiffs in Decker were engaged in unlawful criminal conduct in violation of state law, their recording was not protected by the First Amendment. This distinguished Decker from both Glik and Iacobucci because "in both [of those] cases the court explicitly noted that the arresting officers lacked probable cause to arrest the plaintiffs." Id. at *8.

Section 99 treats only secret recording, and the holding in Glik, relied upon by Plaintiffs in their Complaint, applies only to open recording. Compl. ¶ 4; Glik, 655 F.3d at 84. Moreover, Glik explicitly disclaimed that Section 99 applied to the facts in that case. Glik, 655 F.3d at 87-88. Likewise, the First Circuit's statement in Iacobucci applied only to open recording "not performed in derogation of any law," and the Decker Court recognized this same distinction. Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999); Decker, 2016 WL 141664, at *8. Section 99 by its own terms makes secret recording a violation of state law. Therefore, Glik and Iacobucci do not affect the constitutionality of its enforcement.

Circuit precedent holding that the right to film was not clearly established in the context of a traffic stop. Id. at 85 (distinguishing Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010)). The Third Circuit reached this conclusion because such stops are "inherently dangerous situation[s]." Id. The First Circuit did not reject this logic but instead distinguished the case on the ground that "a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged." Id. Likewise, Section 99's proscription on secret recording would appear to be just such a reasonable restriction on the limited right to record outlined in Glik. Id. at 84. Moreover, the statute would protect officers in inherently dangerous traffic stop situations where concealed items could themselves present safety concerns.

For these reasons, Section 99 does not violate the First Amendment insofar as it applies to the secret recording of police officers, and as a result, Plaintiffs' Complaint cannot state a claim against Commissioner Evans for enforcing Section 99.

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM AGAINST COMMISSIONER EVANS UNDER § 1983 BECAUSE PLAINTIFFS' COMPLAINT DOES NOT IDENTIFY ANY MUNICIPAL POLICY THAT CAUSED THE ALLEGED VIOLATION.

A. Commissioner Evans' Enforcement Of Section 99 Is Not A Municipal "Policy" Countenanced By 42 U.S.C. § 1983.

Plaintiffs' Complaint further fails to state a claim against Commissioner Evans under 42 U.S.C. § 1983 because it does not identify any municipal policy that caused the alleged violation. Instead, Plaintiffs' Complaint takes issue with a state law, Section 99, and attempts to impute liability to Commissioner Evans simply because the City of Boston ("City") enforces the state law. Plaintiffs' try to challenge Section 99 "as applied," but this is a mischaracterization because, as noted above, the statute has not been applied to any conduct of Plaintiffs, who expressly deny violating or intending to violate Section 99. Compl. ¶¶ 1, 8, 9, 47, 71, 106-07. Rather, this is a facial challenge to a state statute to the extent that it applies to any secret recording of police officers in the conduct of their duties. Compl. ¶ 9 ("Plaintiffs therefore seek a declaration . . . that Section 99 is unconstitutional as applied to the secret recording of police officers performing their duties in public."); Driehaus, 134 S. Ct. at 2340 n.3 (finding plaintiffs' as-applied pre-enforcement claims "better read as facial objections").

Under Section 1983, a lawsuit against Commissioner Evans in his official capacity is treated as a lawsuit against the City itself. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.55 (1978) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent[.]"). As a result, the standard for establishing

liability is remarkably high. "[U]nder § 1983, local governments are responsible only for their own illegal acts." Connick v. Thompson, 563 U.S. 51, 60 (2011) (emphasis in original) (internal quotations omitted). That is, "'[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." City of Canton v. Harris, 489 U.S. 378, 389 (1989) (quoting Pembaur v. Cincinnati, 475 U.S. 469, 483-84 (1986) (opinion of Brennan, J.)). Among other requirements, Plaintiffs must identify a policy or custom of the City that violates their rights. Los Angeles Cty. v. Humphries, 562 U.S. 29, 39 (2010); City of Oklahoma City v. Tuttle, 471 U.S. 808, 817, 821 (1985) (plurality opinion) (describing the "policy or custom" requirement as "intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers").

But Commissioner Evans cannot be held liable under Section 1983 for simply enforcing state law because that is not a municipal "policy" countenanced by Section 1983. Yeo v. Town of Lexington, 131 F.3d 241, 257 (1st Cir. 1997) (Stahl, J., concurring) ("[I]t seems obvious that, as an action taken in what appears to have been good faith reliance upon state law . . . this policy cannot give rise to municipal liability under § 1983.") (citing Surplus Store & Exch., Inc. v. City of Delphi, 928 F.2d 788, 791-92 (7th Cir. 1991)). In Surplus Store, the Seventh Circuit considered the "argument that all cities can be charged with 'adopting' as a matter of policy all state laws that they do not ignore; i.e., '[state] statutes are a source of policy for the municipalities acting under them.'" Surplus Store, 928 F.2d at 791 n.4. In addressing this contention, the Court concluded that:

> This argument would render meaningless the entire body of precedent from the Supreme Court and this court that requires culpability on the part of a municipality and/or its policymakers before the municipality can be held liable under § 1983, and would allow municipalities to be nothing more than convenient

> receptacles of liability for violations caused entirely by state actors—here, the [state] legislature. Thus, it is wholly without merit.

Id. The Surplus Court elaborated that:

> To formulate this argument is to see its fatal flaws. First, consider what [Plaintiff] has not alleged . . . [Plaintiff] has not claimed that the alleged constitutional violation was caused by a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by" [the City] that was itself unconstitutional . . . Nor has [Plaintiff] claimed that the constitutional violation was caused by an "entrenched practice with the effective force of a formal policy" that [the City] allowed to develop, which practice or custom was itself unconstitutional . . . Nor has [Plaintiff] argued that [the City], as a matter o[f] policy or custom, enforces the law in a manner or method that caused the constitutional violation, which differentiates [Plaintiff's] claim from the one class of claims in which municipal liability can lie absent a showing of municipal policy or custom that is itself unconstitutional: the 'inadequate training' or 'inadequate procedures' cases . . . Instead, [Plaintiff] argues that [the City] properly can be held liable for the deprivation of its property because [the City] has a "policy" of allowing or instructing its police officers to enforce the challenged statutes. It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from Monell are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.

Id. at 791-92 (emphasis supplied).[4]

Here, Plaintiffs' Complaint is a partial facial challenge to Section 99 insofar as it applies to the secret recording of police officers. Compl. ¶¶ 1, 111-12. The deciding authority is the Massachusetts state legislature, not Commissioner Evans, and the moving force behind the alleged violation is Section 99 itself, not any policy of the City. In the end, Plaintiffs' only

[4] See also City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985) ("[S]ome limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel would never have killed Tuttle if Oklahoma City did not have a 'policy' of establishing a police force. But Monell must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was 'caused' by the municipal 'policy.'").

relevant allegation against Commissioner Evans is that the Boston Police enforce the relevant state law in accordance with its terms, and Plaintiffs admit that those terms forbid secret recording of police officers.[5] Compl. ¶¶ 1, 111-12. Plaintiffs' contention is with state, not City, policy, and the office of the Commissioner serves as "nothing more than [a] convenient receptacle[] of liability for violations caused entirely by state actors—here, the [state] legislature." Surplus Store, 928 F.2d at 791 n.4.

B. The Boston Police Department's Training Regarding Section 99 Is Not A Municipal "Policy" Countenanced By U.S.C. § 1983.

Plaintiffs' allegations regarding the Boston Police Department's training do not give rise to liability under 42 U.S.C. § 1983. As explained above, Commissioner Evans cannot be held liable under Section 1983 for simply enforcing a state law. Yeo, 131 F.3d at 257 (Stahl, J., concurring) (citing Surplus Store, 928 F.2d at 791-92). Nevertheless, Plaintiffs attempt to dress up their claim against Commissioner Evans by alleging that the Boston Police Department, in addition to enforcing Section 99, also trains its officers to "arrest and seek charges against private individuals who secretly record police officers[.]" Compl. ¶¶ 92-105. But where Plaintiffs themselves admit that Section 99 "prohibits all secret recording, even if the person is recording a police officer," these allegations regarding training can only amount to a claim that the Boston Police are trained to enforce relevant state law. Compl. ¶ 1.

For inadequate training to amount to a policy or custom of the City, "a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the

[5] Plaintiffs' Complaint makes allegations without any sufficient detail regarding the past conduct of Boston Police officers being openly recorded. Compl. ¶¶ 20-21, 50, 55, 77-78, 82. These allegations are not relevant to Plaintiffs' only claim for relief, which seeks declarations and injunctions related only to the secret recording of police officers proscribed by Section 99. Id. at ¶¶ 1, 111-12, Prayer for Relief, ¶¶ 1-3. For their part, Plaintiffs explicitly deny engaging or intending to engage in any conduct that violates Section 99. Id. at ¶¶ 8, 47, 71.

rights'" of others. Connick, 563 U.S. at 61 (quoting Harris, 489 U.S. at 388). This is a "stringent" standard, and "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." Id. at 61.

Here, no rights have been violated because relevant case law does not in any way suggest that Section 99 violates the First Amendment insofar as it applies to the secret recording of police officers. Glik, 655 F.3d at 84, 87-88. Where, as here, the alleged policy or custom comports fully with the relevant constitutional principles, there can be no allegation that the training of Boston Police officers was done with "deliberate indifference" to the First Amendment rights of Plaintiffs or similarly situated parties. Therefore, the alleged defects in the training of Boston Police officers cannot give rise to municipal liability, and Commissioner Evans cannot be found to have violated 42 U.S.C. § 1983.

C. The City's Enforcement And Training Of Officers Regarding Section 99 Did Not Cause The Alleged Constitutional Violations.

The City's enforcement and training of Boston Police officers with regard to Section 99 do not violate 42 U.S.C. § 1983 because they do not cause the alleged violation. In addition to identifying a municipal policy or custom that violates their rights, Plaintiffs must prove that such policy or custom caused the alleged injuries. Connick, 563 U.S. at 59-60; Harris, 489 U.S. at 385; see also Silva v. Worden, 130 F.3d 26, 31 (1st Cir. 1997). That is, Plaintiffs must show that "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." Bd. Of Cty. Comm'rs v. Brown, 520 U.S. 397, 404 (1997).[6] As noted above,

[6] Compare Bd. Of Cty. Comm'rs v. Brown, 520 U.S. 397, 404 ("Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward.") with id. at 415 ("As we recognized in Monell and have repeatedly reaffirmed, Congress did not intend municipalities to be liable unless deliberate action attributable to the municipality directly caused a deprivation of federal

"'[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." Harris, 489 U.S. at 389 (quoting Pembaur, 475 U.S. at 483-84 (opinion of Brennan, J.)). As to allegations of deficient training, it must be shown that the alleged deficiencies are "closely related to the ultimate injury" such that "the deficiency in training actually caused the police officers' indifference" to the rights of Plaintiffs. Id. at 391.

First, as described in more detail, supra, in Section I, no action of Commissioner Evans caused the Plaintiffs' alleged injuries for the simple reason that Plaintiffs have suffered no injuries. Second, the Complaint alleges no deliberate choice or conduct on the part of Commissioner Evans that could serve as the moving force behind the alleged violations. Third, as described in more detail, supra, in Sections III.A. and III.B., the deciding authority here is the Massachusetts state legislature, not Commissioner Evans, and the moving force behind the alleged violation is Section 99 itself, not any policy of the City. Moreover, there is no allegation that the training materials detailed in Plaintiffs' Complaint are the cause of Commissioner Evans' enforcement of Section 99. Compl. ¶¶ 93-105. Rather, it is the very existence of the state law as written that causes Plaintiffs' alleged apprehension. Plaintiffs' argument is with state, not City, policy, and Commissioner Evans serves not as a moving force but only as a convenient Defendant. Cf. Surplus Store, 928 F.2d at 791 n.4.

For these reasons, the enforcement and the training of Boston Police officers to enforce Section 99 could not have caused the Plaintiffs' alleged injuries.

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rights."). Here, for reasons described in this section, the City's alleged "policies" were neither deliberate nor were they the direct cause of the alleged injuries.

CONCLUSION

For all the foregoing reasons, Commissioner Evans requests that the Court dismiss Plaintiffs' Complaint with prejudice in its entirety.

Dated: September 30, 2016

Respectfully submitted,

DEFENDANT, WILLIAM EVANS,
in his Official Capacity as Police Commissioner for the City of Boston,

By his attorneys:

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2016, I served a true copy of the above document upon the attorneys of record for the parties through the Court's CM/ECF system and that paper copies will be sent to any parties identified as non-registered participants.

/s/ Matthew M. McGarry
Matthew M. McGarry

LOCAL RULE 7.1(a)(2) CERTIFICATION

The undersigned counsel certifies that on September 29, 2016, he conferred with Plaintiffs' counsel in accordance with Local Rule 7.1(A)(2) in connection with this motion.

/s/ Matthew M. McGarry
Matthew M. McGarry