COUNTY COURT Douglas County, State of Colorado 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (303) 663-7200	
PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. BRIAN MALONE Defendant.	▲ COURT USE ONLY ▲
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MOTION TO DISMISS DUE TO LACK OF EVIDENCE AND IN THE ALTERNATIVE MOTION TO DISMISS BASED ON UNCONSTUTIONAL APPLICATION OF C.R.S. § 18-9-108 TO MR. MALONE IN VIOLATION OF HIS FIRST AMENDMENT RIGHTS TO PROTECTED SPEECH

The Defendant, Brian Malone, by and through his attorney, Daniel N. Recht of Recht Kornfeld, P.C., hereby moves for dismissal of the charge pending in this case on separate grounds: 1) even in the light most favorable to the People, no evidence exists to prove the charge beyond a reasonable doubt, and 2) application of this statute to Mr. Malone under these

circumstances is unconstitutional as it violated his right to engage in protected speech activity. As grounds he states:

INTRODUCTION

The Defendant Brian Malone, by and through undersigned counsel, hereby respectfully moves the Court to dismiss the single charge against him, for violating § 18-9-108, C.R.S. Based on the undisputed material facts, the People cannot meet their burden of proving beyond a reasonable doubt that Mr. Malone violated the aforesaid statute, because they cannot demonstrate *either* that (a) Mr. Malone intended to disrupt the public meeting, or (b) that *his* conduct actually caused a significant disruption of the meeting. People bear the burdern of proving *both* of these elements beyond a reasonable doubt.

Moreover, application of the above-referenced criminal statute to Mr. Malone's activities on August 7, 2012, while he was acting in his capacity as a journalist fails to comply with the applicable constitutional standards because the restrictions imposed by the Douglas County School District ("DCSD") on Mr. Malone's newsgathering activities were overbroad and unjustified restrictions on First Amendment-protected conduct.

Accordingly, the Court should order that the charge against Mr. Malone be dismissed and spare Mr. Malone the burden of having to stand for trial.

APPLICABLE LEGAL STANDARD

The Court may determine that the People are unable to meet their burden of proof by proving all elements of a charged offense beyond a reasonable doubt, and to enter an order dismissing those charges. *People v. Gallegos*, 260 P.3d 15, 25 (Colo. 2010) (dismissing charge because "indictment was insufficient because it did not allege a necessary factual element of the crime charged"); *People v. Tucker*, 631 P.2d 162, 164 (Colo. 1981) (indictment must answer

factual questions of "who, what, where, and how"); *People v. Donachy*, 586 P.2d 14, 17 (Colo. 1978) (indictment must allege facts demonstrating the defendant's conduct was unlawful). In resolving a motion to dismiss criminal charges, the Court must accept the People's offer of proof in the light most favorable to the People. *People v. Luttrell*, 636 P.2d 712, 714 (Colo. 1981) ("The evidence presented must be viewed in the light most favorable to the prosecution.")

However, where, as here, the application of a criminal statute to a defendant's conduct implicates the defendant's rights under the First Amendment to the Constitution of the United States, the government bears the burden of proving that its restrictions on the defendant's fundamental liberty interests comports with the applicable First Amendment standards. *Rickstrew v. People*, 822 P.2d 505, 507 n.3 (Colo. 1991). Because the DCSD Board has been the center of significant public attention, discussion, and public interest, especially with respect to its policies concerning vouchers and its ongoing litigation with the ACLU of Colorado, Mr. Malone's videotaping of DCSD Board meetings, in pursuit of his producing a documentary on this controversy, lies at the heart of First Amendment-protected activity.

Lastly, given the chilling effect that occurs from having to stand trial for exercising one's constitutionally protected rights, even if ultimately acquitted, it is appropriate for the Court to determine, in advance of trial, whether the application of the criminal statute to Mr. Malone's conduct in this case comports with the First Amendment. *See, e.g.*, *United States v. P.H.E., Inc.*, 965 F.2d 848, 849-50 (10th Cir. 1982) ("The First Amendment bars a criminal prosecution where the proceeding is motivated by the improper purpose of interfering with the defendant's constitutionally protected speech."); *id.* at 855-56 (reversing lower court's refusal to dismiss an indictment charging violations of a federal obscenity law and finding there is a "right not to be tried" where there is a chill to the exercise of First Amendment rights (citing *Fort Wayne Books v. Indiana*, 489 U.S. 46, 54-55 (1989) (Court has jurisdiction to consider First Amendment

challenge to state's criminal racketeering statute even though no final judgment had been rendered in state criminal prosecution); *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (bad faith prosecution brought to squelch right of free expression may itself constitute injury to First Amendment rights))).

SUMMARY OF MATERIAL RELEVANT FACTS

1. Mr. Malone is a documentary filmmaker, engaged in gathering information about matters of public interest and concern for the purpose of disseminating that information to the general public.

2. For several months, beginning June 5, 2012, Mr. Malone was permitted to stand, and to place his camera, in a position between the front of the board room, between the School Board members and the speaker's podium, so that Mr. Malone could videotape both the School Board members and the speakers addressing the School Board while they stood at the podium. Not only had Mr. Malone been so permitted, Cinamon Watson, the District Communications Officer, directed Mr. Malone on a previous occasion to videotape from that location. *See* Ex. DCSD071812 01 found at http://malonetv.com/ftp/dfkjhd34907/ .
(Video tape taken July 18, 2012, by Mr. Malone from the forward position).

3. At no time prior to August 7, 2012, did anyone express any concerns to Mr. Malone that his position at that location of the School Board meeting room posed any risks or dangers to any members of the public or members of the Board of Education, nor did anyone mention or suggest to Mr. Malone that his positioning himself toward the front of the School Board meeting room posed any type of interference with the conduct of any DCSD public meeting.

4. At the outset of the DCSD Board meeting on August 7, 2012, DCSD security officer Mark Knapp informed Mr. Malone, and two other videographers (a representative of the

teachers' union and a retired District employee) that for purposes of that evening's meeting, the photographers would be required to place their cameras in a restricted area (hereinafter "free speech zone") – demarcated by masking tape on the floor on the right side of the Board meeting room, *to the rear of* the speaker's podium.

5. Mr. Malone inquired, quietly (in whispered tones), of DCSD security Officer Mark Knapp what was the basis for this new restriction. Knapp stated only "security reasons," but refused to provide any further elaboration or explanation for the restrictions on Mr. Malone's newsgathering activities. *See* Ex. DCSD080712 01 found at http://malonetv.com/ftp/dfkjhd34907/ (video recording of this interaction).

6. Mr. Malone quietly expressed his dissatisfaction with the newly-imposed restrictions. Mr. Malone stated, quietly and calmly, and without causing any disruption to the meeting, that the "free speech zone" prohibited him from recording the faces of speakers addressing the DCSD Board while they stood at the podium, as he had been permitted to do throughout the summer. Mr. Malone also expressed dissatisfaction about his inability to adequately record the audio portion of the meeting from within the "free speech zone." *See id.*

7. When the DCSD Board meeting began, Mr. Malone complied with DCSD's restrictions by placing his tripod within the "free speech zone."

8. After 55 minutes, Mr. Malone decided to move his tripod to the location he had previously been permitted to record DCSD meetings, in front of the speaker's podium. *See id.*

9. Mr. Malone conducted videotaping of the School Board's meeting from the forward position (from which he had previously recorded School Board meetings without incident) for 2 minutes and eighteen seconds without causing any disruption whatsoever to the School Board meeting. *See id.* at 2:18.

10. After approximately two minutes of such uneventful videotaping by Mr. Malone, two security officers approached him and began a conversation with him, in which they quietly demanded that he return his camera to the "free speech zone." Mr. Malone quietly (in whispered tones) responded that he would not abide by the officers' command, and respectfully disagreed that the DCSD's restrictions on his newsgathering activities were lawful. *See* http://malonetv.com/ftp/dfkjhd34907/DCSD080712%2003.wmv at 1:55. During their conversation, in hushed tones, the School Board meeting continued, uninterrupted. *See id.* During this time, the activities of the School Board clearly demonstrated that no disruption occurred; they concluded one agenda item and transitioned to two new items without acknowledgement of any disturbance. The meeting proceeded in its planned fashion.

11. After four minutes with the officers standing between the audience and the Board members, School Board Superintendent Elizabeth Fagan suggested that the School Board would take a brief recess. *See id.* at 4:00.

12. Shortly thereafter, officers from the Castle Rock Police Department placed Mr. Malone under arrest, without his offering any resistance, and charged him with violation of § 18-9-108, C.R.S.

ARGUMENT

As set forth below, application of § 18-9-108, C.R.S., to Mr. Malone's activities on August 7, 2012 violates his rights guaranteed under the First Amendment to the Constitution of the United States and under article II, section 10 of the Colorado Constitution. However, this Court is required to resolve this motion, if possible, on statutory and/or common law grounds, without reaching the constitutional question. *People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985) ("Axiomatic to the exercise of judicial authority is the principle that a court should not decide a constitutional issue unless and until such issue is actually raised by a party to the

controversy and the necessity for such decision is clear and inescapable."); *Bartley v. People*, 817 P.2d 1029, 1033 n.5 (Colo. 1991) (court must strive to avoid addressing constitutional issues unnecessarily, and should only resolve constitutional questions if other grounds for resolving the motion do not exist); *see also People v. Thompson*, 181 P.3d 1143, 1145 (Colo. 2008) (same). Accordingly, this motion will first address the People's inability to prove the statutory elements of the criminal charge against Mr. Malone; thereafter, the constitutional challenge to the application of the criminal statute to Mr. Malone's newsgathering conduct will be presented.

I. NEITHER MR. MALONE'S INTENT NOR HIS CONDUCT CAN BE FOUND, BEYOND A REASONABLE DOUBT, TO SATISFY THE NECESSARY ELEMENTS OF THE CHARGED OFFENSE

Section 18-9-108, C.R.S. requires proof of two elements: 1) that the Defendant intends to prevent or disrupt any lawful meeting, procession, or gathering, and 2) that he significantly obstructs or interferes with the meeting, procession, or gathering by physical action, verbal utterance, or any other means. Mr. Malone did neither. No evidence exists to argue to the contrary. Accordingly, even taking the evidence in the light most favorable to the People, the Prosecution cannot make a *prima facie* case of the offense charged.

A. LACK OF EVIDENCE OF MR. MALONE'S INTENT TO DISRUPT THE MEETING

The facts adduced in discovery, even if conceded outright by the defense, establish that Mr. Malone attended the School Board meeting for purposes of his profession: producing a documentary as a filmmaker. He intended to quietly film the meeting without drawing attention to himself in any fashion, in the same manner he had on several prior occasions. Officers note in their reports that they know Mr. Malone from the previous School Board Meeting he attended and filmed without incident. Mr. Malone clearly intended to film the August 7 meeting in the same fashion as he had before, which had resulted in no disruption to the meetings.

Officers write that Mr. Malone expressed disagreement when they requested that he remain inside an area designated for media (The "Free Speech Zone"). Mr. Malone's characterized "disagreement" and "opposition" was limited to his explaining to the officers, quietly and politely, that he had been allowed to film the meetings on prior occasions without limitations and that from the Free Speech Zone he could not see the faces of the presenters, nor did he have access to the audio outlet. He quietly asked the officers questions about what he perceived as unfair restrictions and expressed concerns about the violation of his constitutional rights. At all times his comments were quietly directed to the officers for the purpose of resolving the issue in order for him to proceed, and without any evidenced intent to disrupt the meeting. The Officers seemingly rely on the fact that unknown persons looked toward them during their contact with Mr. Malone, and that at some point, the Board broke for a recess. Officer contact with Mr. Malone lasted a matter of minutes and Mr. Malone cooperated with their request for him to pack up his camera and exit the building. In short, based on the undisputed evidence (as captured on videotape), no facts exist to support the contention that Mr. Malone intended to disrupt the meeting.

B. LACK OF EVIDENCE OF SIGNFICANT ACTUAL DISRUPTION RESULTING FROM MR. MALONE'S CONDUCT

In *Dempsey v. People*, 117 P.3d 800 (Colo. 2005), the Colorado Supreme Court narrowly restricted the statute so that it would address only conduct, not protected speech; not only must the defendant intend that his conduct interfere with the orderly conduct of the meeting, there must be sufficient evidence (to meet the "beyond a reasonable doubt" standard) that his conduct – not that of the police officers responding to it—"significantly disrupted" the meeting or assembly. And "significant" is defined as "conduct that effectively impaired, interfered with or obstructed the due conduct of the meeting in a *consequential, significant* or *considerable*

manner." 117 P.3d at 806 n.11 (emphasis added). None of Mr. Malone's physical actions and/or verbal utterances caused any significant disruption to rise to the level of a criminal offense. Expressing disagreement with, and inquiring of police or security officers, concerning the parameters of, and basis for, governmental restrictions on constitutionally conduct is not a crime. The undisputed evidence demonstrates that Mr. Malone quietly stated his position to the officers and when they did not relent, he complied with their orders. No *significant* disruption or interference to the conduct f the DCSD Board meeting, as required by the statute, resulted from Mr. Malone's conduct. Not only did the contact with the officers last for only a few minutes, but any alleged minimal attention drawn to Mr. Malone's conversation with the officers resulted from *their* contact with him. Any minimal (not significant) disruption was not independently caused by Mr. Malone's conduct. Prior to the officers contacting and detaining Mr. Malone, no actions on his part caused any interference with the meeting whatsoever and none are alleged. His actions were limited to his quietly filming the meeting just as he had done in the past, without incident. He made verbal utterances only to the officers, not to the meeting participants or audience members, and did so only in response to their requests of him. Thus, under the undisputed evidence, Mr. Malone's conduct (as opposed to that of the police officers) caused no disruption.

But even if there *were* sufficient evidence to establish, beyond a reasonable doubt, that Mr. Malone's *conduct* satisfied both prongs of the statute as limited by *Dempsey* (which there is not), that would be only half of the People's burden; by so limiting the statute's reach the Colorado Supreme Court declared that the "disrupting a lawful assembly" criminal statute would only apply to the defendant's *conduct*, not his speech. Here, however, the defendant's *conduct*, is itself subject to constitutional protection, requiring that the statute satisfy the "time, place, or manner" test in its application to Mr. Malone.

II. MR. MALONE'S *CONDUCT* IS PROTECTED BY THE FIRST AMENDMENT AND ARTICLE II, SECTION 10 OF THE COLORADO CONSTITUTION

As a documentary filmmaker, when he is conducting newsgathering activities by videotaping the official meeting of the DCSB, Mr. Malone is engaged in constitutionally protected conduct. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[w]e do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."); *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) ("News gathering is an activity protected by the First Amendment.").[1]

As a separate matter, the charge resulting from Mr. Malone's filming of government activity raises further questions about the use of a criminal charge to chill his exercise of protected speech activity. In a recent Statement of Interest filed in *Garcia v. Montgomery County, Maryland* (*See attached, Statement of Interest of the United States, Garcia v. Montgomery County, Maryland*, No. 8:12-cv-03592-JFM, U.S. Dist. Maryland, March 2013), the United

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[1] Indeed, if news could not be gathered, the constitutional right to publish would be "impermissibly compromised" as the right to newsgathering is a necessary "corollary of the right to publish." *Id.* at 667, 727-28 (Stewart, J., dissenting).

The Supreme Court has further recognized that it is "[b]eyond question, [that] the role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business." *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978). Indeed, **"terms of access that are reasonably imposed on individual members of the public may, if they *impede effective reporting without sufficient justification*, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see."** *Id.* at 17 (Stewart, J., concurring) (emphasis added). *See also Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) ("routine" reporting techniques are protected); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (the press has been a "mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences"), *abrogated on other grounds by Mu'Min v. Virginia*, 500 U.S. 415 (1991).

States Department of Justice addressed the issue of discretionary charges resulting from an individual videotaping police activity. Recognizing that the protection offered by the First Amendment is not diminished when that speech is communicated through a camera lens or recording device, (*See Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cr. 2012) ("Audio and audiovisual recording are media of expression...included within the free speech and free press guaranty of the First and Fourteenth Amendments.") (citation omitted), the Department of Justice urges courts to view discretionary charges brought against individuals engaged in protected speech with considerable skepticism. Discretionary charges may not be used to chill protected speech activity. (*Id.*)

In this case, Mr. Malone was filming an official School Board meeting. Police charged him with a criminal offense for setting up his camera in a location they did not approve. As it is evident that no evidence exists to support a criminal charge, the charge directly resulted as a consequence of Mr. Malone engaging in protected speech activity.

Of course, any governmental restrictions on such constitutionally protected *conduct* must meet appropriate tests under the First Amendment and article II, section 10 of the Colorado Constitution. *See, e.g., Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1220, 1221 (10th Cir. 2007) ("[T]he ***burden falls on the City*** to show that its 'recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way.'" (emphasis added) (citation omitted)); *Rickstrew*, 822 P.2d at 507 n.3 ("The burden of establishing constitutionality is on the government in cases involving strict and intermediate scrutiny . . . when First Amendment values are implicated."); *see also United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816-17 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [It bears] the burden of identifying [the] interest and justifying the challenged restriction" (citations omitted)); *Doe v. City of*

Albuquerque, 667 F.3d 1111, 1131 (10th Cir. 2012) ("[W]hen a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality." (quotation omitted)); *Denver Publ'g Co. v. City of Aurora*, 896 P.2d 306, 319 (Colo. 1995) (once there is evidence the "Ordinance affected speech, the burden shift[s] to the City to show that the Ordinance withst[ands] application of the appropriate constitutional test.").

III. IN ORDER TO SATISFY THE FIRST AMENDMENT AND ARTICLE II, SECTION 10, THE APPLICATION OF § 18-9-108, C.R.S., MUST SATISFY THE TEST FOR "TIME, PLACE, MANNER" RESTRICTIONS

In order to satisfy the First Amendment and article II, section 10 of the Colorado Constitution, the application of § 18-9-108, C.R.S., must satisfy the test for "time, place, manner" restrictions on protected activity. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Dempsey*, 117 P.3d 800. A constitutionally permissible time, place, or manner restriction must (1) be content neutral;[1] (2) be narrowly tailored to advancing a significant public interest; and (3) leave open ample alternative channels of communicating with the intended audience. *Ward*, 491 U.S. at 791; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

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[1] Here, there are legitimate questions to be raised, should this case proceed to trial, whether the imposition of the "free speech zone" by DCSD was, in fact, *not* content neutral. The evidence will show that Mr. Malone and the other two videographers relegated to the "free speech zone" were known by DCSD to espouse viewpoints critical of the School Board's public policies and its conduct of the public meetings. Thus, Mr. Malone intends to demonstrate that the "free speech zone" was imposed, at least in part, on the basis of the content of the speakers' speech, and their identity. *Black v. Arthur*, 18 F. Supp. 2d 1127, 1135 (D. Or. 1998) ("[A] regulation that restricts the First Amendment freedoms of a specific group is subject to the more demanding standard of 'strict scrutiny' if the government has targeted the group because of its message ***or the identity of the speakers***" (emphasis added)), *aff'd on other grounds*, 201 F.3d 1120 (9th Cir. 2000); *cf. XXL of Ohio, Inc. v. City of Broadview Heights*, 341 F. Supp. 2d 765, 781 (N.D. Ohio 2004) ("Also, a regulation which imposes restrictions based upon the identity of the speaker imposes content-based restrictions.").

IV. AS APPLIED TO MR. MALONE'S CONDUCT AT THE DCSD BOARD MEETING ON AUGUST 7, 2012, THE APPLICATION OF § 18-9-108, C.R.S., IS UNCONSTITUTIONAL

As demonstrated further above, DCSD's imposition of a "free speech zone" within which Mr. Malone and other videographers would be permitted to videotape the School Board meeting of August 7, 2012 was an arbitrary and capricious restriction on his constitutionally-protected newsgathering activity. The "free speech zone" was set up without any prior notice to the public or the press and no opportunity to be heard on the legitimacy or overbreadth of the governmental restriction. When Mr. Malone questioned DCSD security officer Knapp about the restriction, he was told only that it involved "a security issue,"[1] without any further explanation of why he would not be permitted to videotape the faces of speakers addressing the DCSD from the podium, as he had been permitted to do all summer.

A. DCSD'S RESTRICTIONS ON MR. MALONE'S ACTIVITIES DID NOT ADVANCE A SIGNIFICANT GOVERNMENTAL INTEREST

The DCSD claims that the restrictions imposed upon videotaping at the August 7, 2012 Board meeting were put in place to promote the state interests in avoiding disruption of the meetings and in maintaining security. As noted above, Mr. Malone had previously attended at least three School Board meetings at which he was able to videotape the proceedings from the position at which he stood when arrested, and that he *had done so without any disruption of the meeting* and without posing any legitimate security concerns for the Board or audience members.

Furthermore, on the date in question, August 7, 2012, when Mr. Malone moved his camera position from within the "free speech zone" to the position at which he had previously been permitted to videotape, the meeting went on without incident for more than two minutes

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[1] "Security is not a talisman that the government may invoke to justify ***any*** burden on speech (no matter how oppressive)." *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004).

prior to the arrival of the two security officers which caused the "disruption" alleged by the People. In other words, it is undisputed that had *the officers* not "made a scene," Mr. Malone's positioning himself outside the free speech zone (as he had been permitted to do all summer long, without incident or disruption of any prior meeting) would not have caused any disruption to the public meeting. *See, e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111, 117 (1969) (Black, J., concurring) (disorderly conduct conviction cannot stand when defendant acted in an orderly manner but surrounding crowd became hostile); *Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502, 509-10 (5th Cir. 1981) ("[I]t is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others . . . . The existence of a hostile audience, standing alone, has never been sufficient to sustain a . . . punishment for the exercise of First Amendment rights"); *see also Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (state cannot punish Vietnam protestors because of the "resentment" or conduct of onlookers). Not only does this evidence negate a necessary element of the People's case, *see Dempsey*, 117 P.3d at 811 (the *defendant's own conduct* must actually produce a disruption of the meeting), it also demonstrates that the purported governmental interests asserted in support of its restriction on Mr. Malone's constitutionally-protected speech is not, in fact, a *significant* one. *See, e.g.*, *Doe v. Prosecutor, Marion Cnty., Ind.*, --- F.3d ---, 2013 WL 238735, at *6 (7th Cir. Jan. 23, 2013) ("The state 'must do more than simply posit the existence of the disease sought to be cured' and 'the regulation [must] in fact alleviate these harms in a direct and material way.'" (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (government "must demonstrate that the recited harms are real, not merely conjectural"))); *Doe v. City of Albuquerque*, 667 F.3d at 1131 (same).

B. THE GOVERNMENTAL RESTRICTION ON MR. MALONE'S CONSTITUTIONALLY PROTECTED SPEECH IS NOT NARROWLY TAILORED TO FURTHER ANY SIGNIFICANT GOVERNMENTAL INTEREST

Even accepting, *arguendo*, that avoidance of disruption of the meetings and unspecified security concerns are, in the abstract, "significant" governmental interests, the "free speech zone" imposed by DCSD on August 7, 2012 was not narrowly tailored to promote those interests.

"Narrow tailoring means that the government's speech restriction must signify a careful calculation of the costs and benefits associated with the burden on speech imposed by its prohibition." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1238 (10th Cir. 1999) (citation and internal quotation marks omitted). In determining the reasonableness of the "fit" between the Defendants' restrictions and the burdened speech, the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. The "essence of narrow tailoring" is that the government restriction must "focus[] on the source of the evils the [government] seeks to eliminate . . . and eliminate[] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Id.* at 800 n.7.

Furthermore, "narrow tailoring" requires the government to demonstrate more than the importance of its asserted interests in the abstract; it must be shown that the proposed restrictions will in fact advance those interests. *See Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (holding that the "fit" between a government regulation and the government's asserted interest is not sufficiently "direct" when "[t]he city has provided no evidence other than conjecture to support its argument").

By way of example, had DCSD placed the "free speech zone" at the very back of the room or outside the room altogether, thereby significantly interfering with the ability of news

photographers to cover the proceedings of the DCSD School Board, there would be no question that the restrictions were not narrowly tailored. Here, the evidence is undisputed that while positioned within the "free speech zone" Mr. Malone was unable to record the faces, mouths, or any coherent audio of the individuals who addressed the School Board from the podium. Mr. Malone was only able to videotape the backs of people's heads while they stood at the podium addressing the School Board; thus, Mr. Malone and others within the free speech zone were prohibited from capturing 50% of a two-way conversation between members of the public and the School Board. Such a drastic curtailment of Mr. Malone's abilities to adequately cover a legitimate matter of public concern – the interactions between a public school board of education and the constituents it serves – is not "narrowly tailored" to further any governmental interest asserted.

Moreover, when considering whether the government has met its burden of demonstrating that its restrictions on newsgathering are sufficiently "narrowly tailored" to pass constitutional muster, the Court must consider whether there are obvious and substantially less restrictive means available to accomplish the same ends. *See U.S. West, Inc.*, 182 F.3d at 1238 & n. 11 ("[T]he existence of an obvious and substantially less restrictive means for advancing the desired government objective ***indicates a lack of narrow tailoring***." (emphasis added)). Allowing Mr. Malone to videotape the meeting from the "forward position" where he had previously been permitted to stand, without incident, is on "obvious and substantially less restrictive means" that demonstrates the lack of narrow tailoring.

Lastly, it is well established that in reviewing governmental restrictions on fundamental liberty interests such as protected newsgathering, the Court must not give deference to the executive branch's balancing of competing interests. Administrative agency determinations are not subject to deference when those positions involve "constitutional facts," which federal courts

are required to review *de novo*. *See, e.g., Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410 (5th Cir. 1999) (holding that "we do not give [an administrative agency's] actions the usual deference when reviewing a potential violation of a constitutional right."); *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) ("Independent judicial judgment is especially appropriate in the First Amendment area. Judicial deference to agency fact-finding and decision-making is generally premised on the existence of agency expertise in a particular specialized or technical area. But in general, courts, not agencies, are expert on the First Amendment."); *Local 32B-32J, Serv. Employees Int'l Union v. Port Auth.*, 3 F. Supp. 2d 413, 421 (S.D.N.Y. 1998) ("Absent extraordinary circumstances, however, courts may not defer to administrative judgments that implicate First Amendment rights." (citation omitted)).[1]

Here, the Court can and must determine, independently of any argument or claim presented by the DCSD Board, that the restrictions imposed by DCSD on Mr. Mr. Malone and other journalists interested in documenting the official conduct of the School Board on August 7, 2012, were not "narrowly tailored" to further any "substantial" or "significant" governmental

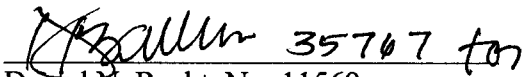
[1] Indeed, there is now a well-developed body of case law in which federal courts have disagreed with the "expert" assessments of executive branch agencies in determining what is the appropriate scope of a "secure perimeter" needed to maintain safety without trammeling the rights of citizens wishing to exercise free speech rights. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (holding that a 75-yard security zone burdened "substantially more speech than is necessary to further the government's legitimate interests"); *Serv. Emp. Int'l Union v. City of L.A.*, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000) (invalidating "security zone" at the Democratic National Convention that kept demonstrators 260 yards away from delegates entering and leaving the convention site); *United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999) (holding that a perimeter keeping demonstrators 150-175 yards away from their intended audience failed the test of narrow tailoring); *Lederman v. United States*, 291 F.3d 36, 42-44 (D.C. Cir. 2002) (rejecting government's claim that 250-foot "no demonstration zone" near the Capitol Building was narrowly tailored to the government's interest in promoting safety and orderly flow of traffic); *Weinberg v. City of Chicago*, 310 F.3d 1029 1040-42 (7th Cir. 2002) (striking down an ordinance banning peddling within 1,000 feet of a sports arena because it burdened substantially more speech than necessary).

interest. Indeed, at its base, the restriction on the location of filming permitted at the public meeting in question was arbitrary and capricious.

WHEREFORE, for the reasons stated herein, Mr. Malone respectfully moves for dismissal of the charge in this case. In the alternative, Mr. Malone requests a hearing on this matter.

Respectfully submitted,

RECHT KORNFELD, P.C.



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and

LEVINE SULLIVAN KOCH & SCHULZ, LLP
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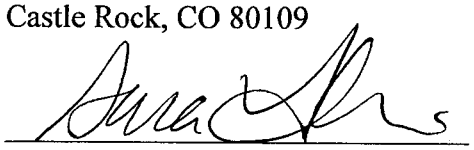
In Cooperation with the ACLU of Colorado

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2013, a true and correct copy of the foregoing **MOTION TO DISMISS DUE TO LACK OF EVIDENCE AND IN THE ALTERNATIVE MOTION TO DISMISS BASED ON UNCONSTUTIONAL APPLICATION OF C.R.S. § 18-9-108 TO MR. MALONE IN VIOLATION OF HIS FIRST AMENDMENT RIGHTS TO PROTECTED SPEECH** was mailed, postage pre-paid, addressed to the following.

Office of the District Attorney
Douglas County Office
4000 Justice Way, Ste. 2525A
Castle Rock, CO 80109



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MANNIE GARCIA, Plaintiff, v. MONTGOMERY COUNTY, MARYLAND, *et al.*, Defendants.	)	Civil No. 8:12-cv-03592-JFM

STATEMENT OF INTEREST OF THE UNITED STATES

The United States addressed the central questions raised in this case – whether individuals have a First Amendment right to record police officers in the public discharge of their duties, and whether officers violate individuals' Fourth and Fourteenth Amendment rights when they seize such recordings without a warrant or due process – in a Statement of Interest filed in *Sharp v. Baltimore City Police Dept., et al.*, No. 1:11-cv-02888 (D. Md.), attached here as Exhibit A.[1] Here, as there, the United States urges the Court to answer both of those questions in the affirmative.

This case raises questions that the United States did not address directly in *Sharp*, the answers to which are critical to ensuring that the constitutional rights at issue in that case are upheld. First, the United States urges the Court to find that both the First and Fourth Amendments protect an individual who peacefully photographs police activity on a public street, if officers arrest the individual and seize the camera of that individual for that activity. Second, the United States is concerned that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment

[1] Statement of Interest of the United States, *Sharp v. Baltimore City Police Dept., et al.*, No. 1:11-cv-02888 (D. Md. Jan. 10, 2012), ECF No. 24.

rights. The United States believes that courts should view such charges skeptically to ensure that individuals' First Amendment rights are protected. Core First Amendment conduct, such as recording a police officer performing duties on a public street, cannot be the sole basis for such charges. Third, the First Amendment right to record police officers performing public duties extends to both the public and members of the media, and the Court should not make a distinction between the public's and the media's rights to record here. The derogation of these rights erodes public confidence in our police departments, decreases the accountability of our governmental officers, and conflicts with the liberties that the Constitution was designed to uphold.

The United States is charged with enforcing three federal civil rights statutes that prohibit state and local law enforcement agencies from engaging in conduct that deprives persons of their rights under the Constitution and laws of the United States. One of the provisions that the United States enforces is the police misconduct provision of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, which authorizes the Attorney General to file lawsuits seeking court orders to reform police departments engaging in a pattern or practice of violating individuals' federal rights. The United States also enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964. Together, these two provisions prohibit discrimination on the basis of race, color, sex, or national origin by police departments receiving federal funds. Because of these enforcement responsibilities, the United States has a strong interest in ensuring that individuals' constitutional rights are protected when they observe and document police carrying out their duties in a public setting. Accordingly, the United States files this Statement of Interest pursuant to 28 U.S.C. § 517.

FACTUAL AND PROCEDURAL BACKGROUND

According to the Complaint, on June 6, 2011, Mr. Garcia observed Montgomery County Police Department ("MCPD") officers arresting two men and became concerned that the actions of the officers were inappropriate and might involve excessive force.[2] Compl. at 4-5, ECF No. 1. He was on a public street when he observed the arrest. *Id.* As a journalist, Mr. Garcia took out his camera and began photographing the incident, initially from at least 30 feet away, and then from nearly 100 feet away after an officer flashed him with a spotlight. *Id.* at 5. He did not interfere with the police activity. *Id.* Other than clearly and audibly identifying himself as a member of the press, Mr. Garcia did not speak to the officers. *Id.*

One of the officers was visibly upset that Mr. Garcia was recording and shouted that Mr. Garcia was under arrest. *Id.* The officer placed Mr. Garcia in a choke hold and dragged him to the police cruiser. *Id.* The officer placed Mr. Garcia in handcuffs, seized his camera, and threw Mr. Garcia to the ground, injuring him. *Id.* at 5-6. Mr. Garcia did not resist his arrest. *Id.* at 6. While in the police car, Mr. Garcia observed the officer remove the battery and video card from his camera. *Id.* Mr. Garcia was charged with disorderly conduct. *Id.* at 7. Although his possessions were returned to him when he was released, his video card was never returned. *Id.* Following a bench trial in December 2011, Mr. Garcia was acquitted of the disorderly conduct charge. *Id.* at 8.

On December 7, 2012, Mr. Garcia filed a Complaint against Montgomery County, the Chief of MCPD, an MCPD Lieutenant, and three MCPD officers alleging violations of state law and rights protected by the First and Fourth Amendments to the Constitution. On February 1, 2013, the official

[2] The United States assumes the facts presented in the Plaintiff's Complaint are true for the purposes of this Statement of Interest. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

capacity defendants ("Defendants") filed a Motion to Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure.

ARGUMENT

The First, Fourth, and Fourteenth Amendments protect Mr. Garcia from the actions taken by MCPD officers in response to Mr. Garcia's recording of their actions, at least on the facts alleged in the Complaint. As the United States argued in *Sharp*, recording police officers in the public discharge of their duties is protected First Amendment activity, and officers violate individuals' Fourth and Fourteenth Amendment rights when they seize such recordings without a warrant or due process, except in exigent circumstances not present here.

Because recording police officers in the public discharge of their duties is protected speech, when a person is arrested for recording police officers in a public place, both the First and Fourth Amendments are implicated. Arrests involving such activity should receive the highest level of scrutiny, particularly if the charges involved are highly discretionary, such as disorderly conduct or loitering. And the protections afforded by the First and Fourth Amendments in this context extend not only to members of the press, but also to the general public. Because Defendants' Motion to Dismiss does not adequately recognize these constitutional protections, the Motion to Dismiss should be denied.[3]

I. The First Amendment Protects Photographing Police Activity That Occurs in Public

It is now settled law that the First Amendment protects individuals who photograph or otherwise record officers engaging in police activity in a public place. Here, Mr. Garcia alleges that he was

[3] The Defendants make numerous arguments in their Motion to Dismiss, many of which do not implicate the United States' interests. In this Statement of Interest, the United States addresses only those arguments that pertain to its enforcement responsibilities under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, the Omnibus Crime Control and Safe Streets Act of 1968, and Title VI of the Civil Rights Act of 1964.

peacefully photographing what he perceived to be police officers using excessive force on a public street. If true, and we must assume that it is for the purposes of a motion to dismiss, this conduct is unquestionably protected by the First Amendment. Both the location of Mr. Garcia's photography, a public street, and the content of his photography, speech alleging government misconduct, lie at the center of the First Amendment. By forcibly arresting Mr. Garcia and seizing his camera, Defendants stopped Mr. Garcia from photographing a matter of public interest and prevented him from distributing those photographs to the public. Yet, Defendants argue that the First Amendment does not protect individuals from such police action and the only "real alleged Constitutional violation" lies under the Fourth Amendment.[4] Defendants further allege that the officer's "alleged seizure of the memory card is not a First Amendment violation." *Id.* These arguments underestimate the breadth of the First Amendment's protections.

A. The First Amendment Is Implicated When a Person Is Arrested for Recording Public Police Activity

Contrary to Defendants' assertions, the First Amendment is implicated when police arrest and seize the camera of a person recording police activity in a public place. As alleged in the Complaint, Mr. Garcia recorded officers in a public place. He photographed officers engaged in their duties on a public street, "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Public streets "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citation omitted); *accord Warren v. Fairfax Cnty.*, 196 F.3d 186, 191 (4th Cir. 1999) ("[A] court can generally

[4] *See* Defendants' Amended Motion to Dismiss/Partially Dismiss Counts I, II, III, IV, V, VI and VII of Plaintiff's Complaint and For Other Relief (hereinafter "Def.'s Mot. Dismiss"), ECF No. 11 at 21.

treat a street, sidewalk, or park as a traditional public forum without making a 'particularized inquiry.'"). Accordingly, "members of the public retain strong free speech rights when they venture into public streets and parks," and "government entities are strictly limited in their ability to regulate private speech in such traditional public fora."[5] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (citation omitted).

The First Amendment is implicated by Mr. Garcia's arrest not only because of where Mr. Garcia was recording, but also because of the nature of the speech he was engaged in. The type of speech at issue here – alleged government misconduct – "has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."). The protection offered by the First Amendment is not diminished when that speech is communicated through a camera lens or recording device. *See Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cr. 2012) ("Audio and audiovisual recording are media of expression . . . included within the free speech and free press guaranty of the First and Fourteenth Amendments.") (citation omitted); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (recognizing First Amendment right to "videotape police carrying out their duties."); *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a First Amendment right to record police conduct); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (same). While the right to record police activity is generally subject to reasonable time, manner, and place restraints, *see, e.g., Kelly v. Borough*

[5] This statement does not address First Amendment rights in non-public and limited public forums. *See Am. Civil Liberties Union v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005) ("[A] non-public forum is one that has not traditionally been open to the public, where opening it to expressive conduct would somehow interfere with the objective use and purpose to which the property has been dedicated.") (citation omitted); *id.* (A limited public forum "is one that is not traditionally public, but the government has purposefully opened to the public, or some segment of the public, for expressive activity.").

of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010), the conduct that Mr. Garcia engaged in – "peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties," is conduct "not reasonably subject to limitation." *Glik*, 655 F.3d at 84.

Accordingly, Defendants' position that the officers' arrest of Mr. Garcia and seizure of his camera only implicates the Fourth Amendment is untenable. The reach of the First Amendment's protection extends beyond the right to gather information critical of public officials – it also prohibits government officials from "punish[ing] the dissemination of information relating to alleged governmental misconduct." *Gentile*, 501 *U.S.* at 1034-35 (Kennedy, J.). When police officers seize materials in order to suppress the distribution of information critical of their actions, "the seizure clearly contravene[s] the most elemental tenets of First Amendment law." *Rossignol v. Voorhaar*, 316 F.3d 516, 521 (4th Cir. 2003) (deputies violated First Amendment by suppressing distribution of newspaper critical of Sheriff's department). For decades, the Supreme Court has recognized that government action intended to prevent the dissemination of information critical of public officials, including police officers, constitutes an invalid prior restraint on the exercise of First Amendment rights. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931) (finding that statute prohibiting the publication of articles critical of law enforcement officers was an unlawful prior restraint on First Amendment rights); *Rossignol*, 316 F.3d at 522 (By "intentionally suppress[ing] the dissemination of plaintiffs' political ideas on the basis of their viewpoint . . . before the critical commentary ever reached the eyes of readers," Defendants' "conduct met the classic definition of a prior restraint."). That MCPD officers seized a camera and video card and not a publication does not diminish the significance of the First Amendment violation. "Seizure of [a] camera and film is at least as effective a prior restraint—if not more so—as . . . an injunction against publication." *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 637 (D. Minn. 1972);

see also Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) ("[T]o the extent that the troopers were restraining Robinson from making any future videotapes and from publicizing or publishing what he had filmed, the defendants' conduct clearly amounted to an unlawful prior restraint upon his protected speech."). For these reasons, Mr. Garcia's claims under the First Amendment should not be dismissed.

B. Mr. Garcia May Bring Claims Under Both the First and Fourth Amendments

To the extent that Defendants argue that Mr. Garcia must choose between two applicable constitutional provisions, this position is inaccurate. The Supreme Court "has never held that one specific constitutional clause gives way to another equally specific clause when their domains overlap." *Presley v. City of Charlottesville*, 464 F.3d 480, 485 (4th Cir. 2006); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another."). Where a "wrong[] affect[s] more than a single right," courts are not charged with "identifying . . . the claim's 'dominant' character," but instead "must examine each constitutional provision in turn." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 70 (1992). Because the facts alleged in Mr. Garcia's Complaint involve potential violations of both the First and Fourth Amendments, he may bring claims under both, and he need not choose between the protections afforded by them.

II. Discretionary Charges May Not Be Used To Chill Protected Speech Activity

Because recording public police activity is protected by the First Amendment, courts have viewed and should view discretionary charges brought against individuals engaged in protected speech with considerable skepticism. Several cases that have arisen recently regarding the recording of public police activity have involved discretionary charges such as disorderly conduct, loitering, disturbing the

peace, and resisting arrest, being brought against the person engaged in the recording. *See, e.g., Glik*, 655 F.3d at 80 ("[T]he Boston Municipal Court disposed of the remaining two charges for disturbance of the peace and violation of the wiretap statute. With regard to the former, the court noted that the fact that the 'officers were unhappy they were being recorded during an arrest . . . does not make a lawful exercise of a First Amendment right a crime.'"); *Datz v. Milton*, No. 2:12-cv-01770 (E.D.N.Y.) (Plaintiff was charged with obstructing government administration); *Montgomery v. City of Philadelphia*, No. 2:2013-cv-00256 (E.D. Pa.) (Plaintiff was charged with disorderly conduct); *see also* Justin Fenton, *In Federal Hill, Citizens Allowed to Record Police – But Then There's Loitering*, The Baltimore Sun, Feb. 11, 2012 (officer instructing a citizen-recorder that he would face loitering charges if he failed to move away from the scene of an arrest). Use of such charges against individuals recording public police activity chills protected First Amendment speech.

Here, the Complaint alleges that Mr. Garcia was arrested for disorderly conduct solely because he photographed what he believed to be officers engaging in excessive force. If true, this arrest violates both the First and Fourth Amendments. Courts have routinely rejected officers' attempts to criminalize protected speech through the use of charges that rely heavily on the discretion of the arresting officer on both First and Fourth Amendment grounds. *See Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (reversing disorderly conduct conviction where petitioner "nonprovocatively voic[ed] his objection to what he obviously felt was a highly questionable detention by a police officer"); *Swartz v. Insogna*, 704 F.3d 105, 110-11 (2d Cir. 2013) (no probable cause for disorderly conduct arrest where plaintiff's statements and gesture critical of the police were protected speech); *Wilson v. Kittoe*, 337 F.3d 392, 401 (4th Cir. 2003) ("While it may be inconvenient to a police officer for a neighbor to stand nearby and watch from his driveway as the officer works, inconvenience cannot, taken alone, justify an arrest under

the Obstruction Statute."); *Payne v. Pauley*, 337 F.3d 767, 777 (7th Cir. 2003) (finding that "arguing with a police officer, even if done loudly, or with profane or offensive language, will not in and of itself constitute disorderly conduct"); *Johnson v. Campbell*, 332 F.3d 199, 213 (3d Cir. 2003) (disorderly conduct arrest not supported by probable cause where plaintiff's "words [to officer] were unpleasant, insulting, and possibly unwise" but were protected by the First Amendment); *Gainor v. Rogers*, 973 F.2d 1379, 1387-88 (8th Cir. 1992) (disorderly conduct arrest not supported by probable cause where plaintiff was "merely exercising his First Amendment rights" when he expressed a religious message and challenged police officers' actions); *see also Cox v. City of Charleston, SC*, 416 F.3d 281, 286 (4th Cir. 2005) (finding disorderedly conduct statute violated First Amendment where individuals' "expression does nothing to disturb the peace, block the sidewalk, or interfere with traffic," yet "the Ordinance renders it criminal").

These decisions are based, in part, on the premise that "[p]olice officers must be more thick skinned than the ordinary citizen and must exercise restraint in dealing with the public" and "must not conceive that every threatening or insulting word, gesture, or motion amounts to disorderly conduct." *Payne v. Pauley*, 337 F.3d at 777 (citation omitted). *See also City of Houston, Tex. v. Hill*, 482 U.S. 451, 462 (1987) (citing *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring) ("[A] properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen.")). Indeed, police officers have a duty to ensure that the First Amendment is upheld and protected speech is not curtailed.

To be sure, individuals may not use the guise of engaging in protected First Amendment speech in an effort to interfere with police activity. *See Colten v. Commonwealth of Kentucky*, 407 U.S. 104 (1972) (individual's speech not protected by the First Amendment where individual persistently tried to

engage an officer in conversation while the officer was issuing a summons to a third party on a congested roadside and refused to depart the scene after at least eight requests from officers); *King v. Ambs*, 519 F.3d 607 (6th Cir. 2008) (individual was not engaged in protected speech when he repeatedly instructed a witness being questioned by a police officer not to respond to questions). But there are no facts alleged in the Complaint that suggest that Mr. Garcia interfered with the MCPD officers during the course of their arrest of the other individuals. He merely recorded their activity from a considerable distance, and backed even further away when he thought the officers may be bothered by his presence. In doing so, Mr. Garcia's actions were entirely consistent with the guidelines the United States provided to Baltimore City Police Department in *Sharp*. *See* Letter from Jonathan M. Smith to Mark H. Grimes and Mary E. Borja ("BPD Letter") at 5-7 (May 14, 2012) (describing how officers should instruct individuals to a less-intrusive place where they can continue recording) (attached here as Exhibit B). There are no facts alleged in the Complaint that suggest that Mr. Garcia was arrested for anything other than recording the MCPD officers making an arrest, which is protected under both the First and Fourth Amendments.

III. Members of the Public and the Media Are Both Entitled to Protection Under the First Amendment

The First Amendment protections afforded members of the public and press when recording public police activity are coextensive. As the Supreme Court established more than thirty years ago, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978). Although Mr. Garcia alleges facts here that show that he is a member of the press, this makes no difference to the analysis under the First Amendment. *See* BPD Letter at 10-11.

In his Complaint, Mr. Garcia alludes to his status as a photojournalist and credentialed member of the news media. Compl. at 5. He alleges that MCPD's policy on Police/Media Relations should have governed how MCPD handled the incident, and thus the officers on the scene should have treated Mr. Garcia "as 'invited guest,' as the policy requires." Compl. at 8. While Mr. Garcia's status as a journalist and the existence of MCPD's media relations policy may be applicable to Mr. Garcia's claim that Montgomery County has a custom or practice of preventing members of the media from recording police activity and fails to train MCPD officers on its media policy, it is not relevant to the constitutional analysis. As the First Circuit stated in upholding a private individual's right to record the police, "[t]he First Amendment right to gather news is . . . not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press." *Glik*, 655 F.3d at 83 (citing *Houchins v. KQED, Inc.*, 438 U.S. 11, 16 (1978) (Stewart, J., concurring)). "[T]he news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* at 84; *see also Alvarez*, 679 F.3d at 597-98 (noting that the Supreme Court "declined to fashion a special journalists' privilege" in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) and holding that audio recordings of police officers by private individuals are entitled to First Amendment protections).

Courts have long held that recordings made by private citizens of police conduct or other items of public interest are entitled to First Amendment protection. *See, e.g.*, *Glik*, 655 F.3d at 84-85 (finding First Amendment right to record "clearly established"); *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439; *Blackston v. Alabama*, 30 F.3d 117, 120-21 (11th Cir. 1994); *Lambert v. Polk Cnty.*, 723 F. Supp. 128, 133 (S.D. Iowa 1989). Similarly, the Supreme Court has established that journalists are not entitled to greater First Amendment protections than private individuals. *See,e.g.*, *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 608-09 (1978) ("The First Amendment generally grants the press no right to information

about a trial superior to that of the general public."); *Branzburg*, 408 U.S. at 684 ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.") (citing cases). Thus, this Court should make clear that Mr. Garcia's status as a credentialed journalist does not influence its analysis of his First Amendment right to document police activity occurring in public.

CONCLUSION

For the reasons set forth herein, the Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,

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