UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 16-1650 & 16-1651

RICHARD FIELDS,
Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, *et ano*,
Defendants-Appellees.

AMANDA GERACI,
Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, *et al.*,
Defendants-Appellees.

On Appeal From the Memorandum and Order Granting Partial Summary Judgment Dated February 19, 2016,
at E.D. Pa. Nos. 14-cv-4424 & 14-cv-5264

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

COUNTER-STATEMENT OF FACTS RELATING TO MUNICIPAL LIABILITY 3

ARGUMENT 16

I. THE CITY IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' *MONELL* CLAIMS 16

A. Plaintiffs Have Adduced Ample Evidence of an Unconstitutional Custom Within the PPD of Retaliating Against Individuals Who Record the Police. 18

B. Plaintiffs Have Adduced Ample Evidence that PPD Policymakers Were Deliberately Indifferent to the Need for Better Training and Supervision for PPD Officers on the Public's Right to Record. 20

C. Plaintiffs Have Adduced Ample Evidence that the City's Failures Caused the Violation of Their First Amendment Right to Record. 24

D. The City Can Be Held Liable Even if this Court Finds the Individual Officers Entitled to Qualified Immunity. 25

II. THE INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 16

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) 27

Beck v. City of Pittsburgh, 89 F.3d 966 (3d Cir. 1996) 17, 18, 24

Bielevicz v. Dubinon, 915 F.2d 845 (3d Cir. 1990) 18, 24

Camreta v. Greene, 563 U.S. 692 (2011) 28

Carter v. City of Philadelphia, 181 F.3d 339 (3d Cir. 1999) 20

Carver v. Foerster, 102 F.3d 96 (3d Cir. 1996) 26

Hope v. Pelzer, 536 U.S. 730 (2002) 27

Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010) 2, 27

L.R. v. School District of Philadelphia, 836 F.3d 235 (3d Cir. 2016) 27

Owen v. City of Indep., Mo., 445 U.S. 622 (1980) 26

Thomas v. Cumberland County, 749 F.3d 217 (3d Cir. 2014) 17

Thomas v. Cumberland Cty., 749 F.3d 217 (3d Cir. 2014) 20

Tolan v. Cotton, 134 S. Ct. 1861 (2014) 16

Other Authorities

Model Civ. Jury Instructions,
§ 4.6.6 (3d Cir. 2016) 17

Model Civ. Jury Instructions,
§ 4.6.7 (3d Cir. 2016) 17

Rules

Fed. Rule Civ. Proc. 56 16

INTRODUCTION

Defendants do not seek seriously to defend the trial court's conclusion that the First Amendment provides no protection for the Plaintiffs' acts of recording and observing police activity. Their brief apprises the Court that the City now instructs its officers that "like the ability to protest, the ability to record police was a right they had sworn to protect." Appellees' Br. 12. But the Defendants urge this Court to avoid articulating the same instruction and to duck the issue on grounds not addressed by the trial court. This Court cannot avoid the question, however, nor should it. Plaintiffs have adduced more than enough evidence to raise a genuine issue of fact with respect to municipal liability, the individual Defendants are not entitled to qualified immunity, and this case raises a fundamental and recurring issue of police accountability and free expression in the twenty-first century.

With respect to municipal liability, the City's brief argues facts in the light most favorable to itself, draws all inferences in its own favor, and simply ignores much of the evidence that Plaintiffs would be entitled to present to a jury. This Court—like the court below—cannot view the evidence in this one-eyed fashion. Indeed, a straightforward application of Rule 56 and *Monell* demonstrates that Plaintiffs are entitled to proceed to trial on their claims against the City.

Defendants' qualified immunity argument starts and ends with this Court's decision in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), which held that as of May 2007, "there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment." *Id.* at 262. Defendants insist that this holding somehow precludes any different conclusion about the clarity—in 2012 or 2013—of the right to record police who were *not* engaged in a traffic stop. Those arguments misunderstand both the test for qualified immunity and its purpose. Moreover, the City advances a dangerous position by asking the Court to sidestep First Amendment analysis through a finding of qualified immunity. *See Camreta v. Greene*, 563 U.S. 692, 706 (2011) ("qualified immunity . . . threatens to leave standards of official conduct permanently in limbo. . . Qualified immunity . . . may frustrate 'the development of constitutional precedent' and the promotion of law-abiding behavior.") (internal citations omitted).

As Plaintiffs' opening brief and the briefs of amici argue at length, there is a pressing need for this Court to address the First Amendment rights of those who observe and record police conduct, and to decide that the First Amendment protects the right to record the police, regardless of whether the recorder manifests

a particular reason for the recording. Because Defendants do not seriously dispute the existence of a First Amendment right to record the police, Plaintiffs will not repeat these arguments here.

COUNTER-STATEMENT OF FACTS RELATING TO MUNICIPAL LIABILITY[1]

Plaintiff Richard Fields was arrested and then cited for photographing police activity from a distance while standing on a public sidewalk in Philadelphia on September 13, 2013. Plaintiff Amanda Geraci was forcefully prevented from taking a photo of police arresting a protester on September 21, 2012, while serving as a "legal observer" during a demonstration outside the Pennsylvania Convention Center in Philadelphia. Plaintiffs allege that their incidents are not isolated, but resulted from a custom and practice of Philadelphia Police Department ("PPD") officers, who regularly used detention, arrest, and other actions to retaliate against citizens who attempt to record their actions, and from the City's deliberate indifference to the need to train and supervise their officers to ensure respect for

[1] Plaintiffs' opening brief recounted only the facts related to the issue decided by the district court: whether Plaintiffs' acts of recording the police were protected by the First Amendment. In light of the City's argument that the Court can affirm the decision below due to an alleged lack of factual support for Plaintiffs' claims against the City, Plaintiffs here offer additional facts from the record below relevant to municipal liability. Plaintiffs will not address the City's mischaracterizations of the record below where those errors are not material to the questions before the Court. A more detailed recitation of the facts and where the City gets them wrong was submitted in the district court. *See* Pls.' Stmt. Facts, *Fields* ECF No. 27-1, *Geraci* ECF No. 27-1.

the right to record. Despite news articles and other public sources, and Internal Affairs complaints putting PPD officials on notice of at least 19 incidents prior to Ms. Geraci's incident, and an additional 2 incidents prior to Mr. Fields' arrest, in which Philadelphia police officers retaliated against civilians for recording the police, at no point did the Philadelphia Police Department initiate any internal investigations into the practice. *See* JA0117 (2013 Healy Dep. 47:16–48:10); JA0135 (2013 Healy Dep. 118:19–24); JA0136 (2013 Healy Dep. 122:12–20).

Memorandum 11-01

After attending a national conference in the summer of 2011 and learning of growing concern around the country over police taking cameras from people who were recording them, Commissioner Ramsey directed Captain Francis Healy to draft a policy for the Philadelphia police department on this issue. JA0109 (2013 Healy Dep. 13:6–8). While drafting the policy, Captain Healy surveyed Philadelphia police officers and discovered that it was "very clear" that some PPD officers thought it was acceptable to stop people from recording them. JA0119–20 (2013 Healy Dep. 55:19–58:6). On September 23, 2011, the PPD issued Memorandum 11-01 to "remove any confusion as to the duties and responsibilities of sworn personnel when being photographed, videotaped or audibly recorded while conducting official business or while acting in official capacity in any public space." JA1185 (Memorandum 11-01).

Memorandum 11-01 was announced to officers in September 2011 at roll call, but officers received no training on the new policy. JA0109 (2013 Healy Dep. 14:6–16); JA0200 (2015 Healy Dep. 11:2–12); JA1378 (Healy Memo to Nola Joyce, Dec. 18, 2013) ("It appears the only training that was provided was roll call training."). Captain Healy did not discuss with any police supervisors the fact that some PPD officers believed it was permissible to prevent civilians from recording them. JA0122 (2013 Healy Dep. 68:9–17). Nor did he follow up to ask any officers whether they understood Memorandum 11-01 after it was sent out. JA0126 (2013 Healy Dep. 83:7–23).

<u>The PPD "Culture" of Suppressing Citizen Recording
Before Memorandum 11-01</u>

Before Memorandum 11-01 was issued, there was plenty of information available to PPD policymakers regarding the culture among PPD officers of retaliating against people who recorded police activity.[2] As Captain Healy testified, press reports are one of the primary ways the PPD leadership learns of

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[2] Commissioner Charles Ramsey and Captain Healy were both official policymakers for the Philadelphia Police Department on the issue of recording police. Commissioner Ramsey delegated to Captain Healy primary authority for the City's policies on recording, including the authority to order training on those policies. *See* JA0247 (2015 Healy Dep. 58:5–15). Captain Healy was twice designated by the City as the individual most knowledgeable about the City's policies regarding the right to record the police and the City's training, monitoring, and supervision of Philadelphia police officers to ensure compliance with those policies. JA0107 (2013 Healy Dep. 6:16–20); JA0199 (2015 Healy Dep. 10:1–6).

recurring problems with officer conduct. JA0249–50 (2015 Healy Dep. 60:19–61:19). Captain Healy recalled numerous news stories about PPD officers interfering with recording. *See, e.g.*, JA0124 (2013 Healy Dep. 73:7–74:1); JA0310–11, JA0312, JA0313, JA0314–15, JA0322 (2015 Healy Dep. 121:20–122:7, 123:1–5, 124:3–8, 125:19–126:6, 126:13–18, 133:10–18). *See also* JA1528–38 (news articles). A September 3, 2011 article detailed several incidents in which Philadelphia police officers retaliated against civilians for recording them. JA1531–32 (Jan Ransom, "Even a top cop concedes a right to video arrests – but the street tells a different story," Philly.com (Sep. 3, 2011)).

In addition to press reports, complaints made to the Internal Affairs Division ("IAD") can alert PPD leadership to problems requiring correction. JA0318 (2015 Healy Dep. 129:5–131:3). In 2010 and 2011, at least four IAD complaints alleged that PPD officers had interfered with other individuals who attempted to record police activity. *See* JA1578–86 (IAD 10-0615); JA1642 (IAD 11-0154); JA1587–90 (IAD 11-0433); JA1591–1608 (IAD 11-0468). Every IAD investigation results in a memo to the Commissioner.

Despite the results of Captain Healy's survey of PPD officers, press reports, and IAD complaints all indicating that PPD officers routinely interfered with civilians' right to record, the Commissioner's primary concern was "getting the policy out"; he did not take any further action, including ordering training on the

new policy, to ensure that officers would not violate the policy and citizens' rights. JA0110 (2013 Healy Dep. 17:5–19).

PPD policymakers knew that "complex directives or radical changes in [police] policy" or policies intended to effect a "cultural change" sometimes require advanced training beyond roll call readings. JA0109, JA0111 (2013 Healy Dep. 15:7–20, 22:12–23:2). As Captain Healy later acknowledged, the City's policies on recording the police represented a "cultural change" for the Philadelphia Police Department. JA0234–35 (2015 Healy Dep. 45:5–46:17) ("So it's a cultural change on how we do bus[iness]. . . . [The First Amendment right to record the police] is a very complicated issue that needs more training than we would do normally."); JA0296 (2015 Healy Dep. 107:7–15) (testifying that it is "not normal" that "a new right, constitutional right, is basically imposed on the police officers to enforce that they did not otherwise know. So in that regard, I don't think there is standard operating procedure.").

As a result, Captain Healy acknowledged that the PPD should have done more training when it instituted this policy shift. JA0235 (2015 Healy Dep. 46:15–17) ("this is a very complicated issue that needs more training than we would do normally").

<u>Notice to Policymakers of Non-Compliance with Memorandum 11-01</u>

Despite the fact that the new rule required changing police culture, the PPD had no system for monitoring compliance with Memorandum 11-01 or tracking alleged violations of the memorandum, and policymakers made no efforts to monitor compliance with it. JA0111–12 (2013 Healy Dep. 23:14–24:9, 25:18–27:11); JA0201–02 (2015 Healy Dep. 12:4–13, 13:15–20). There was also no mechanism for ensuring that civilian complaints that involved alleged violations of the policy were brought to the attention of the involved officers' supervisors. JA0116 (2013 Healy Dep. 43:20–44:22).

Reports that officers had retaliated against people for recording them continued after the adoption of Memorandum 11-01. *See, e.g.*, JA1528–38 (news articles). And, the number of IAD complaints of officers interfering with recording *increased* substantially after the adoption of Memorandum 11-01. *See* JA1569–77 (IAD 10-0315); JA1650–52 (IAD 12-0359); JA1646–47 (IAD 12-0060); JA1617–24; JA1641 (IAD 11-0681); JA1644–46 (IAD 12-0125); JA1625–40 (IAD 12-0158); JA1643–44 (IAD 12-0218); JA1647–48 (IAD 12-0421); JA1195–1289 (IAD 12-0579). It was during this time that Plaintiff Geraci was violently restrained to prevent her from recording the arrest of a protester. *See* JA1195–1289 (Internal Affairs file on the incident); JA1648–49 (Police Advisory Commission documents on incident).

Directive 145

In the spring of 2013 Commissioner Ramsey learned that the U.S. Department of Justice had issued guidelines on the right to record the police, and directed Captain Healy to incorporate those guidelines into a new PPD directive on recording. JA0110 (2013 Healy Dep. 19:20–20:12); *see also* JA1675 (Department of Justice Letter Re: *Sharp*). Captain Healy worked on drafting the directive from May until November 2012. JA0128 (2013 Healy Dep. 89:8–91:9).

The City claims on appeal that Directive 145 was developed "in response" to violations of Memorandum 11-01, and "to address" them (*see* Appellees' Br. 8), but that version of facts is false—or, at the very least, contested. Captain Healy testified that he did not investigate the nature or extent of violations of Memorandum 11-01 because "[w]hether we had one complaint or a hundred made no difference. [Ramsey] wanted a policy done." JA0139 (2013 Healy Dep. 134:11–18).

Unlike Memorandum 11-01, Directive 145 requires that police officers contact a supervisor before taking action against a person who is recording them. *Compare* JA1185–86 (Memorandum 11-01) *with* JA1189–91 (Directive 145 § V(A), V(D), V(E)(4), and V(G)(1)). The requirement that patrol officers call for a supervisor in various situations stems from a recognition that police officers generally do not like being recorded and may need to be "deescalated" in such

situations. JA0241 (2015 Healy Dep. 52:3–7). Nonetheless, supervisors did not receive any additional information or training as to their role or responsibilities under the Directive. JA0111 (2013 Healy Dep. 23:7–13). The PPD has no system for ensuring that supervisors are actually called to the scene as required by Directive 145 when a police officer seeks to take restrictive action against, or has a confrontation with, someone who is recording police. JA0145–46 (2013 Healy Dep. 160:5–164:17).

As with Memorandum 11-01, officers were notified about Directive 145 via a teletype notice that was read to police officers during roll call. JA0125 (2013 Healy Dep. 80:9–18); JA0204 (2015 Healy Dep. 15:10–19). Each sergeant determined how much of the directive to read out loud during roll call; given the length of Directive 145, it is unlikely that sergeants read it out loud in its entirety. JA0132 (2013 Healy Dep. 108:4–109:5); JA0204–05, JA0206 (2015 Healy Dep. 15:20–16:24, 17:11–23). This roll call reading was the only "training" officers received on Directive 145 when it was issued. JA0111 (2013 Healy Dep. 21:22–22:11).

And as with Memorandum 11-01, there was no system for tabulating or tracking alleged violations of Directive 145. JA0111, JA0112 (2013 Healy Dep. 23:14–24:9, 25:18–27:11); JA0207 (2015 Healy Dep. 18:18–24). There is no system for notifying a police officer's supervisor about complaints involving

allegations that the officer violated Directive 145. JA0116 (2013 Healy Dep. 44:12–22). The PPD has no mechanism for ensuring that a supervisor reviews citations issued on the street to people recording the police. JA0145–46 (2013 Healy Dep. 160:5–161:16). And the PPD has no system for alerting supervisors if charges filed by a police officer against someone recording the police are withdrawn or dismissed in court. JA0146–47 (2013 Healy Dep. 164:20–165:2).

Captain Healy later acknowledged that simply presenting Directive 145 to officers at roll call and holding them individually responsible for reading and understanding it was a "failing on our part" and that officers and supervisors may not have read the entire directive. JA0230–31 (2015 Healy Dep. 41:7–42:8). Captain Healy recognizes that "[h]aving training with somebody who is reading a directive to you is not training." JA0145 (2013 Healy Dep. 159:3–20).

Notice to Policymakers of Non-Compliance with Directive 145

The passage of Directive 145 triggered numerous conversations between Captain Healy and police officers about the policy. PPD officers often argued with Captain Healy about whether the First Amendment protected the right to record, or told him they thought that position was "crap." JA0230–34, JA0238, JA0240, JA0243 (2015 Healy Dep. 41:7–45:6, 51:5–17, 49:5–23, 54:7–16, 54:17–10). Captain Healy ultimately concluded that Directive 145 had not settled the matter: "I believe anecdotally officers didn't understand that there was a constitutional

right and that there—officers may still be seizing cameras. I don't know where I heard that, but I just—I did. I don't know whether it was from complaints in the media or the Temple University case or whatever it was, I forget." JA0282–83 (2015 Healy Dep. 93:5–94:5).[3]

The IAD continued to receive complaints after the issuance of Directive 145 and prior to the arrest of Plaintiff Fields in September 2013, alleging retaliation by PPD officers for recording the police. *See* JA1642–43 (IAD 13-0039); JA1649–50 (IAD 12-0669); JA1740–45 (IAD 13-0192). And on March 13, 2013, the Police Advisory Commission ("PAC") wrote a memorandum to Commissioner Ramsey citing media accounts and IAD reports of PPD officers violating Department policy.[4] It is rare for the PAC to bring issues to the attention of the Commissioner, and extremely unusual for the PAC to issue a written recommendation calling for corrective action. JA0273, JA0274 (2015 Healy Dep. 84:14–24, 85:9–20). The PPD took no action in response to the PAC memorandum. JA1658–59

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[3] The "Temple University case" Captain Healy refers to was an incident in March 2012 in which Temple photojournalism student Ian Van Kuyk was arrested and cited for photographing police. JA0625–40 (IAD 12-0158). The incident resulted in a letter of protest to Commissioner Ramsey and a response from him. JA1362–66.

[4] The PAC memo refers to violations of Memorandum 11-01, apparently unaware that it had been superseded by Directive 145 some months earlier. JA1653.

(Interrogatory No. 13, 16); JA1668–70 (City's Response to Interrogatory No. 13, 16).

2014 Training

On November 26, 2013, Plaintiffs' counsel deposed Captain Healy in connection with a previous round of lawsuits alleging PPD interference with recording.[5] Shortly after that deposition, on December 18, 2013, Captain Healy wrote a memorandum to Captain Nola Joyce in which he conceded that "there is some credence" to the Plaintiffs' failure-to-train legal theory, and that the Department "could have done more training" on both Memorandum 11-01 and Directive 145. JA1378 (Healy Memo to Nola Joyce, Dec. 18, 2013). In his memorandum, Captain Healy recommended advanced training for all police officers on Directive 145. JA1378.

In later deposition testimony in the instant cases, Captain Healy again admitted that roll call training was not sufficient to ensure compliance with Memorandum 11-01 and Directive 145. JA0277 (2015 Healy Dep. 88:19–23) ("I believe the department was lacking in the training provided to its officers."); *see*

[5] By June of 2013, the ACLU of Pennsylvania had filed three lawsuits alleging that the City's deliberate indifference to the right to record the police had resulted in violations of constitutional rights. The complaints listed other similar incidents. JA1424–27 (*Montgomery* complaint); JA1409–12 (*Fleck* complaint); JA1468–72 (*Loeb* complaint).

also JA0208, JA0235, JA0237–38, JA0248–49, JA0260, JA0264 (2015 Healy Dep. 19:11–15, 46:15–17, 48:23–49:3, 59:18–60:14, 71:9–24, 75:7–17).

The advanced training recommended by Captain Healy began in January 2014. JA0213 (2015 Healy Dep. 24:3–7). It provided an opportunity for police officers to ask questions about Directive 145, which further illuminated the extent to which police officers had been confused by Directive 145 prior to the advanced training. *See* JA0215, JA0230–31 (2015 Healy Dep. 26:12–23, 41:23–42:23).

<u>Expert Testimony Regarding the City's Failure of Training and Supervision</u>

In opposing Defendants' motion for summary judgment, Plaintiffs proffered the testimony of a police practices expert, R. Paul McCauley, Ph.D., who has more than 25 years of experience as a police instructor, including almost 10 years teaching police operational policy formulation. JA1686–87 (McCauley Report at 1–2). Dr. McCauley's report examined the history of complaints against PPD officers for interfering with citizens who are recording police and noted that Captain Healy, who assumed primary responsibility for this issue within the PPD, testified that PPD officers told him outright that they did not believe that citizens had a right to record them. JA1688–93 (McCauley Report at 3–8). Dr. McCauley then evaluated the training that PPD officers had received on Memorandum 11-01 and Directive 145 in light of the PPD's knowledge of the many violations of those policies, and found that training was so deficient as to reflect indifference to the

risk that PPD officers would continue violating the rights of citizens who recorded them. JA1701–06 (McCauley Report at 16–21). Dr. McCauley likewise opined that the PPD's supervision of its officers' behavior toward people who attempted to record their activities was so deficient as to reflect indifference to the risk that PPD officers would continue violating the rights of citizens who recorded them. *Id*.

Dr. McCauley concluded—and would testify at trial—that PPD policymakers could not reasonably expect that merely reading a complex policy at roll call would result in "meaningful changes in officer performance when responding to people recording police." This expectation was particularly unreasonable in light of the evidence of an "existing police culture that exhibited 'pushback' to the idea that people really could record the police." JA1705 (McCauley Report at 20).

ARGUMENT

I. THE CITY IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' *MONELL* CLAIMS.

"Courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014). Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence 'in the light most favorable to the opposing party.'" *Tolan*, 134 S. Ct. at 1866 (internal citations omitted). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). Plaintiffs' municipal liability claims easily survive summary judgment.

The City is liable for Plaintiffs' injuries under two distinct theories of municipal liability: first, because Plaintiffs' injuries resulted from the unconstitutional custom and practice of PPD officers of using detention, arrest, and other actions to retaliate against citizens who attempt to record their actions; and, second, because Plaintiffs' injuries resulted from the failure of policymakers within the PPD to implement training, discipline, or supervisory protocols to prevent this type of officer misconduct, with deliberate indifference to the demonstrated probability that their failure would result in continued constitutional violations.

The first theory of liability requires evidence of a custom that was so widespread that PPD policymaking officials either knew of it or should have known of it. *See* Model Civ. Jury Instructions, § 4.6.6 (3d Cir. 2016). The second theory of liability does not require proof of such a widespread practice, but does require "deliberate indifference"—proof that PPD policymakers knew their officers would encounter the situation, knew that their officers had a history of mishandling such situations, and knew that their mistakes would likely lead to a violation of constitutional rights, yet failed to implement the training or supervisory changes that would have reduced that risk. *See* Model Civ. Jury Instructions, § 4.6.7 (3d Cir. 2016); *Thomas v. Cumberland County*, 749 F.3d 217, 223–24 (3d Cir. 2014).

The fact that the violations of Plaintiffs' rights also violated City policy is not sufficient to bar municipal liability when that policy is routinely disregarded. *Beck v. City of Pittsburgh*, 89 F.3d 966, 974 (3d Cir. 1996) ("We reject the district court's suggestion that mere Department procedures to receive and investigate complaints shield the City from liability. . . . Protection of citizens' rights and liberties depends upon the substance of the OPS investigatory procedures.").

The City argues that "Plaintiffs must prove" their case for municipal liability and that "Plaintiffs cannot make such a showing." Appellees' Br. 13–14. But that

is not the summary judgment standard. Plaintiffs have more than sufficient evidence to take both of their theories of municipal liability to the jury.

A. Plaintiffs Have Adduced Ample Evidence of an Unconstitutional Custom Within the PPD of Retaliating Against Individuals Who Record the Police.

"Custom . . . can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990). A pattern of similar incidents and inadequate responses to those incidents—including incidents that post-date the plaintiffs' experiences—may demonstrate custom through municipal acquiescence. *See Beck*, 89 F.3d at 972. The "acquiescence" of policymakers can be shown through their direct knowledge of this pattern of similar incidents, or by evidence that policymakers should have known of the pattern. *Bielevicz*, 914 F.2d at 850.

As laid out in the Counter-Statement of Facts, *supra*, the record in this case shows a long-standing pattern of retaliatory actions by PPD officers against people who recorded police activity, incidents that were brought to the attention of PPD policymakers through press reports, citizen complaints, and lawsuits.

First, there was a persistent stream of complaints to IAD that PPD officers had retaliated against people who recorded them, beginning in 2010 and continuing

through 2013—at least 20 such complaints, most of them dating from after the PPD's adoption of written policy forbidding these actions.

Second, there were numerous press reports of such retaliation. As Captain Healy testified, the Commissioner and his top staff routinely used media reports to identify potential areas of PPD officer misconduct. Captain Healy acknowledged that he was aware, beginning in 2011, of numerous press reports of PPD officers retaliating against people who recorded police activity.

In addition, the Police Advisory Commission took the unusual step of writing to the Commissioner in March 2013 about the problem that PPD officers were continuing to interfere with the right of the public to record police activity. Also during the first half of 2013, the PPD was sued over three different incidents in which PPD officers had arrested members of the public who sought to observe or record them. Each of those complaints described many similar incidents.

Finally, Captain Healy had direct knowledge that PPD officers did not believe the public had a right to record their activities. In fact, Captain Healy testified that he knew the PPD needed to provide better training on the public's right to record based on his observations that Philadelphia police officers did not understand PPD policies on the subject, did not understand why there was a First Amendment right to record the police, or believed it was "crap," and that a "cultural change" was thus needed to bring about compliance with the policy.

JA0230–34 (2015 Healy Dep. 41:7–45:6). Captain Healy heard these things directly from officers prior to the issuance of Memorandum 11-01, which convinced him that corrective action was urgently needed. Despite the issuance of Memorandum 11-01, Captain Healy continued to hear that officers disagreed about the right to record and to hear of violations of Directive 145 through at least 2013, yet took no action to correct the problems until he ordered additional training for calendar year 2014.

B. Plaintiffs Have Adduced Ample Evidence that PPD Policymakers Were Deliberately Indifferent to the Need for Better Training and Supervision for PPD Officers on the Public's Right to Record.

Plaintiffs have amassed extensive evidence that PPD policymakers were deliberately indifferent to the need for training and supervision to change police culture to protect the right of the public to record police activity. This Court applies a three-part test to determine whether a municipality's failure to train or supervise amounts to deliberate indifference: "it must be shown that (1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves . . . a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights." *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999); *see also Thomas v. Cumberland Cty.*, 749 F.3d 217, 223–25 (3d Cir. 2014) (holding that a jury could find that County was deliberately indifferent to risk that plaintiff would be

injured at the hands of other inmates based on proof that County knew about regular inmate fights and nonetheless failed to train officers on de-escalation or conflict intervention techniques).

PPD policymakers clearly knew that officers would encounter individuals who sought to record them with increasing frequency—that is why PPD policymakers wanted policies in place, and Captain Healy testified that this remained a "hot button" issue with the officers well after the adoption of Directive 145. JA0244 (2015 Healy Dep. 55:11–23). And, as set forth in detail *infra* at 5–8, 11–12, PPD policymakers also knew or should have known, long before they instituted new training in 2014, that PPD officers had a history of gravely mishandling situations in which people tried to record police activity. If Captain Healy could conclude "there is some credence" to the Plaintiffs' failure-to-train legal theory, and that the Department "could have done more training" on both Memorandum 11-01 and Directive 145, JA1378 (Healy Memo to Nola Joyce, Dec. 18, 2013), a jury can reasonably come to the same conclusion.

Indeed, there was ample reason for PPD policymakers to know, even without the accumulation of complaints and warnings from the PAC and others, that the mere distribution of a written policy alone would not be sufficient to protect the public's right to record. Captain Healy knew, even before the adoption of Memorandum 11-01, that officers did not think the public had a right to record

them. He heard the same position again after the introduction of Directive 145. And he knew that handing out copies of a written policy to police officers does not change "culture" or ingrained patterns of behavior. JA0111 (2013 Healy Dep. 22:23–23:2) ("When there is a cultural change behind the policy, that's when there's usually a need for training to make sure everybody gets on board before you put the policy out there."). Captain Healy later admitted that introducing a new constitutional concept should have been accompanied by additional training. JA0234–35 (2015 Healy Dep. 45:5–46:17) ("So it's a cultural change on how we do bus[iness]. . . . [The First Amendment right to record the police] is a very complicated issue that needs more training than we would do normally."); JA0264 (2015 Healy Dep. 75:7–17) (the "intensity" of Directive 145 and the announcement of a constitutional right "should deserve more attention than what I do believe a [roll] call training normally gives").

In addition, the PPD was able to develop and implement a robust training program on the right to record within a month of Captain Healy's request that it do so. As Plaintiffs' expert noted, given what the PPD did in 2014, it could and obviously should have done training in 2012 or 2011. JA1704 (McCauley Report at 18).

In fact, Plaintiffs' expert would testify that there was far more that the PPD should have done to educate and supervise its officers. The PPD should have

gathered data from Internal Affairs and line supervisors about known incidents or complaints of police interfering with recording; coupled the dissemination of policy with substantive training for both line officers and their direct supervisors; and evaluated the effectiveness of that training through periodic surveys of officers and supervisors, as well as review of Internal Affairs records. JA1703 (McCauley Report at 17). The City did none of that.

There is also substantial evidence that PPD policymakers were deliberately indifferent to the fact that without better supervision, PPD officers would likely continue to violate the rights of people who recorded police activity. To begin with, despite knowing that PPD officers did not believe that the public had a right to record police activity, the PPD set up no system to monitor officers' compliance with Memorandum 11-01, nor with Directive 145, even as complaints about violations continued to roll in. Moreover, despite having announced a role for supervisors in Directive 145, the Department made no effort to ensure that supervisors were trained or that the supervisor protocols were followed.

There was, quite simply, no effort beyond the adoption of paper policies to ensure protection of the public's right to record. The mere adoption of a policy does not suffice to safeguard constitutional rights:

> Formalism is often the last refuge of scoundrels; history teaches us that the most tyrannical regimes, from Pinochet's Chile to Stalin's Soviet Union, are theoretically those with the most developed legal procedures. The point is obviously not to tar the Police Department's

> good name with disreputable associations, but only to illustrate that we cannot look to the mere existence of superficial grievance procedures as a guarantee that citizens' constitutional liberties are secure. Protection of citizens' rights and liberties depends upon the substance of the OPS investigatory procedures. Whether those procedures had substance was for the jury's consideration.

Beck, 89 F.3d at 974; *see also id.* ("Because there is no formalized tracking of complaints for individual officers, a jury could find that officers are guaranteed repeated impunity, so long as they do not put themselves in a position to be observed by someone other than another police officer.").

C. Plaintiffs Have Adduced Ample Evidence that the City's Failures Caused the Violation of Their First Amendment Right to Record.

Plaintiffs have alleged that they were retaliated against in the same ways as many other citizens. Their rights were violated in the middle of the time period during which the PPD received numerous complaints, press reports, and other warnings that officers were regularly retaliating against other people who recorded police activity, and before the PPD finally took corrective action. That is sufficient to take the issue of causation to a jury. "As long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury." *Bielevicz*, 915 F.2d at 851. "A sufficiently close causal link between . . . a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific

violation was made reasonably probable by permitted continuation of the custom." *Id.*

Plaintiffs have additional causation evidence in the statement of Captain Healy that he saw improvement in officers' view of recording after the training provided in 2014. JA0228–30 (2015 Healy Dep. 39:22–41:2); *see also* JA0237 (2015 Healy Dep. 48:18–22). If the jury finds that the individual defendant officers acted to retaliate against the Plaintiffs, they may properly infer that the officers would not have done so had they received proper training and supervision before their interactions with Plaintiffs.

D. The City Can Be Held Liable Even if this Court Finds the Individual Officers Entitled to Qualified Immunity.

The City agrees that there is a constitutional right to observe and record police, although it does not want this Court to say so. And, the City agrees that its policymakers were aware of the existence of that right. Indeed, the PPD issued precatory notices of the right to its officers. But the City suggests—without citation—that because the Third Circuit had not "clearly established" the parameters of the right before the time of Plaintiffs' encounters with the police, the City had no obligation to take actions to prevent regularly occurring and violations of which policymakers were aware. Appellees' Br. 42 ("[I]t is difficult to see how City policymakers could be deliberately indifferent to the constitutional rights of citizens when . . . those constitutional rights were not clearly established in the first

place.”). This is not the law: individual officials have a qualified immunity where rights are not clearly established. Municipalities have no such immunity. *See, e.g.*, *Carver v. Foerster*, 102 F.3d 96, 103 (3d Cir. 1996) (“the core principle of *Monell* and *Owen*: Local governments, unlike individual legislators, should be held liable for the losses they cause”).

Section 1983 was intended not only to provide compensation to the victims of past abuses, but also to serve as a deterrent against future constitutional deprivations. As the Supreme Court has explained:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights.

Owen v. City of Indep., Mo., 445 U.S. 622, 651–52 (1980) (internal citation omitted). Municipal liability is particularly designed to create a deterrent when individual officials are entitled to immunity:

> In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute system-wide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens’ constitutional rights is, of course, particularly acute where the frontline officers are judgment-proof in their individual capacities.

Id. at 652 n.36.

II. THE INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The individual Defendants' primary argument is that this Court's decision in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), requires a finding of qualified immunity in these cases, as well, because cases from outside this Circuit cannot "vitiate the binding holding" of *Kelly*, and because "Plaintiffs' cases are contradicted by other non-binding cases, rendering the law unclear again." Appellees' Br. 14. Defendants misunderstand the meaning of qualified immunity.

As Plaintiffs' opening brief explains, the "salient question" in determining whether a right is sufficiently "established" to result in individual liability is whether the defendant officers had "fair warning" that *their* conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). This test necessarily focuses on the state of the law at the time of the violation, not whether the law was sufficiently "established" five or six years earlier. To hold—as Plaintiffs have argued—that a "survey[of] both our case law and that of our sister circuits" at the time of the Plaintiffs' encounters with police reveals "sufficiently analogous cases that should have placed a reasonable official . . . on notice" of the right to record, *see L.R. v. School District of Philadelphia*, 836 F.3d 235, 249 (3d Cir. 2016), is not to "vitiate" the holding of *Kelly* as to the law in 2007. *See also Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011) (acknowledging that the requisite clarity can be established by a "robust consensus" of persuasive authority from other circuits and

courts). Qualified immunity exists to protect officials as the law evolves, not to set that law for the future. Justice Kagan recognized this danger in *Camreta v. Greene*, 563 U.S. 692 (2011):

> The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again.

Id. at 706.

In this case, contrary to Defendants' argument, there is no case since *Kelly* that contradicts the right to record police established by the "robust consensus" described in Plaintiffs' opening brief. Some courts have, as this Court did in *Kelly*, declined to find the right to record police to be sufficiently "established" to hold individual officials liable. *See* Appellees' Br. 31 (collecting cases). And other courts, it seems, have held that there is no right to record, for personal use, something other than police performing their duties in public. *See* Appellees' Br. 32. But none of the cases cited by Defendants undermine Plaintiffs' demonstration that the consensus among the courts is that the First Amendment protects the right to record police performing their jobs in public.[6]

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[6] Moreover, a few courts holding to the contrary would not preclude the finding of a "robust consensus of persuasive authority." Consensus does not mean unanimity.

Finally, despite stating that they take no position on the correctness of the district court's holding, Defendants argue that the authorities cited by Plaintiffs are all distinguishable because "all of them contain evidence of expressive intent." Appellees' Br. 14. As explained in Plaintiffs' opening brief, the district court erred in holding that the act of recording the police is not protected by the First Amendment unless the recorder communicates an "intent to convey a particular message." The myriad authorities supporting the right to record police do not turn on, or even discuss, whether the recorder communicated an "intent to convey a particular message" because that is not required for First Amendment protection.

Most importantly, Defendants offer no reason why this Court should, if it finds uncertainty in the law, prolong that uncertainty. Technology has progressed and so has the law. The recording of police is more important than ever to the public's right to hold police accountable. As the amici in this case have emphasized, this is an issue that calls out for clarity.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated: January 13, 2017

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COMBINED CERTIFICATIONS

Mary Catherine Roper, one of the attorneys for Appellants, hereby certifies that:

1. I am admitted to the bar of the Third Circuit.

2. This Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the limitations governing reply briefs because it contains fewer than 7,000 words and the opening brief in this appeal was filed prior to December 1, 2016. *See* Marcia Waldron, Clerk of Court, *Notice to Counsel Re: Word Limits*, http://www.ca3.uscourts.gov/sites/ca3/files/2016%20word%20length%20chart%20with%20notice.pdf (stating that in cases where the opening brief was filed before December 1, 2016, pre-December 1 word limits apply to the appellee's brief and reply brief). The brief contains 6780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman size 14 font.

4. On this date, the foregoing Reply Brief of Appellants was filed electronically and served on all counsel of record via the ECF system of the United States Court of Appeals for the Third Circuit.

5. The printed Reply Brief will be filed with the Court by hand delivery in accordance with Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure.

6. The printed Reply Brief filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Reply Brief filed with the Court was virus checked using Webroot SecureAnywhere on January 13, 2017, and was found to have no viruses.

Dated: January 13, 2017

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