UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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.	Civ. No 1:16-cv-11362-PBS **Oral Argument Requested**

PLAINTIFFS' OPPOSITION TO DEFENDANT EVANS' MOTION TO DISMISS

Plaintiffs Eric Martin and René Pérez bring this challenge to vindicate their First Amendment right to record police officers in the public performance of their duties. Because plaintiffs wish to secretly exercise this right in Boston, and because the Boston Police Department (BPD) has a clear policy of enforcing a state law that prohibits such recording, this case should proceed to the merits of plaintiffs' pre-enforcement challenge.

Plaintiffs believe that secretly exercising their First Amendment right to record police officers publicly performing their duties is sometimes the only means to safely gather and disseminate accurate information about police actions in Boston. However, they are now chilled from engaging in this constitutionally protected activity due to a credible fear of arrest and prosecution under the plain language Massachusetts wiretap law, M.G.L. ch. 272 § 99 (Section 99), which criminalizes the secret recording of police officers, *Commonwealth v. Hyde*, 434 Mass. 594, 599-600 (2001). Defendant William Evans, the Boston Police Commissioner, acknowledges that Section 99 has been interpreted to prohibit "precisely" the conduct plaintiffs

wish to undertake, and the BPD has expressly authorized officers to arrest people for this conduct. Evans Mem. 9, ECF No. 19; Complaint (Compl.), ¶¶ 92-105, ECF No. 1. By alleging that the plaintiffs seek to engage in activity in Boston that is protected by the First Amendment, and which would subject them to arrest, the Complaint states a plausible claim for relief against Evans. Compl. ¶¶ 4-8, 15-22, 40-89, 92-107.

Nevertheless, Commissioner Evans asks this Court to avoid addressing the merits of plaintiffs' claim for three reasons, each of which this Court should reject.

First, Evans contends that the Complaint fails to allege any First Amendment violation because, in his view, secretly recording the police performing their duties in public does not even implicate the First Amendment, let alone violate it. This contention misapprehends the First Amendment right to record, as articulated in *Glik v. Cunniffe*, 655 F.3d 78 (2011). *Glik* recognized a broad right to record police officers performing their duties in public, which the court called a "basic, vital, and well-established liberty." *Id.* at 85. The First Circuit nowhere limited this right to open recording. Under this holding, the First Amendment is implicated by any restriction on the right to record police officers performing their duties in public. Section 99 is such a restriction because it prohibits exercising this right in secret.

Second, Evans argues that plaintiffs lack standing. But the Commissioner's clear position is that Section 99 prohibits the very behavior in which they wish to engage, Evans Mem. 9-10, and the BPD's clear policy is to enforce this prohibition, Compl. ¶¶ 92-105. These facts are more than sufficient to establish a "credible threat of enforcement" of Section 99 against plaintiffs, which in turn gives them standing to bring this pre-enforcement challenge. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343 (2014).

Third, Evans argues that the BPD has no "policy" for which it can be held liable under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), but this argument is also defeated by the BPD's own enforcement policy. Far from seeking to impose municipal liability for a general practice of "enforcing state law," Evans Mem. 14, the Complaint points to the BPD's own policy of enforcing Section 99's ban on secretly recording police officers conducting their duties in public. Compl. ¶¶ 92-105. Because enforcing a particular criminal law is up to each police department, the BPD's "conscious choice" to authorize its officers to enforce Section 99 against people who record the police is a municipal policy for which it is liable. *See Vives v. City of New York*, 524 F.3d 346, 352-53 (2d Cir. 2008).

STATEMENT OF FACTS

As elaborated more fully in the argument below, the Complaint alleges the following facts:

I. Law enforcement officials enforce Section 99's ban of secretly recording police officers performing their duties in public.

Section 99 imposes up to five years' incarceration on "any person who willfully commits an interception, [or] attempts to commit an interception" of any "communication," where "interception" means "to secretly hear, secretly record, or aid another to secretly hear or secretly record." M.G.L. ch. 272 § 99(B)(4) & (C)(1). It imposes the same felony liability on any person who "permits," "participates in a conspiracy to commit," or serves as "an accessory to a person who commits" a prohibited interception. *Id.* § 99(C)(6). Section 99 contains no exemption for secretly recording police officers performing their duties in public, and indeed, law enforcement officials have arrested and prosecuted several individuals for this behavior.

For example, Michael Hyde was convicted under this statute for secretly recording a traffic stop, *Hyde*, 434 Mass. at 594-97, and District Attorney Conley prosecuted Jeffrey

Manzelli under Section 99 for recording police officers during a demonstration with an allegedly secret tape recorder, *Commonwealth v. Manzelli*, 68 Mass. App. Ct. 691 (2007). In the past six years, both the Hadley and Chicopee Police Departments have charged individuals with violating Section 99 for secretly recording police officers performing their duties in public, while the Hardwick Police Department charged a woman as an accessory because she knew about, and was present during, the secret recording of a traffic stop. Compl. ¶¶ 35-36, 39. During this same period, the Shrewsbury Police Department charged an individual under Section 99 for instructing a passenger how to use a recording device so that she could secretly record his interaction with a police officer. *Id.* ¶ 38.

BPD's training materials instruct officers that they may arrest and charge someone who secretly records police officers performing their duties in public. *Id.* ¶ 93. BPD's Training Bulletin 15-10 describes two cases where defendants were convicted for secretly recording police officers performing their duties in public, and instructs officers that they have a "right of arrest" if they have probable cause to believe that someone violates Section 99. *Id.* ¶¶ 94-97. A BPD training video similarly tells officers that Section 99 "specifically prohibit[s] all secret recordings by members of [the] public, including recordings of police officers." *Id.* ¶ 102. It goes on to depict a scene where a driver secretly records a police officer during a traffic stop, instructing officers that they could "take charges out against" the driver for secretly recording the police. *Id.* ¶¶ 102, 104-105.

II. Mr. Martin and Mr. Pérez want to secretly record police performing their duties in public, but are afraid to do so for fear of arrest or prosecution under Section 99.

Mr. Martin and Mr. Pérez each want to secretly record police officers performing their duties in public. *Id.* ¶¶ 6, 46, 56-57, 70, 80. Mr. Martin would like to do so when he is alone

because he does not feel safe openly recording police officers in such instances. *Id.* ¶¶ 6, 44, 48-49, 56, 72, 76, 79. This fear stems from his personal experiences—including an instance in Colorado where police officers pulled their guns and slammed Mr. Martin on the hood of a car before realizing that he was not their suspect, and another when a BPD officer shoved him to the ground and yelled at him to stop taking pictures during a political demonstration—as well as the April 2015 video of a BPD officer waving what appeared at the time to be a real gun in the face of a civilian who was openly recording the officer's activities. *Id.* ¶¶ 50, 52-55. He also wants to secretly record police officers performing their duties in public to create an accurate narrative of their behavior during street stops or their interactions with homeless individuals. *Id.* ¶¶ 57-60.

Mr. Pérez similarly wants to secretly record police officers during traffic stops when he is alone because he does not feel safe doing so openly. *Id.* ¶¶ 72-79. This fear partially stems from his experiences in Texas, where police officers always yelled at him to get out of the car as soon as he was pulled over. *Id.* ¶ 74. He is also afraid to record such interactions because—based on an instance when a BPD police officer screamed at him and grabbed his recording device while he was openly recording the officer's interactions with protesters—he learned that openly recording a BPD police officer can trigger a hostile response that threatens his physical safety. *Id.* ¶¶ 76-78. Mr. Pérez also wants to secretly record police officers to accurately capture their behavior and to ensure he can record without disruption. *Id.* ¶¶ 80-83.

Despite their desire to secretly record police officers performing their duties in public, plaintiffs will not do so because they are afraid of being arrested and prosecuted under Section 99. ¶¶ 1, 8, 47, 71.

ARGUMENT

I. Plaintiffs allege a violation of their First Amendment right to record police officers performing their duties in public.

Commissioner Evans' sole argument on plaintiffs' First Amendment claim is that this case should not proceed to discovery and summary judgment because, in the Commissioner's view, Section 99 does not implicate the First Amendment *at all*. Evans Mem. 9-13. That argument is incorrect. Because there is a clearly established First Amendment right to record police officers performing their duties in public, *Glik*, 655 F.3d at 82, any law that restricts recording police officers performing their duties in public necessarily implicates the First Amendment. Section 99 is such a restriction because it prohibits exercising this right in secret.

The First Amendment right to record police officers performing their duties in public arises from the nature of the officer's conduct—i.e., publicly performing an important government job that can result in the arrest of, or armed confrontation with, civilians—not the manner in which that officer's conduct is recorded. As the First Circuit explained, "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs," which "not only aids in the uncovering of abuses but also may have a salutary effect on the functioning of government more generally." *Glik*, 655 F.3d at 82-83 (internal citations and quotation marks omitted). This is "particularly true" with respect to information about law enforcement officials. *Glik,* 655 F.3d at 82. As a result, the First Circuit has held that the First Amendment "unambiguously" protects the right to record police officers carrying out their duties in public. *Glik*, 655 F.3d at 82; *see also Gericke v. Begin*, 753 F.3d 1, 7-10 (1st Cir. 2014). The First Circuit has never held that the existence of this right turns on

whether the recording device is in view of the police officers. *Glik*, 655 F.3d at 82; *Gericke*, 753 F.3d at 7.

This makes sense because, as other courts have recognized, the First Amendment principles articulated in *Glik* apply to open and secret recording of police officers alike.[1] For example, information about police behavior informs public discourse regardless of whether it is obtained through open or secret recording. *See Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001) (content of secretly recorded phone call was a matter of public interest). Moreover, some officers may change their conduct if they are aware they are being recorded, rendering secret recording the only way to gather accurate information about how these officers behave when they are not under scrutiny. Compl. ¶18. Finally, for those who are afraid that openly recording a police officer could trigger violence or a threat of arrest for interfering with an officer, secret recording represents the only method to exercise their First Amendment right. *Id.* ¶¶ 19-22.

Commissioner Evans does not demonstrate otherwise. Though Evans cites passages from *Glik* discussing the open nature of the recording in that case, those passages concern Glik's Fourth Amendment claim. Evans Mem. 11; *Glik*, 655 F.3d at 80, 85-88. This is unsurprising. There, the Court was analyzing whether there was probable cause to arrest Glik under Section 99, which depended on whether Glik's conduct was secret because "only secret recordings violate Section 99." Evans Mem. 9. In contrast, *Glik*'s analysis of the First Amendment claim does not mention—let alone limit its holding to—the open nature of the recording. *Glik*, 655

[1] *See State of New Hampshire v. Alfredo Valentin*, Dckt No. 216-2015-CR-766, unpub op. at 5 (Superior Court Northern District New Hampshire, October 21, 2015) ("[T]he Court finds that the First Amendment protects secretly filming police in public, for the same reasons that the First Amendment generally protects filming the police."); *see also Bacon v. McKeithen*, No. 5:14-cv-37, unpub op. at *10 (N.D. Fl. August 28, 2014) (construing state wiretap statute to allow secret recording of police officers performing their duties in public because a contrary construction "would raise serious constitutional issues as to . . . protected speech").

F.3d 82-85; *see Gericke*, 753 F.3d at 7 (First Amendment protected recording because subject "is police carrying out their duties in public"); *Rideout v. Gardner*, 838 F.3d 65, 75 (1st Cir. 2016) (citing *Glik* as "holding that there is a First Amendment interest in videotaping government officials performing their duties in public places").

Nor does Evans point to any other First Amendment right whose existence turns on whether the person seeking to exercise it provides notice to the subject of her speech or expression. He does not suggest that a journalist's First Amendment protection hinges on whether she alerts the subject of a forthcoming story, or that an artist's First Amendment protection depends on whether she made sure that the subject knew her image would appear in a painting. Indeed, the Commissioner's novel suggestion that the existence of a right to record simply disappears into a coat pocket, along with the recording device, appears to have no precedent in First Amendment jurisprudence. *Cf. Kelly v. Borough of Carlisle*, 622 F.3d 248, 259 n.7 (3d Cir. 2010) ("[I]t is unclear why the 'surreptitious' nature of the videotaping would be significant as to whether the videotaping implicates the existence of a First Amendment right").

Finally, Commissioner Evans' circular suggestion that secret recording of police officers does not implicate the First Amendment *because* Section 99 prohibits secret recording is incorrect. Evans Mem. 12. Nothing in *Glik* suggests that a plaintiff cannot raise a First Amendment challenge to Section 99, and neither do the cases cited by Evans. In *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999), the First Circuit held that an individual who recorded a public meeting and was not "in derogation of any law" could not be charged with disorderly conduct for that recording. And *Belsito Commc'n v. Decker*, No. 10-cv-450, 2016 WL 141664 (D.N.H. Jan. 12, 2016), simply stands for the proposition that individuals cannot claim a First Amendment violation when they are arrested for crimes *other than* wiretapping unrelated to their

expressive activity. *See id.* at *8 (no First Amendment claim when plaintiff "was stopped and his camera was seized" because he illegally impersonated emergency rescue personnel, which was "conduct unrelated to (or, at best, only indirectly related to) any constitutionally protected news-gathering efforts").

Thus, plaintiffs allege a violation of the First Amendment. Section 99 restricts the First Amendment right to record police officers performing their duties in public by prohibiting the secret exercise of this right.

II. Plaintiffs have standing because there is a credible threat that Section 99 will be enforced against them.

"To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List.*, 134 S. Ct. at 2341 (internal quotation marks omitted). An injury in fact must be both "actual or imminent" and "concrete and particularized." *Id.* (internal quotation marks omitted). Plaintiffs satisfy each of these requirements.

A. Plaintiffs' allege an actual injury that is concrete and particularized.

1. Actual Injury

Plaintiffs' ability to satisfy the actual injury requirement turns on whether they have alleged a harm that is sufficiently imminent. They have. Courts use different adjectives to describe imminence, including a harm that is "certainly impending" or of which there is a "substantial risk." *Susan B. Anthony List*, 134 S. Ct. at 2341 (quoting *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147, 1150 n.5 (2013)). But, no matter which term is used to *articulate* that a harm is "sufficiently imminent," that standard is *satisfied* when plaintiffs bringing a pre-

enforcement challenge to a criminal statute allege three things: (1) "an intent[] to engage in a course of conduct arguably affected with a constitutional interest," that is (2) "proscribed by a statute," and (3) "a credible threat of prosecution thereunder." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *see also Blum*, 744 F.3d at 796 (same). Plaintiffs satisfy this test here because their desire to secretly exercise the right to record the police implicates the First Amendment, *see supra,* Evans concedes that Section 99 proscribes this conduct, Evans Mem. 9-10, and there exists a credible threat of arrest under BPD's policy of enforcing Section 99, Compl. ¶ 92-105.

i. **Plaintiffs allege an intent to engage in constitutionally protected activity.**

Plaintiffs' detailed allegations establish their intent to engage in constitutionally protected activity. Both are civil rights activists in Boston who regularly participate in demonstrations and otherwise see police officers on the street, Compl. ¶¶ 41-43, 66-67, and both provide a detailed account of circumstances in which they have wanted and will want to secretly record police officers performing their duties in public.

Mr. Martin alleges that he has wanted and will continue to want to secretly record police officers performing their duties in public about once a month. *Id.* ¶ 46. He wants to do so when he seeks an accurate account of police behavior, *id.* ¶¶ 57-60, and when he is alone, *id.* ¶¶ 48-49, 56. He describes particular episodes when he has wanted to secretly record police officers—including when a BPD officer shoved him to the ground and yelled at him to stop taking pictures, and several others where he has seen BPD officers interacting with homeless individuals in Downtown Crossing—and alleges that he would want to do so again in similar circumstances. *Id.* ¶¶ 55-57, 59-60. Mr. Pérez similarly alleges that has wanted and will continue to want to secretly

record police officers performing their duties in public. *Id.* ¶ 70. He wants to do so when he seeks an accurate account of police behavior, *id.* ¶ 80, when he feels that he cannot openly exercise his rights to record without police disruption, *id.* ¶ 81-84, and during traffic stops, *id.* ¶ 72. He describes particular episodes—including one instance when a BPD officer screamed at him and grabbed his recording device while he was openly recording police interactions with protesters outside of Secretary of State John Kerry's house—where he has wanted to and will continue to want to engage in secret recording. *Id.* ¶¶ 77-79, 82-84.

In addition, both plaintiffs teach Know Your Rights trainings about recording the police. *Id.* ¶¶ 61-62, 85-86. They allege that they want to instruct individuals that they should secretly exercise their right to record police officers performing their duties in public when they are alone or otherwise feel unsafe openly recording. *Id.* ¶¶ 64-65, 87-89. These intentions yield an even greater threat of prosecution under Section 99 because, unlike secret recording, *instructing* individuals to secretly record is a violation of Section 99 that occurs in the open.

Confronted with plaintiffs' detailed allegations about their desire to secretly record police officers performing their duties in public and to instruct others to do the same, Commissioner Evans simply repeats his argument that the conduct itself is not constitutionally protected. Evans Mem. 7. As discussed in Part I above, this argument is incorrect.

***ii.* Plaintiffs allege a credible threat of prosecution under Section 99.**

When a plaintiff challenges a non-moribund statute, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996); *see Hedges v. Obama*, 724 F.3d 170, 197-200 (2d Cir. 2013) (collecting cases in support of the proposition that the Supreme Court "presume[s] that the government will enforce" a non-moribund criminal statute). "*Clapper*

does not call into question th[is] assumption," which the government generally overcomes only by explicitly disavowing enforcement against the specific plaintiff. *Blum*, 744 F.3d at 798 n.11; *see also Susan B. Anthony List*, 134 S. Ct. at 2345. Thus, if a pre-enforcement challenge targets a non-moribund law, the plaintiff has standing unless *the government* carries its burden to show that the law will not be enforced. *Hedges*, 724 F.3d at 197.[2] Evans fails to carry that burden.

Section 99 is anything but moribund. There have been at least six Section 99 prosecutions and arrests across Massachusetts in the past 15 years. *Compare* Compl. ¶¶ 32-39, *with Poe v. Ullman,* 367 U.S. 497, 501-02, 508 (1961) (statute moribund when only result in one prosecution over 80 years) *and Johnson v. District of Columbia*, 71 F. Supp. 3d 155, 161 (D.D.C. 2014) (statute moribund where it had gone "unenforced for nearly four decades" and "in fact it seems likely that the government has never enforced the statute *at all*"). This recent history indicates that Section 99 is not a "dead letter." *New Hampshire Right to Life*, 99 F.3d at 17.

The burden thus shifts to Commissioner Evans to "convincingly demonstrate" that the BPD will not enforce this statute against plaintiffs. *Id.* at 16. He does not do so. Although Evans correctly notes that "there are no specific allegations in the complaint that any Boston Police officers have made any arrests pursuant to Section 99," Evans Mem. 8, there *are* specific allegations about the BPD's explicit policy to enforce Section 99 against individuals who secretly record police officers performing their duties in public. Compl. ¶¶ 92-105. Taking the BPD at its official word, this policy constitutes "facts to support that the Boston Police will imminently enforce Section 99 against Plaintiffs or others." Evans Mem. 8.

[2] *Hedges* emphasizes that although "the executive branch enjoys prosecutorial discretion with regard to traditional punitive statutes" because "Congress generally does not mandate or direct criminal prosecution," it is "appropriate to presume for standing purposes that the government will enforce the law against a plaintiff covered by a traditional punitive statute." 724 F.3d at 201.

The BPD's policy distinguishes this case from *Blum*, where the government stated that "the statute simply does not prohibit the actions plaintiffs intend to take." 744 F.3d at 800.[3] Here, Evans does not simply fail to disavow enforcement of Section 99 against plaintiffs; his submission restates the BPD's policy and defends its constitutionality. Evans Mem. 8-10, 12, 14-16. This defense of Section 99's prohibition on secretly recording police officers "indicates that [Commissioner Evans] will someday enforce it." *New Hampshire Right to Life*, 99 F.3d at 17.

2. Concrete and Particularized

Plaintiffs' allegations that Commissioner Evans has chilled their First Amendment right to record police officers performing their duties in public—and to train others to do so—establishes a concrete and particularized injury because it is a harm that "actually exist[s]," which affects plaintiffs in a "personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Courts routinely determine that an alleged chill of First Amendment rights satisfies the injury requirement. *See, e.g.*, *Susan B. Anthony List*, 134 S. Ct. at 2341-43; *Babbitt*, 442 U.S. at 302; *New Hampshire Right to Life,* 99 F.3d at 13-14; *cf. Platt v. Bd of Comm'rs on Grievance & Discipline of Ohio Supreme Court*, 769 F.3d 447, 451-52 (6th Cir. 2014) (plaintiff meets the actual-injury and concrete-and-particularized requirements "when the threat of enforcement of th[e] law is sufficiently imminent").

Evans does not present a reason to reach a different conclusion in this case. Plaintiffs do not need to provide more than their detailed description of what Evans terms a "mere desire" to secretly record police officers performing their duties in public, Evans Mem. 6. "[A]n actual

[3] *See also id.* at 793 n.3 (government stated "flatly" in its motion to dismiss that the plaintiffs did not allege any activities "that will possibly subject them to [prosecution]," and insisted at oral argument "there is no intent to prosecute plaintiffs for their intended conduct").

injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." *New Hampshire Right to Life,* 99 F.3d at 13. "[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statue that he claims deters the exercise of his constitutional rights." *Susan B. Anthony List,* 134 S. Ct. at 2342 (internal quotation marks omitted). Nor have plaintiffs simply alleged injuries "common to all citizens of the Commonwealth." Evans Mem. at 6. By detailing in sworn court documents the specific instances in which they would exercise their right to secretly record police officers performing their duties in public but for a fear of arrest and prosecution, Mr. Martin and Mr. Pérez have alleged a harm that affects them in a "personal and individual way." *Spokeo*, 136 S. Ct. at 1548.

B. Plaintiffs allege a sufficient causal connection and likelihood of redress.

The final two elements of the standing test require plaintiffs to show that their injury can be fairly traced to the challenged conduct and will likely be redressed by a favorable court decision. *New Hampshire Right to Life*, 99 F.3d at 13. These elements "are not legitimately [at] issue here." *Id.* Plaintiffs' injury—the chilling of their constitutionally protected right to record police officers performing their duties in public and to instruct others to do the same—stems directly from the existence and threatened enforcement of Section 99. This "injury is also redressable in this action: when a plaintiff seeks a declaration that a particular statute is unconstitutional, the proper defendants are the government officials charged with administering and enforcing it." *Id.*

Commissioner Evans offers only limited arguments to the contrary. First, he alleges that "there is no threatened injury here, and thus no causation or redressability." Evans Mem. 8. This argument relies on Evans' mistaken views about the presence of an injury in fact. Second, he

suggests that the injunction "cannot remedy Plaintiffs' concerns, which are with the statute." *Id.* at 9. As one of two entities responsible for enforcing Section 99 in Suffolk County—along with defendant Conley—enjoining the Commissioner from enforcing Section 99 would undeniably remedy plaintiffs' concerns about facing arrest in Boston under Section 99. Finally, he posits that complying with such an injunction "would force Commissioner Evans" to "violat[e] the state law." *Id.* But since neither Section 99 nor any other state law *requires* police departments to enforce this statute against civilians who record police officers performing their duties in public, ending such enforcement would not violate state law. Even if it did, federal injunctions routinely require state and local police actors to "violate" state law to comply with the U.S. Constitution.

III. Plaintiffs state a cognizable *Monell* claim because the BPD's explicit policy to enforce Section 99 has chilled their First Amendment rights.

Municipalities are proper defendants under 42 U.S.C. § 1983 when the execution of a municipal policy violates the U.S. Constitution. *Monell*, 436 U.S. at 690-91. Here, the Complaint's claim against defendant Evans in his official capacity amounts to a municipal liability claim. *Id.* at 690 n.55. In making that claim, plaintiffs allege that the BPD has a policy to arrest people who secretly record police officers performing their public duties, and that this policy has unconstitutionally chilled Mr. Martin's and Mr. Pérez's First Amendment rights. Compl. ¶¶ 93-107.[4] Commissioner Evans does not deny this policy's existence. Instead, he argues that it cannot form the basis for municipal liability because the BPD is "simply enforcing state law." Evans Mem. 14. But where, as here, the municipality has discretion regarding the enforcement of a statute, an express policy to enforce it establishes *Monell* liability. *See Vives*, 524 F.3d at 353.

[4] Plaintiffs reference these training materials only as evidence of a policy for which the BPD can be held liable, and do not to allege a "failure to train" claim. Evans Mem. 16-18.

A. The BPD's policy to arrest individuals who secretly record police officers performing their public duties is a cognizable municipal policy under *Monell.*

In the context of *Monell* liability, the word "policy" generally implies a "deliberate" or "conscious" choice amongst various alternatives by the municipality. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). The BPD's policy to enforce Section 99 triggers *Monell* liability because when a municipality retains discretion to enforce a state statute, an express policy to enforce that statute constitutes such a "deliberate" or "conscious" choice.[5] *See Vives,* 524 F.3d at 353.[6]

Monell liability in these circumstances is warranted by the practical operation of municipalities: because a municipality cannot, and does not, prioritize the enforcement of every state statute, its adoption of an explicit policy to enforce a particular statute *does* constitute a conscious choice amongst various alternatives. It also reflects the same principles underlying the Supreme Court's refusal to apply qualified immunity to municipalities. *Owen v. City of Independence*, 445 U.S. 622, 650-57 (1980). *Owen* concluded that it was "fairer" to allocate the

[5] Neither the First Circuit nor the District of Massachusetts has analyzed this question. Evans cites the concurring opinion in *Yeo v. Town of Lexington*, 131 F.3d 241, 257 (1st Cir. 1997), Evans Mem. 14, 16, but *Yeo*'s majority never reached the issue of municipal liability, *id.* at 248 n.3, and even the concurrence did not rely on the quoted statement in its reasoning.

[6] *Cf. Cooper v. Dillon*, 403 F.3d 1208, 1221-1223 (11th Cir. 2005) ("While the unconstitutional statute authorized" the final policymaker to arrest the plaintiff, it was the final policymaker's "deliberate decision to enforce the statute that ultimately deprived [him] of his constitutional rights and therefore triggered municipal liability"); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 363-64 (6th Cir. 1993)(municipal liability for enforcing municipal deadly force policy which relied on, but was more restrictive than, state deadly force policy); *Evers v. County of Custer*, 745 F.2d 1196, 1203-04 (9th Cir. 1984) (municipal liability despite objection that county "was merely acting according to state law" when the "Declaration of Public Road was an official decision of the Commissioners . . . and the criminal action was instigated at their direction"); *see also Caminero v. Rand*, 882 F. Supp. 1319, 1325-26 (S.D.N.Y 1995) (municipal liability when municipality adopts specific policy enforcing a particular state law); *see also Davis v. Camden*, 657 F.Supp. 396, 404 (D.N.J. 1987) (municipal liability for affirmative adoption of specific policy enforcing a particular state law regardless of discretion).

burden of unforeseen constitutional developments to the municipalities "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Id* at 655. Like all other government officials, municipalities must "consider whether [its] decision comports with constitutional mandates," *id.* at 656, and cannot "receive immunity for blindly following laws passed by a state," *RHJ Medical Ctr. v. City of DuBois*, 754 F. Supp. 2d 723, 765 (W.D. Pa. 2010).

Applying this analysis here, the BPD's express policy to arrest individuals who secretly record police officers performing their public duties constitutes a conscious choice that triggers *Monell* liability. This policy is evidenced by the BPD's official training materials. Compl. ¶¶ 93-94, 98; *Vives*, 524 F.3d at 356-57 (finding department training manuals constituted evidence "that the City *did* make a conscious choice to enforce [state statute] in an unconstitutional manner"). The Boston Police Academy Training Bulletin 15-10 instructs police officers that they have a "right of arrest" when one person secretly records another. Compl. ¶ 95-96. It then details two Massachusetts cases where defendants were convicted for secretly recording the police performing their public duties. *Id.* ¶ 97. The BPD also issued a training video—shown at all Boston Police Academy trainings and roll calls and available in the BPD's "e-learning program"—which informs officers that Section 99 "specifically prohibit[s] all secret recordings by members of the public, including recordings of police officers." *Id.* ¶¶ 100, 102. It then instructs officers they can "take charges out against" individuals for secretly recording the police. *Id.* ¶ 105. This clear policy of enforcing Section 99's ban on secretly recording police officers performing their duties in public means that, if Section 99 is unconstitutional, the Commissioner is liable under *Monell*.

Commissioner Evans's contrary argument relies heavily on *Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991). Evans Mem. 14-16. But that decision merely holds that a municipality can escape liability if it demonstrates that it is *required* to enforce the relevant state statute. *See Bethesda Lutheran Homes and Servs. Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998) (*Surplus* is "entirely consistent" with the holding that a municipality can be held liable where it is not mandated to enforce the state statute); *Snyder v. King*, 745 F.3d 242, 248 (7th Cir. 2014) (same).[7] Evans does not make such a showing here. He does not point to anything in Section 99 or any other Massachusetts law that requires the BPD to enforce Section 99 against people who record police officers publicly performing their duties.[8] To the contrary, police departments routinely choose *not* to arrest individuals for certain offenses. The BPD's policy therefore constitutes a conscious choice that triggers *Monell* liability.

B. The BPD's policy has caused a cognizable injury.

"As long as the casual link is not too tenuous," the question of causation "should be left to the jury." *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3rd Cir. 1990); *see also Young v. City of Providence*, 404 F.3d 4, 23 (1st Cir. 2005) (causation typically a jury question). Here, the Complaint alleges sufficient facts to survive a motion to dismiss. Plaintiffs' First Amendment rights are chilled because they face a credible threat of arrest if they secretly record police performing their duties in public. Compl. ¶¶ 8, 11-12, 64-65, 88-89, 106-07. The BPD has

[7] *Snyder* approvingly cited both *Vives* and *Cooper*. 745 F.3d at 248.

[8] *Compare* M.G.L. ch. 272 § 99(C)(1) (prescribing punishments for violations of the statute, without instructing police departments to enforce each such violation), *with Vives*, 524 F.3d at 354 n.6 (statute requires enforcement when it states "a constable or police officer must . . . issue an appearance ticket" when a person violates the law), *and Snyder*, 745 F.3d at 243-44 (statute requires enforcement when it states "a county voter registration office shall remove from the official list of registered voters the name of a voter who is disfranchised under this chapter due to a criminal conviction").

authorized its officers to arrest people for this conduct. *Id.* ¶¶ 92-107. The "conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains." *Bd. of Cnty. Comm'rs of Bryan Cnty. v Brown*, 520 U.S. 397, 405 (1997); *Haley v. City of Boston,* 657 F.3d 39, 51-52 (1st Cir. 2011) (same). For this reason, "[r]esolution of the policy issue should also resolve the issue of causation." *Vives*, 524 F.3d at 357. The BPD's enforcement policy therefore plausibly establishes that it is a moving force behind the violation of plaintiffs' First Amendment rights. *Cf. Caminero v. Rand*, 882 F. Supp. 1319, 1327 (S.D.N.Y 1995).

In response, Commissioner Evans once again argues that there is no First Amendment violation—which fails for the reasons stated above in Part I—and that "the moving force behind the alleged violation is Section 99 itself." Evans Mem. 18. The BPD's policy "sufficiently demonstrates, for the purposes of surviving a motion to dismiss that there was a direct causal link" between plaintiffs' injury and the municipality's conscious choice. *Caminero*, 882 F. Supp. at 1327; *see Vives*, 524 F.3d at 357-58; *Lowden v. Cnty. of Clare*, 709 F. Supp. 2d 540, 568 (E.D. Mich. 2010) (denying motion to dismiss when "[p]laintiffs contend that the County is liable for [its] policy even if it happens to be consistent with a state law").

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument on defendant Evans' motion to dismiss under Local Rule 7.1(d).

CONCLUSION

For the foregoing reasons, this Court should deny defendant Evans' motion to dismiss.

Respectfully submitted,
Plaintiff, K. ERIC MARTIN
Plaintiff, RENÉ PÉREZ

By their attorneys,

/s/ Jessie J. Rossman
Matthew R. Segal, BBO #654489
Sarah Wunsch, BBO #548767
Jessie J. Rossman, BBO #670685
ACLU Foundation of Massachusetts
211 Congress Street
Boston, MA 02110
617-482-3170 x 337
jrossman@aclum.org

Dated: December 19, 2016

LOCAL RULES 7.1(A)(2) CERTIFICATION

I certify that I have conferred with counsel for the defendants in this matter and attempted in good faith to resolve or narrow these issues.

DATE: December 19, 2016 */s/ Jessie J. Rossman*
Jessie J. Rossman

CERTIFICATE OF SERVICE

I certify that on this day I caused a true copy of the above document to be served upon the attorney of record for all parties via CM/ECF.

DATE: December 19, 2016 */s/ Jessie J. Rossman*
Jessie J. Rossman