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12 RAY ASKINS AND CHRISTIAN RAMIREZ

13 UNITED STATES DISTRICT COURT  
14 SOUTHERN DISTRICT OF CALIFORNIA  
15

16 RAY ASKINS and CHRISTIAN RAMIREZ,

17 Plaintiffs,

18 v.

19 UNITED STATES DEPARTMENT OF  
20 HOMELAND SECURITY; DAVID V.  
AGUILAR, Deputy Commissioner of United  
21 States Customs and Border Protection;  
CALEXICO PORT DIRECTOR BILLY  
22 WHITFORD; SAN YSIDRO PORT  
DIRECTOR FRANK JARAMILLO;  
23 UNITED STATES CUSTOMS & BORDER  
PROTECTION OFFICERS DOES 1 through  
24 15; and DOES 16 through 50,

25 Defendants.  
26  
27  
28

Case No. **'12CV2600 W BLM**

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF AND  
DAMAGES**

**JURY TRIAL DEMANDED**

1 Plaintiffs Ray Askins and Christian Ramirez (collectively, “Plaintiffs”) bring this First and  
2 Fourth Amendment action against the U.S. Department of Homeland Security, U.S. Customs and  
3 Border Protection Deputy Commissioner David V. Aguilar, Calexico Port Director Billy  
4 Whitford, San Ysidro Port Director Frank Jaramillo, U.S. Customs and Border Protection  
5 Officers Does 1-15, and Defendants Does 16-50 (collectively, “Defendants”), and allege as  
6 follows.

### 7 **NATURE OF THE ACTION**

8 1. This is a civil action to remedy violations of Plaintiffs’ First and Fourth  
9 Amendment rights by officers of U.S. Customs and Border Protection (“CBP”), an agency within  
10 the Department of Homeland Security.

11 2. The First Amendment right to freedom of speech includes the right to take  
12 photographs and make video recordings of matters such as U.S. ports of entry and federal law  
13 enforcement officers engaged in the public discharge of their duties. The U.S. Department of  
14 Justice (“DOJ”) agreed in a letter providing guidance for potential settlement negotiations in  
15 *Christopher Sharp v. Baltimore City Police Department, et. al.*, No. 1:11-cv-02888-BEL (D.  
16 Md.), advising that “[r]ecording governmental officers engaged in public duties is a form of  
17 speech through which private individuals may gather and disseminate information of public  
18 concern, including the conduct of law enforcement officers.” (Exhibit A, DOJ Guidance Letter  
19 dated May 14, 2012, at 2 (citations omitted).) DOJ further advised that “the justification for this  
20 right is firmly rooted in long-standing First Amendment principles” and that “[t]he right to  
21 ‘[g]ather[] information about government officials in a form that can readily be disseminated to  
22 others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion  
23 of governmental affairs.’” (*Id.* at 3 (citations omitted).)

24 3. CBP has an unconstitutional policy and practice of prohibiting the use of cameras  
25 and video recording devices at or near CBP-controlled facilities, including U.S. ports of entry,  
26 without the CBP’s prior approval. Acting pursuant to this policy and practice, CBP officers  
27 violated Plaintiffs’ First Amendment rights by directing Plaintiffs to cease taking photographs  
28 and erasing the photographs they did take of CBP personnel and buildings at U.S. ports of entry.



1 (collectively, with the Doe Officers, the “Doe Defendants”) are unknown to Plaintiffs, who  
2 therefore sue the Doe Defendants by fictitious names. Plaintiffs reserve the right to amend this  
3 Complaint to further identify the Doe Defendants when Plaintiffs have ascertained these  
4 defendants’ true names and capacities.

5 11. All defendants are sued in their official capacities for declaratory and injunctive  
6 relief. Mr. Askins also sues Officers Does 1-15 in their individual capacities for damages.

7 12. Injunctive relief is sought against each defendant as well as each defendant’s  
8 agents, assistants, successors, employees, attorneys, and all persons acting in concert or  
9 cooperation with any of them or at the direction or under the control of any of them.

10 **JURISDICTION AND VENUE**

11 13. The Court has jurisdiction under 28 U.S.C. § 1331 because Defendants are acting  
12 on behalf of the United States and this action arises under the First and Fourth Amendments to the  
13 United States Constitution.

14 14. The Court may grant declaratory and injunctive relief for the constitutional  
15 violations alleged here pursuant to 5 U.S.C. § 702, which waives the sovereign immunity of the  
16 United States for relief other than money damages; 28 U.S.C. § 2201; and/or Federal Rules of  
17 Civil Procedure 57 and 65. Additionally, pursuant to *Bivens v. Six Unknown Federal Narcotics*  
18 *Agents*, 403 U.S. 388 (1971), the Court may award damages against the Doe Officers, who are  
19 sued in their individual capacities.

20 15. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (e),  
21 because the events that give rise to this action occurred within this district, and because one or  
22 more defendants reside in this district.

23 16. The Court has personal jurisdiction over Officers Does 1-15, all of whom, on  
24 information and belief, are residents of the state of California.

25 **FACTS**

26 **PLAINTIFF ASKINS**

27 17. Mr. Askins is a U.S. citizen living primarily in Mexicali, Mexico. He travels  
28 frequently to the United States, often to attend meetings or to visit his home in Lake Arrowhead,

1 California. He maintains and contributes to a blog that primarily addresses environmental issues  
2 and human rights abuses in the U.S.-Mexico border region. This work involves extensive  
3 research, investigation, and analysis of CBP border activities. Additionally, this work has  
4 culminated in numerous reports prepared by Mr. Askins and submitted to U.S. Representative  
5 Bob Filner, whose congressional district includes the entire California-Mexico border.

6 18. Mr. Askins's claims arise from his attempt to take photographs of the Calexico-  
7 Mexicali port of entry for a presentation at a conference entitled "Health Impacts of Border  
8 Crossings," held on May 4, 2012, in San Ysidro, California. According to its website, the  
9 conference was funded by the Southwest Consortium on Environmental Research and Policy.  
10 The website also states: "This binational conference focuses on local health impacts of the U.S.-  
11 Mexico border. The emphasis is on avenues for reduction of exposures to traffic pollutants  
12 experienced by people crossing the border at the U.S.-Mexico Ports of Entry, workers and the  
13 community on both sides of the border. The conference includes participation of researchers and  
14 stakeholders from the San Diego-Tijuana region and other areas along the U.S.-Mexico border  
15 with similar issues." See <http://www.healthyborders2012.com/#!/about> (attached as Exhibit B to  
16 this Complaint). Furthermore, the conference materials state that, as an outcome of the  
17 conference, "[a] White Paper is to be sent to the Air Quality and Environmental Health Task  
18 Forces of the EPA Border 2012 initiative as well as local and state agencies and regional  
19 stakeholders along the border."

20 19. In connection with his conference presentation, Mr. Askins wished to photograph  
21 the secondary inspection area of the Calexico-Mexicali port of entry to demonstrate that the CBP  
22 does not make full and proper use of this inspection area, leading to longer delays at the border  
23 crossing and, accordingly, to more pollution arising from emissions of vehicles waiting in line to  
24 cross the border or enter the port of entry.

25 20. On or about April 18, 2012, Mr. Askins contacted CBP Officer John Campos by  
26 phone and requested permission to take three or four photographs inside the secondary inspection  
27 area at the Calexico port of entry the next day. Officer Campos said that this would be  
28 inconvenient, but otherwise did not object to the request.

1           21.     On or about April 19, 2012, Mr. Askins called Officer Campos to follow up.  
2     When Officer Campos did not answer, Mr. Askins left a voicemail message stating that, instead  
3     of taking photographs inside the building, Mr. Askins would stand on the street in Calexico and  
4     take photographs of the exit of the secondary inspection area.

5           22.     On or about April 19, 2012, at approximately 3:21 p.m., Mr. Askins was standing  
6     on the shoulder of a public street in Calexico, California, approximately 50-100 feet from the exit  
7     from the secondary inspection area at the Calexico port of entry. From this vantage point, Mr.  
8     Askins took three or four photographs of the exit of the secondary inspection area, including the  
9     following photograph:



20  
21           23.     While taking these photographs, Mr. Askins was not engaged in any form of  
22     commercial speech or activity. Mr. Askins took these photographs for political and/or other non-  
23     commercial purposes.

24           24.     Additionally, when taking these photographs, Mr. Askins was not engaged in the  
25     act of crossing the border. Mr. Askins was outside the port of entry on the U.S. side of the border  
26     when taking the photographs.

27           25.     Shortly after he took the photos, a number of male CBP officers (Officers Does 1-  
28     15) approached Mr. Askins. One or two of the officers (Officer Doe 1 and/or Officer Doe 2)

1 demanded that Mr. Askins delete the photos. When Mr. Askins stated that he would not do so,  
2 Officer Doe 1 and/or Officer Doe 2 stated that they would smash the camera if Mr. Askins did not  
3 delete the photos. Mr. Askins again declined to delete the photos, explaining that they were his  
4 property. One or more officers (Officers Does 1-15) then handcuffed Mr. Askins from behind  
5 and took his camera, passport, car keys, and hat.

6 26. Throughout this encounter, the CBP officers—particularly Officer Doe 1—spoke  
7 to Mr. Askins in an aggressive and threatening manner, despite the fact that Mr. Askins at no  
8 point posed a threat to the safety of the officers and at no point actively resisted arrest.  
9 Furthermore, Mr. Askins committed no crime and took no actions giving rise to a reasonable  
10 suspicion or probable cause that he had committed or was about to commit a crime.

11 27. After Mr. Askins was handcuffed and his possessions taken, Officer Doe 1  
12 forcefully led Mr. Askins into a small room inside the secondary inspection area, holding Mr.  
13 Askins's right arm in a tight grip that caused significant pain and bruising on the inside of Mr.  
14 Askins's arm. The officer told Mr. Askins to sit down. Mr. Askins was not free to leave the  
15 room.

16 28. After about 20 minutes, Officer Doe 1 led Mr. Askins to a separate room where he  
17 subjected Mr. Askins to an invasive and embarrassing physical search. During the search, Mr.  
18 Askins remained clothed and Officer Doe 1 used his hands to pat Mr. Askins's entire body. Mr.  
19 Askins felt that he was being groped, and experienced particular discomfort when Officer Doe 1  
20 unnecessarily squeezed and touched Mr. Askins's groin area several times.

21 29. One or more CBP officers (Officers Does 1-15) then told Mr. Askins that he was  
22 free to go and returned his belongings. Officer Doe 4 escorted him to the exit. From the moment  
23 CBP officers first detained Mr. Askins to the moment they told him he was free to go,  
24 approximately 25-35 minutes elapsed. The officers had no warrant or other justification for the  
25 search and/or seizure of Mr. Askins's person or property.

26 30. When Mr. Askins later scrolled through the pictures on his digital camera, he  
27 discovered that all but one of the photographs he just had taken of the port of entry had been  
28 deleted.





1           36. Mr. Ramirez's claims arise from his experience crossing the border at the San  
2 Ysidro port of entry on Father's Day 2010. On or about that day—June 20, 2010—Mr. Ramirez  
3 and his wife crossed the border into Mexico to visit his father. They parked on the U.S. side of  
4 the border and walked into Mexico through the pedestrian entrance at San Ysidro.

5           37. After a late lunch, Mr. Ramirez and his wife returned to the United States. They  
6 passed through primary inspection at the San Ysidro port of entry without incident. They then  
7 crossed a pedestrian bridge that passes over, among other things, the southbound lanes of  
8 Interstate 5.

9           38. While crossing this pedestrian bridge, Mr. Ramirez noticed that, at a southbound  
10 security checkpoint below him, which was staffed by CBP officers, women were being inspected  
11 and patted down by male CBP officers. Mr. Ramirez's wife commented that the officers  
12 appeared to be pulling aside only women for inspection.

13           39. Mr. Ramirez observed the checkpoint for approximately ten to 15 minutes. During  
14 that time he took approximately ten pictures using his cell phone camera, out of concern that the  
15 CBP officers might have been acting inappropriately.

16           40. While taking the photographs at issue on or about June 20, 2010, Mr. Ramirez was  
17 not engaged in any form of commercial speech or activity. Mr. Ramirez took these photographs  
18 for political and/or other non-commercial purposes.

19           41. Additionally, when taking these photographs, Mr. Ramirez was not engaged in the  
20 act of crossing the border. Mr. Ramirez was in the United States when taking the photographs.

21           42. While observing the checkpoint, Mr. Ramirez and his wife were approached by  
22 two men who appeared to be private security officers. One of the private security officers asked  
23 for Mr. Ramirez's personal identification documents. Mr. Ramirez explained that he and his wife  
24 had already passed through inspection and declined to hand over his documents again.

25           43. One of the private security officers then ordered Mr. Ramirez to stop taking  
26 photographs. Mr. Ramirez refused and took a picture of the private security officer. Acting  
27 aggressively, the private security officer attempted to grab Mr. Ramirez. Mr. Ramirez stopped  
28 taking photographs and said "let's go" to his wife.

1           44. Mr. Ramirez and his wife then began to descend the pedestrian bridge, now  
2 followed by the private security officers, whom Mr. Ramirez heard make a radio call for backup.  
3 At the bottom of the bridge, approximately five to seven CBP officers were waiting. They asked  
4 whether and why Mr. Ramirez had taken any photographs. Mr. Ramirez responded that he had  
5 taken photographs because he had witnessed what he believed to be inappropriate activity by  
6 CBP officers at the checkpoint—namely, the patting down of women by male officers.

7           45. The CBP officers at the bottom of the bridge then asked Mr. Ramirez to turn over  
8 his phone. Mr. Ramirez refused and explained that he was willing only to show them the  
9 photographs.

10           46. An officer in plain clothes then confronted Mr. Ramirez and asked for Mr.  
11 Ramirez's personal identification documents. The officer later identified himself as a U.S.  
12 Immigration and Customs Enforcement ("ICE") agent. Mr. Ramirez refused to turn over his  
13 documents and explained that they had already been inspected. The ICE officer said to Mr.  
14 Ramirez, "Give me one other reason to take you down." The officer took Mr. Ramirez's and Mr.  
15 Ramirez's wife's passports out of Mr. Ramirez's shirt pocket and went to a nearby office.

16           47. A CBP officer then took Mr. Ramirez's phone and scrolled through the photos,  
17 making a comment about Mr. Ramirez's personal pictures. When Mr. Ramirez later looked  
18 through the contents of his phone, he discovered that the CBP officer who took his phone had  
19 deleted all of the photos that Mr. Ramirez had just taken at the CBP checkpoint.

20           48. Throughout this encounter, officers spoke to Mr. Ramirez in an aggressive and  
21 threatening manner, despite the fact that Mr. Ramirez at no point posed a threat to the safety of  
22 the officers and at no point actively resisted arrest. Furthermore, Mr. Ramirez committed no  
23 crime and took no actions giving rise to a reasonable suspicion or probable cause that he had  
24 committed or was about to commit a crime.

25           49. Approximately ten to 15 minutes after the ICE agent had taken the passports  
26 belonging to Mr. Ramirez and Mr. Ramirez's wife, the ICE agent returned with the documents  
27 and gave them back to Mr. Ramirez. Mr. Ramirez and his wife were then allowed to continue on  
28 their way.



1 restricts and/or hinders the ability of persons such as Plaintiffs to take photographs and make  
2 video recordings of matters such as U.S. ports of entry and federal law enforcement officers  
3 engaged in the public discharge of their duties. This CBP policy and/or practice continues to be  
4 an impermissible prior restraint on speech and to chill, deter, and infringe Mr. Askins's First  
5 Amendment right to freedom of speech.

6 56. Furthermore, the violation of Mr. Askins's First Amendment rights by Officers  
7 Does 1-15 caused Mr. Askins to suffer harm. As a result, Mr. Askins is entitled to monetary  
8 damages from Officers Does 1-15 pursuant to the *Bivens* doctrine.

9 57. The violation of Mr. Askins's First Amendment rights by Officer Does 1-15 was  
10 also oppressive, malicious, and done with a willful and conscious disregard of Mr. Askins's  
11 rights, justifying an award of punitive damages.

12 **CLAIM TWO**  
13 **(VIOLATION OF THE FIRST AMENDMENT—FREEDOM OF SPEECH—**  
14 **BY PLAINTIFF RAMIREZ AGAINST DEFENDANTS**  
15 **DEPARTMENT OF HOMELAND SECURITY AND COMMISSIONER AGUILAR)**

16 58. Plaintiff Ramirez incorporates by reference and re-alleges each preceding  
17 paragraph as if fully set forth herein.

18 59. Mr. Ramirez has the right to freedom of speech, which includes the right to take  
19 photographs and make video recordings of matters such as U.S. ports of entry and federal law  
20 enforcement officers engaged in the public discharge of their duties.

21 60. By engaging in the above-described conduct on or about June 20, 2010, the CBP  
22 violated Mr. Ramirez's First Amendment right to freedom of speech.

23 61. In violating Mr. Ramirez's First Amendment rights, the CBP officers acted  
24 pursuant to an expressly adopted official CBP policy and/or a longstanding CBP practice of  
25 prohibiting the use of cameras and video recording devices at CBP-controlled facilities, including  
26 U.S. ports of entry, without the CBP's prior approval. This policy and/or practice prevents,  
27 restricts and/or hinders the ability of persons such as Plaintiffs to take photographs and make  
28 video recordings of matters such as U.S. ports of entry and federal law enforcement officers  
engaged in the public discharge of their duties. This CBP policy and/or practice continues to be

1 an impermissible prior restraint on speech and to chill, deter, and infringe Mr. Ramirez’s First  
2 Amendment right to freedom of speech.

3 **CLAIM THREE**  
4 **(VIOLATION OF THE FOURTH AMENDMENT—UNLAWFUL SEARCH AND**  
5 **SEIZURE—BY PLAINTIFF ASKINS AGAINST DEFENDANTS DEPARTMENT OF**  
6 **HOMELAND SECURITY, COMMISSIONER AGUILAR, AND OFFICERS DOES 1-15)**

6 62. Plaintiff Askins incorporates by reference and re-alleges each preceding paragraph  
7 as if fully set forth herein.

8 63. By engaging in the above-described conduct on or about April 19, 2012, CBP  
9 Officers Does 1-15 searched and seized Mr. Askins’s person and/or property without a warrant,  
10 probable cause, reasonable suspicion, consent, exigent circumstances, or any other justification,  
11 in violation of Mr. Askins’s Fourth Amendment right to freedom from unreasonable search and  
12 seizure.

13 64. In violating Mr. Askins’s Fourth Amendment rights, the CBP officers acted  
14 pursuant to an expressly adopted official CBP policy and/or a longstanding CBP practice of  
15 searching and seizing individuals without a warrant, probable cause, reasonable suspicion,  
16 consent, exigent circumstances, or any other justification, when the individuals use cameras and  
17 video recording devices at or near CBP-controlled facilities, including U.S. ports of entry, without  
18 the CBP’s prior approval.

19 65. Furthermore, the conduct of Officers Does 1-15 caused Mr. Askins to suffer harm.  
20 As a result, Mr. Askins is entitled to monetary damages from Officers Does 1-15 pursuant to the  
21 *Bivens* doctrine.

22 66. The unreasonable search and seizure by Officer Does 1-15 was also oppressive,  
23 malicious, and done with a willful and conscious disregard of Mr. Askins’s rights and safety,  
24 justifying an award of punitive damages.

1 **CLAIM FOUR**  
2 **(VIOLATION OF THE FOURTH AMENDMENT—EXCESSIVE USE OF FORCE—BY**  
3 **PLAINTIFF ASKINS AGAINST DEFENDANTS DEPARTMENT OF HOMELAND**  
4 **SECURITY, COMMISSIONER AGUILAR, AND OFFICERS DOES 1-15)**

5 67. Plaintiff Askins incorporates by reference and re-alleges each preceding paragraph  
6 as if fully set forth herein.

7 68. By engaging in the above-described conduct on or about April 19, 2012, including  
8 gripping Mr. Askins's right arm with such force as to cause significant pain and bruising, without  
9 provocation or justification, Officer Doe 1 violated Mr. Askins's Fourth Amendment right to  
10 freedom from the use of excessive force.

11 69. Furthermore, the conduct of Officer Doe 1 caused Mr. Askins to suffer harm. As a  
12 result, Mr. Askins is entitled to monetary damages from Officer Doe 1 pursuant to the *Bivens*  
13 doctrine.

14 70. Officer Doe 1's excessive use of force was also oppressive, malicious, and done  
15 with a willful and conscious disregard of Mr. Askins's rights and safety, justifying an award of  
16 punitive damages.

17 **CLAIM FIVE**  
18 **(VIOLATION OF THE FOURTH AMENDMENT—UNLAWFUL SEARCH AND**  
19 **SEIZURE—BY PLAINTIFF RAMIREZ AGAINST DEFENDANTS DEPARTMENT OF**  
20 **HOMELAND SECURITY AND COMMISSIONER AGUILAR)**

21 71. Plaintiff Ramirez incorporates by reference and re-alleges each preceding  
22 paragraph as if fully set forth herein.

23 72. By engaging in the above-described conduct on or about June 20, 2010, the CBP  
24 officers searched and seized Mr. Ramirez's person and/or property without a warrant, probable  
25 cause, reasonable suspicion, consent, exigent circumstances, or any other justification, in  
26 violation of Mr. Ramirez's Fourth Amendment right to freedom from unreasonable search and  
27 seizure.

28 73. In violating Mr. Ramirez's Fourth Amendment rights, the CBP officers acted  
pursuant to an expressly adopted official CBP policy and/or a longstanding CBP practice of  
searching and seizing individuals without a warrant, probable cause, reasonable suspicion,

1 consent, exigent circumstances, or any other justification, when the individuals use cameras and  
2 video recording devices at or near CBP-controlled facilities, including U.S. ports of entry, without  
3 the CBP’s prior approval.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs respectfully request that the Court:

6 A. Preliminarily and permanently enjoin all Defendants, their successors, agents,  
7 servants and employees, and anyone acting in concert with Defendants, from preventing,  
8 impeding, or otherwise interfering with Plaintiffs’ First Amendment free speech rights to take  
9 photographs and make video recordings of U.S. ports of entry and federal law enforcement  
10 officers engaged in the public discharge of their duties;

11 B. Preliminarily and permanently enjoin all Defendants, their successors, agents,  
12 servants and employees, and anyone acting in concert with Defendants, from violating Plaintiffs’  
13 Fourth Amendment rights by searching and seizing Plaintiffs and/or Plaintiffs’ cameras or video  
14 recording devices without a warrant, probable cause, reasonable suspicion, consent, exigent  
15 circumstances, or any other justification, when Plaintiffs use cameras and video recording devices  
16 at or near CBP-controlled facilities, including U.S. ports of entry.

17 C. Declare Defendants’ conduct to be unlawful;

18 D. Award Plaintiff Askins general, compensatory, statutory, nominal, and/or punitive  
19 damages against CBP Officers Does 1-15 for the violations of his First and Fourth Amendment  
20 rights, in an amount to be proven at trial;

21 E. Award Plaintiffs’ costs, including reasonable attorneys’ fees; and

22 F. Award such other relief as the Court deems proper.

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**JURY DEMAND**

Plaintiffs hereby demand a trial by jury for all issues so triable.

Dated: October 24, 2012

MORRISON & FOERSTER LLP

By:                   s/M. Andrew Woodmansee                    
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MAWoodmansee@mofo.com

Attorneys for Plaintiffs  
RAY ASKINS and CHRISTIAN RAMIREZ



# **Exhibit A**



Civil Rights Division

JMS:TDM:RJO  
DJ 207-35-10

Special Litigation Section - PHB  
950 Pennsylvania Ave, NW  
Washington DC 20530

May 14, 2012

Mark H. Grimes  
Baltimore Police Department  
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Washington, DC 20006

Re: *Christopher Sharp v. Baltimore City Police Department, et. al.*

Dear Counsel:

Judge Paul W. Grimm scheduled a settlement conference in *Christopher Sharp v. Baltimore City Police Department, et. al.* for May 30, 2012. While we take no position on Mr. Sharp's claim for damages against the individual defendants, it is the United States' position that any resolution to Mr. Sharp's claims for injunctive relief should include policy and training requirements that are consistent with the important First, Fourth and Fourteenth Amendment rights at stake when individuals record police officers in the public discharge of their duties. These rights, subject to narrowly-defined restrictions, engender public confidence in our police departments, promote public access to information necessary to hold our governmental officers accountable, and ensure public and officer safety.

The guidance in this letter is designed to assist the parties during the upcoming settlement conference. It specifically addresses the circumstances in this case and Baltimore City Police Department's General Order J-16 ("Video Recording of Police Activity"), but also reflects the United States' position on the basic elements of a constitutionally adequate policy on individuals' right to record police activity.

## 1. Background

In his complaint, Mr. Sharp alleged that on May 15, 2010, Baltimore City Police Department ("BPD") officers seized, searched and deleted the contents of his cell phone after he used it to record officers forcibly arresting his friend. Compl. at 9-12, ECF. No. 2. Mr. Sharp further alleged that BPD maintains a policy, practice or custom of advising officers to detain citizens who record the police while in the public discharge of their duties and to seize, search, and delete individuals' recordings. *Id.* at 7. On November 30, 2011, BPD and Frederick H.

Bealefeld, III filed a Motion to Dismiss Complaint of for Summary Judgment. According to the Motion to Dismiss, BPD promulgated a general order on recording police activity on November 8, 2011. BPD did not file this policy as an exhibit to its Motion to Dismiss. Instead, BPD filed a declaration providing a brief summary of its contents.

On January 10, 2012, the United States filed a Statement of Interest in this matter. In that statement, the United States urged the Court to find that private individuals have a First Amendment right to record police officers in the public discharge of their duties, and that officers violate individuals' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process. The United States also opined that, based on the limited information on the record regarding BPD's development of new policies and training on individuals' right to record the police, BPD failed to meet its burden of establishing that it had taken sufficient action to prevent future constitutional violations. On February 10, 2012, BPD provided the Court, Mr. Sharp and the United States with a courtesy copy of General Order J-16. The same day, BPD released General Order J-16 to the public.<sup>1</sup> Following a hearing on February 13, 2012, Judge Legg denied BPD's motion.

Constitutionally adequate policies must be designed to effectively guide officer conduct, accurately reflect the contours of individuals' rights under the First, Fourth and Fourteenth Amendments, and diminish the likelihood of future constitutional violations. BPD's general order does not meet these requirements in some areas. In other areas, BPD's general order does adequately protect individuals' constitutional rights. We discuss those areas below, as well as others in which BPD should amend the general order to ensure that individual's constitutional rights are protected.

## **2. Guidance on the Right to Record Police Activity.**

### *A. Policies should affirmatively set forth the First Amendment right to record police activity.*

Policies should affirmatively set forth the contours of individuals' First Amendment right to observe and record police officers engaged in the public discharge of their duties. Recording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.<sup>2</sup> See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (“[b]asic

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<sup>1</sup> Peter Hermann, *Baltimore Police Told Not to Stop People Taking Photos or Video of Their Actions*, The Baltimore Sun, February 11, 2012.

<sup>2</sup> There is no binding precedent to the contrary. In *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009), the Fourth Circuit issued a one page, unpublished per curiam opinion summarily concluding – without providing legal or factual support – that the “right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct.” *Id.* at 853; see also *McCormick v. City of Lawrence*, 130 F. App'x 987 (10th Cir. 2005). In the Fourth Circuit, “[u]npublished opinions have no precedential value.” *United States v. Stewart*, 595 F.3d 197, 199 n.1 (4th Cir. 2010); see also *Glik*, 655 F.3d at 85 (“[T]he absence of substantive discussion deprives *Szymecki* of any marginal persuasive value it might otherwise have had.”).

First Amendment principles” and federal case law “unambiguously” establish that private individuals possess “a constitutionally protected right to videotape police carrying out their duties.”); *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the “First Amendment right . . . to photograph or videotape police conduct.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing the “First Amendment right to film matters of public interest”). The First Amendment right to record police activity is limited only by “reasonable time, place, and manner restrictions.” *Glik*, 655 F.3d at 84; *Smith*, 212 F.3d at 1333.

While courts have only recently begun to refine the contours of the right to record police officers, the justification for this right is firmly rooted in long-standing First Amendment principles. The right to “[g]ather[] information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’” *Glik*, 655 F.3d at 82 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The application of this right to the conduct of law enforcement officers is critically important because officers are “granted substantial discretion that may be used to deprive individuals of their liberties.” *Id.*; *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035-36 (1991) (“Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption.”). The “extensive public scrutiny and criticism” of police and other criminal justice system officials serves to “guard[] against the miscarriage of justice,” *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)), a harm that undermines public confidence in the administration of government. When police departments take affirmative steps to protect individuals’ First Amendment rights, departments “not only aid[] in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally.” *Glik*, 655 F.3d at 82-83.

Policies should explain the nature of the constitutional right at stake and provide officers with practical guidance on how they can effectively discharge their duties without violating that right. For example, policies should affirmatively state that individuals have a First Amendment right to record police officers and include examples of the places where individuals can lawfully record police activity and the types of activity that can be recorded.<sup>3</sup> While this area of the law

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<sup>3</sup> Police duties discharged in public settings may include a range of activities, including detentions, searches, arrests or uses of force. In *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), the Third Circuit considered whether there was sufficient 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 conduct during the stop would violate the First Amendment.” *Id.* at 262. The Court determined that, because there were no cases specifically addressing the right to record traffic stops and the relevant Third Circuit decisions were inconsistent, there was insufficient case law to support a finding that the right to record traffic stops was clearly established. *Id.* Because the right was not clearly established, the officer involved was entitled to qualified immunity. *Id.* at 262-63. The Third Circuit expressly did not reach the question of whether the First Amendment protects the recording of police activity during a traffic stop, because it did not need to reach that question to decide that the officer should receive qualified immunity. *Id.* In other contexts, the Supreme Court has noted that, when faced with a close call, “the First Amendment requires [courts] to err on the side of protecting political speech rather than suppressing it.” *FEC v. Wisconsin Right to*

is still developing, existing case law is instructive. In *Glik*, an individual engaged in protected activity when he recorded officers allegedly engaging in excessive force in a public park, “the apotheosis of a public forum.” *Glik*, 655 F.3d at 84. Individuals have a right to record in all traditionally public spaces, including sidewalks, streets and locations of public protests.

Courts have also extended First Amendment protection to recordings taken on private property, including an individual filming police activity from his or her home or other private property where an individual has a right to be present. See *Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007) (activist’s posting of a video of “a warrantless and potentially unlawful search of a private residence” on her website was entitled to First Amendment protection); *Pomykacz v. Borough of West Wildwood*, 438 F.Supp.2d 504, 513 (D. N.J. 2006) (individual was engaging in political activism protected by the First Amendment when she photographed police officer while officer was in police headquarters and in municipal building); *Robinson v. Fetterman*, 378 F.Supp.2d 534, 541 (E.D. Pa. 2005) (individual who videotaped state troopers from private property with the owner’s permission was engaged in constitutionally protected speech). The 1991 videotaped assault of Rodney King at the hands of law enforcement officers exemplifies this principle. A private individual awakened by sirens recorded police officers assaulting King from the balcony of his apartment. This videotape provided key evidence of officer misconduct and led to widespread reform. Congress enacted 42 U.S.C. §14141 in response to this incident. Section 14141 granted the U.S. Attorney General the right to seek declaratory or injunctive relief against law enforcement agencies engaged in a pattern or practice of violating the Constitution or federal law.

BPD’s General Order J-16 should affirmatively set forth that individuals have a First Amendment right to record officers in the public discharge of their duties. At numerous points throughout General Order J-16, BPD refers to “Constitutional rights” that form the basis for the policy. For example, General Order J-16 begins with a statement acknowledging that the purpose of the policy is to “to ensure the protection and preservation of every person’s Constitutional rights,” *id.* at 1, and later refers to bystanders’ “absolute right to photograph and/or video record the enforcement actions of any Police Officer.” *Id.* at 2. Yet, General Order J-16 never explicitly acknowledges that this right derives from the First Amendment. Particularly given the numerous publicized reports over the past several years alleging that BPD officers violated individuals’ First Amendment rights, BPD should include a specific recitation of the First Amendment rights at issue in General Order J-16.

Other areas of General Order J-16 also require further clarification. For example, General Order J-16 states that officers may not prohibit a person’s ability to observe, photograph, and/or make a video recording of police activity that occurs “in the public domain,” General Order J-16 at 1, but never defines this term. BPD should clarify that the right to record public officials is not limited to streets and sidewalks – it includes areas where individuals have a legal right to be present, including an individual’s home or business, and common areas of public and private facilities and buildings.

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*Life, Inc.*, 551 U.S. 449, 457 (2007). See also *Bertot v. School Dist. No. 1, Albany County, Wyo.*, 613 F.2d 245, 252 (10th Cir. 1979) (“We prefer that governmental officials acting in sensitive First Amendment areas err, when they do err, on the side of protecting those interests.”).

*B. Policies should describe the range of prohibited responses to individuals observing or recording the police.*

Because recording police officers in the public discharge of their duties is protected by the First Amendment, policies should prohibit interference with recording of police activities except in narrowly circumscribed situations. More particularly, policies should instruct officers that, except under limited circumstances, officers must not search or seize a camera or recording device without a warrant. In addition, policies should prohibit more subtle actions that may nonetheless infringe upon individuals' First Amendment rights. Officers should be advised not to threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or recording devices.

Policies should prohibit officers from destroying recording devices or cameras and deleting recordings or photographs under any circumstances. In addition to violating the First Amendment, police officers violate the core requirements of the Fourteenth Amendment procedural due process clause when they irrevocably deprived individuals of their recordings without first providing notice and an opportunity to object. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society."); *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 823 (5th Cir. 2007) (The notice defendant provided to the plaintiff "was insufficient to satisfy due process because [plaintiff] did not receive the notice until after his personal property was allegedly discarded . . . [D]iscarding [plaintiff's] personal property in this manner violated his procedural due process rights.").

BPD's General Order J-16 addresses the search and seizure of cameras or recording devices. However, the policy does not prohibit more subtle officer actions that nonetheless may infringe upon individuals' First Amendment rights. BPD should instruct officers not to threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or other recording devices.

The order also prohibits officers from damaging or erasing the contents of a device without first obtaining a warrant, General Order J-16 at 2. This is not merely a Fourth Amendment question, however. Under the First Amendment, there are no circumstances under which the contents of a camera or recording device should be deleted or destroyed. BPD's general order should include clear language prohibiting the deletion or destruction of recordings under any circumstances.

*C. Policies should clearly describe when an individual's actions amount to interference with police duties.*

The right to record police activity is limited only by "reasonable time, place, and manner restrictions." *Glik*, 655 F.3d at 8; *Smith*, 212 F.3d at 1333. If a general order permits individuals to record the police unless their actions interfere with police activity, the order should define what it means for an individual to interfere with police activity and, when possible, provide specific examples in order to effectively guide officer conduct and prevent infringement on activities protected by the First Amendment.

A person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, or incite others to violate the law. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (words “likely to cause a fight” are not afforded First Amendment protection); *see also Louisiana ex rel. Gremillion v. National Ass’n for the Advancement of Colored People*, 366 U.S. 293, 297 (1961) (“criminal conduct . . . cannot have shelter in the First Amendment”). Courts have held that speech is not protected by the First Amendment if it amounts to actual obstruction of a police officer’s investigation – for example, by tampering with a witness or persistently engaging an officer who is in the midst of his or her duties. *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).

However, an individual’s recording of police activity from a safe distance without any attendant action intended to obstruct the activity or threaten the safety of others does not amount to interference. Nor does an individual’s conduct amount to interference if he or she expresses criticism of the police or the police activity being observed. *See City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987) (“[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”); *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16 (1973) (“Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer.”) Even foul expressions of disapproval towards police officers are protected under the First Amendment.<sup>4</sup> *See, e.g., Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (individual who was “making obscene gestures” and “yell[ed] profanities” at an officer engaged in conduct that “fell squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech—such as stopping or hassling the speaker—is categorically prohibited by the Constitution.”).

Time, place, and manner restrictions on First Amendment speech must “leave open ample alternative channels for communication of the information,” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). BPD’s general order specifically suggests that, if a bystander’s actions are

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<sup>4</sup> The Supreme Court has carved out an exception for “‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky*, 315 U.S. at 572. However, the Court has indicated that the fighting words exception “might require a narrower application in cases involving words addressed to a police officer, because ‘a properly trained officer may reasonably be expected to exercise a higher degree of restraint’ than the average citizen, and thus be less likely to respond belligerently to ‘fighting words.’” *Hill*, 482 U.S. at 462. *See also Johnson v. Campbell*, 332 F.3d 199 (3d Cir. 2003) (detainee’s words “son of a bitch” to police officer were not fighting words); *Posr v. Court Officer Shield #207*, 180 F.3d 409 (2d Cir. 1999) (individual’s statement to officer “one day you’re gonna get yours,” spoken while in retreat, were not fighting words); *Buffkins v. City of Omaha, Douglas County*, 922 F.2d 465, 472 (8th Cir. 1991) (finding no evidence that individual caused “an incitement to immediate lawless action” by calling officer “asshole”).

“approaching the level of a criminal offense,” supervisors should “recommend a less-intrusive location to the bystander from which he/she may continue to observe, photograph, or video record the police activity.” *Id.* at 5. This is effective language to guide supervisor’s conduct. However, BPD’s general order does not permit or recommend that “members” – presumably officers – provide this information to bystanders before effectuating an arrest. BPD should revise its general order to provide “members” with the same authority.

General Order J-16 must set forth with specificity the narrow circumstances in which a recording individual’s interference with police activity could subject the individual to arrest. Recent publicized interactions between citizen-recorders and BPD officers highlight the need for clear guidance on this issue. *See* Peter Hermann, *Police Allow Bystanders to Tape Arrest, But at What Risk?*, The Baltimore Sun, April 3, 2012 (president of the city police union stating that officers “are confused right now” about how to appropriately respond to individuals recording police conduct); *see also*, *Fox45 Top News Stories Video*, Fox45 WBFF Baltimore, March 22, 2012 (covering the suspension of a BPD officer who confiscated a cell phone from an individual recording police from a family member’s property)<sup>5</sup>; Justin Fenton, *In Federal Hill, Citizens Allowed to Record Police – But Then There’s Loitering*, The Baltimore Sun, February 11, 2012 (BPD officer instructing a citizen-recorder that he would face loitering charges if he failed to move away from the scene of an arrest).

Under “General Information,” General Order J-16 at 2, the policy states that bystanders have an absolute right to record police activity as long as the bystanders’ actions do not fall into one of six exceptions. One exception is that bystanders may not “Interfere with or violate any section of the law, ordinance, code, or criminal or traffic article.” While bystanders clearly may not violate the law, it is less clear under what circumstances an individual’s actions would “interfere” with a law or ordinance. This language encourages officers to use their discretion in inappropriate, and possibly unlawful, ways. Instead, General Order J-16 should encourage officers to provide ways in which individuals can continue to exercise their First Amendment rights as officers perform their duties, rather than encourage officers to look for potential violations of the law in order to restrict the individual’s recording.

*D. Policies should provide clear guidance on supervisory review.*

First line supervision is a critical component of constitutional policing. Policies should include guidance on when an officer should call a supervisor to the scene and what a supervisor’s responsibilities are once he or she arrives at the scene. A supervisor’s presence at the scene should be required before an officer takes any significant action involving citizen-recorders or recording devices, including a warrantless search or seizure of a camera or recording device or an arrest.<sup>6</sup>

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<sup>5</sup> Available at: [http://www.foxbaltimore.com/newsroom/top\\_stories/videos/wbff\\_vid\\_12767.shtml](http://www.foxbaltimore.com/newsroom/top_stories/videos/wbff_vid_12767.shtml).

<sup>6</sup> Supervisors should be present at the scene to approve any arrest for conduct related to the use of cameras or recording devices. For example, an arrest for quality of life offenses, including “hindering” or “loitering,” may be based upon the individuals’ alleged interference with police duties while using a recording device. *See, e.g.*, Justin Fenton, *In Federal Hill, Citizens Allowed to Record Police – But Then There’s Loitering*, The Baltimore Sun, February 11, 2012 (BPD



BPD should clarify the role of supervisors. A supervisor's presence at the scene should be required before an officer takes any significant action involving cameras or recording devices, including a warrantless search or seizure. If feasible, supervisors should be present prior to an individual's arrest related to the use of a recording device. At a minimum, supervisors must be present to approve such arrests before an individual is transported to a holding facility. BPD's general order does not include mandatory language requiring supervisors to be present during these occurrences, but rather advises supervisors to be present "if possible." General Order J-16 at 4.

Moreover, BPD's general order includes inconsistent language regarding when a member should contact a supervisor. On page 4, officers are instructed to notify a supervisor *after* an individual has been arrested. Later on the same page, under the supervisor's responsibilities, the supervisor is advised to go to any scene where the actions of a bystander are "approaching the level of a criminal offense." BPD should reconcile this inconsistency and require, at a minimum, a supervisor's presence at the scene to approve all arrests or any other significant action by a member.

*E. Policies should describe when it is permissible to seize recordings and recording devices.*

Policies on individuals' right to record and observe police should provide officers with clear guidance on the limited circumstances under which it may be permissible to seize recordings and recording devices. An officer's response to an individual's recording often implicates both the First and Fourth Amendment, so it's particularly important that a general order is consistent with basic search and seizure principles. A general order should provide officers with guidance on how to lawfully seek an individual's consent to review photographs or recordings and the types of circumstances that do—and do not—provide exigent circumstances to seize recording devices, the permissible length of such a seizure, and the prohibition against warrantless searches once a device has been seized. Moreover, this guidance must reflect the special protection afforded to First Amendment materials.

Policies should include language to ensure that consent is not coerced, implicitly or explicitly. *See Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973) ("[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."). In assessing whether an individual's consent to search was freely and voluntarily given, Courts may consider "the characteristics of the accused . . . as well as the conditions under which the consent to search was given (such as the officer's conduct; the number of officers present; and the duration, location, and time of the encounter)." *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996). BPD's explanation of the process for obtaining consent includes clear guidelines regarding what steps an officer should take once an individual provides an officer with consent to review a recording. However, BPD's general order should include language to ensure that consent is not coerced, implicitly or explicitly.

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officer instructing a citizen-recorder that he would face loitering charges if he failed to move away from the scene of an arrest).

Warrantless seizures are only permitted if an officer has probable cause to believe that the property “holds contraband or evidence of a crime” and “the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.” *United States v. Place*, 462 U.S. 696, 701 (1983). Any such seizure must be a “temporary restraint[] where needed to preserve evidence until police c[an] obtain a warrant.” *Illinois v. McArthur*, 531 U.S. 326, 334 (2001). Seizures must be limited to a reasonable period of time. For example, in *Illinois v. McArthur*, the Supreme court upheld a police officer’s warrantless seizure of a premises, in part, because police had good reason to fear that evidence would be destroyed and the restraint only lasted for two hours – “no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.” *Id.* at 332. Once seized, officers may not search the contents of the property without first obtaining the warrant. *Place*, 462 U.S. at 701 & n.3. In the context of the seizure of recording devices, this means that officers may not search for or review an individual’s recordings absent a warrant.

Police departments must also recognize that the seizure of a camera that may contain evidence of a crime is significantly different from the seizure of other evidence because such seizure implicates the First, as well as the Fourth, Amendment. The Supreme Court has afforded heightened protection to recordings containing material protected by the First Amendment. An individual’s recording may contain both footage of a crime relevant to a police investigation and evidence of police misconduct. The latter falls squarely within the protection of First Amendment. *See, e.g., 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 warrantless seizure of such material is a form of prior restraint, a long disfavored practice. *Roaden v. Kentucky*, 413 U.S. 496, 503 (1973) (when an officer “br[ings] to an abrupt halt an orderly and presumptively legitimate distribution or exhibition” of material protected by the First Amendment, such action is “plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards.”). *See also Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (Where sheriff’s deputies suppressed newspapers critical of the sheriff “before the critical commentary ever reached the eyes of readers, their conduct met the classic definition of a prior restraint.”). An officer’s warrantless seizure of an individual’s recording of police activity is no different. *See Robinson v. Fetterman*, 378 F.Supp.2d 534, 541 (E.D. Penn 2005) (By restraining an individual from “publicizing or publishing what he has filmed,” officer’s “conduct clearly amounts to an unlawful prior restraint upon [] protected speech.”); *see Channel 10, Inc. v. Gunnarson*, 337 F.Supp. 634, 637 (D.Minn. 1972) (“it is clear to this court that the seizure and holding of the camera and undeveloped film was an unlawful ‘prior restraint’ whether or not the film was ever reviewed.”).

The warrantless seizure of material protected by the First Amendment “calls for a higher hurdle in the evaluation of reasonableness” under the Fourth Amendment. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973). Police departments should limit the circumstances under which cameras and recording devices can be seized and the length of the permissible seizure. BPD’s general order does not convey that the warrantless seizure of recording material is different than the warrantless seizure of many other types of evidence, in that it implicates the First, as well as the Fourth, Amendment. General Order J-16 should make it clear to officers that, in the ordinary course of events, there will not be facts justifying the seizure of cameras or recording devices. Moreover, General Order J-16 does not define “temporary” seizure. BPD should clarify how long and under what circumstances an officer may seize a recording device, even temporarily,

and how the recordings on the device must be maintained after seizure. A policy permitting officers, with supervisory approval, to seize a film for no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant if that film contains critical evidence of a felony crime would diminish the likelihood of constitutional violations.

*F. Police departments should not place a higher burden on individuals to exercise their right to record police activity than they place on members of the press.*

The Supreme Court has established that “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). Indeed, numerous courts have held that a private individual’s right to record is coextensive with that of the press. A private individual does not need “press credentials” to record police officers engaged in the public discharge of their duties. *See e.g., Glik*, 655 F.3d at 83 (“The First Amendment right to gather news is, as the Court has often noted, 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.”); *Lambert v. Polk County, Iowa*, 723 F.Supp. 128, 133 (S.D. Iowa 1989) (“It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events—all of us . . . have that right.”). The First Amendment “attempt[s] to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’” including the “promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

This principal is particularly important in the current age where widespread access to recording devices and online media have provided private individuals with the capacity to gather and disseminate newsworthy information with an ease that rivals that of the traditional news media. *See Glik*, 655 F.3d at 84 (“[M]any of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.”).

BPD’s general order appropriately does not place a higher burden on individuals to exercise their right to record police activity than in places on members of the press. Policies should not establish different guidelines for media and non-media individuals. BPD’s general order includes language that accomplishes this goal:

“Members of the press and members of the general public enjoy the same rights in any area accessible to the general public.” *Id.* at 4.

“No individual is required to display ‘press credentials’ in order to exercise his/her right to observe, photograph, or video record police activity taking place in an area accessible to, or within view of, the general public.” *Id.*

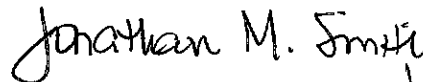
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These two provisions effectively convey that officers should not place a higher burden on individuals to exercise their right to record police activity than in places on members of the press.

### 3. Conclusion

Comprehensive policies and effective training are critical to ensuring that individuals' First, Fourth and Fourteenth Amendment rights are protected when they record police officers in the public discharge of their duties. If the parties determine that settlement of this matter is feasible, we encourage the parties to reach an agreement that is consistent with the guidance provided above. Please note that this letter is a public document and will be posted on the Civil Rights Division's website. If you have any questions, please feel free to contact us.

Sincerely,

  
by SES

JONATHAN M. SMITH  
Chief  
Special Litigation Section

# **Exhibit B**



# Health Impacts of Border Crossings Conference 2012

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## About:

This binational conference focused on local health impacts of the U.S.-Mexico border. The emphasis was on avenues for **reduction of exposures to traffic pollutants** experienced by people crossing the border at the U.S.-Mexico Ports of Entry, workers and the community on both sides of the border. The conference included participation of researchers and stakeholders from the San Diego-Tijuana region and other areas along the U.S.-Mexico border with similar issues.

### Who attended?

- Community residents living/working near border crossings
- Scientists and researchers
- Health advocates
- Government agencies
- Planners
- Policy makers
- People who cross the border often

### Outcomes:

A white paper will be published and distributed after the conference, incorporating input from participants.

### Location

San Ysidro Civic Center  
 212 W. Park Avenue  
 San Ysidro, CA 92173

### Ubicación

San Ysidro Centro Cívico  
 212 W. Park Avenue  
 San Diego, CA 92173



Photo courtesy of: REUTERS/Mike Blake

## Descripción:

Esta conferencia binacional fue sobre los impactos locales en la salud de los pasajeros y vehículos comerciales en los cruces fronterizos a lo largo de la frontera México-U.S. El énfasis estaba en las **vías de reducción de afectación a personas por la exposición de contaminantes del tráfico**, incluyendo a las comunidades locales que rodean a ambos lados de la frontera, las personas que cruzan en vehículos o caminado y trabajadores.

### Quién asistió?

- Residentes de la comunidad que viven/trabajan cerca de los cruces fronterizos
- Científicos e Investigadores
- Defensores de la Salud Pública
- Organismos gubernamentales
- Planificadores
- Funcionarios públicos
- Personas que Cruzan la frontera con frecuencia

### Resultado Final:

Un documento será publicado y distribuido después de la conferencia, incorporando las aportaciones de los participantes.



# **Exhibit C**

**Prendergast, Mary**

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**From:** Sean Riordan <SRiordan@aclusandiego.org>  
**Sent:** Tuesday, October 23, 2012 12:00 PM  
**To:** Prendergast, Mary  
**Subject:** FW: Complaint/arrest  
**Attachments:** Letter to Billy Whitford\_04-19-12 (2).doc

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**From:** Ray Askins [<mailto:ras6057499@hotmail.com>]  
**Sent:** Wednesday, May 09, 2012 1:58 AM  
**To:** David Loy  
**Subject:** FW: Complaint/arrest

CBP response

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Subject: RE: Complaint/arrest  
Date: Fri, 20 Apr 2012 15:34:03 -0400  
From: [BILLY.B.WHITFORD@CBP.DHS.GOV](mailto:BILLY.B.WHITFORD@CBP.DHS.GOV)  
To: [ras6057499@hotmail.com](mailto:ras6057499@hotmail.com)

Hello Ray,

In response to the issues raised in your complaint, the area in question is currently under the jurisdiction of GSA and CBP. CBP security policies prohibit visitors at CBP-controlled facilities from using cameras and video recording devices without the prior approval from the senior CBP official (Port Director or designee).

The officer perceived your actions as a security violation and detained you briefly until a supervisor was contacted and it was determined that you posed no threat to the facility, the public, or the officers. I regret that this incident occurred and hope that all officers conducted themselves in a professional manner at all times.

Billy Whitford

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**From:** Ray Askins [<mailto:ras6057499@hotmail.com>]  
**Sent:** Friday, April 20, 2012 6:47 AM  
**To:** WHITFORD, BILLY B  
**Subject:** Complaint/arrest

Good morning Billy

See attached.

Please get back to me

Ray Askins



CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
RAY ASKINS and CHRISTIAN RAMIREZ
(b) County of Residence of First Listed Plaintiff Imperial County
(c) Attorneys (Firm Name, Address, and Telephone Number)
M. Andrew Woodmansee (CA SBN 201780) (see Attachment A)
Morrison & Foerster LLP, 12531 High Bluff Drive
San Diego, CA 92130-2040 Telephone: (858) 720-5100

DEFENDANTS
UNITED STATES DEPARTMENT OF HOMELAND SECURITY; et al.
(see Attachment B)
County of Residence of First Listed Defendant Washington D.C.
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
'12CV2600 W BLM
Attorneys (If Known)
U.S. Department of Justice, Office of the Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001 Telephone: (202) 514-2001

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT
110 Insurance
120 Marine
130 Miller Act
140 Negotiable Instrument
150 Recovery of Overpayment & Enforcement of Judgment
151 Medicare Act
152 Recovery of Defaulted Student Loans (Excl. Veterans)
153 Recovery of Overpayment of Veteran's Benefits
160 Stockholders' Suits
190 Other Contract
195 Contract Product Liability
196 Franchise
TORTS
PERSONAL INJURY
310 Airplane
315 Airplane Product Liability
320 Assault, Libel & Slander
330 Federal Employers' Liability
340 Marine
345 Marine Product Liability
350 Motor Vehicle
355 Motor Vehicle Product Liability
360 Other Personal Injury
362 Personal Injury - Med. Malpractice
PERSONAL INJURY
365 Personal Injury - Product Liability
367 Health Care/Pharmaceutical Personal Injury Product Liability
368 Asbestos Personal Injury Product Liability
370 Other Fraud
371 Truth in Lending
380 Other Personal Property Damage
385 Property Damage Product Liability
FORFEITURE/PENALTY
625 Drug Related Seizure of Property 21 USC 881
690 Other
LABOR
710 Fair Labor Standards Act
720 Labor/Mgmt. Relations
740 Railway Labor Act
751 Family and Medical Leave Act
790 Other Labor Litigation
791 Empl. Ret. Inc. Security Act
IMMIGRATION
462 Naturalization Application
463 Habeas Corpus - Alien Detainee (Prisoner Petition)
465 Other Immigration Actions
BANKRUPTCY
422 Appeal 28 USC 158
423 Withdrawal 28 USC 157
PROPERTY RIGHTS
820 Copyrights
830 Patent
840 Trademark
SOCIAL SECURITY
861 HIA (1395ff)
862 Black Lung (923)
863 DIWC/DIWW (405(g))
864 SSID Title XVI
865 RSI (405(g))
FEDERAL TAX SUITS
870 Taxes (U.S. Plaintiff or Defendant)
871 IRS—Third Party 26 USC 7609
OTHER STATUTES
375 False Claims Act
400 State Reapportionment
410 Antitrust
430 Banks and Banking
450 Commerce
460 Deportation
470 Racketeer Influenced and Corrupt Organizations
480 Consumer Credit
490 Cable/Sat TV
850 Securities/Commodities/Exchange
890 Other Statutory Actions
891 Agricultural Acts
893 Environmental Matters
895 Freedom of Information Act
896 Arbitration
899 Administrative Procedure Act/Review or Appeal of Agency Decision
950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 U.S.C. § 702; 28 U.S.C. § 2201; U.S. Const. amend. I, IV
Brief description of cause:
Violation of First and Fourth Amendment rights

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND \$
CHECK YES only if demanded in complaint:
JURY DEMAND: X Yes [ ] No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE DOCKET NUMBER

DATE 10/24/2012 SIGNATURE OF ATTORNEY OF RECORD s/M. Andrew Woodmansee

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**ATTACHMENT A TO  
ASKINS v. U.S. DEPT. OF HOMELAND SECURITY  
CIVIL COVER SHEET**

**ATTORNEYS FOR PLAINTIFFS:**

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**ATTACHMENT B TO  
*ASKINS v. U.S. DEPT. OF HOMELAND SECURITY*  
CIVIL COVER SHEET**

**DEFENDANTS:**

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DAVID V. AGUILAR, Deputy Commissioner of United States Customs and Border Protection; CALEXICO PORT DIRECTOR BILLY WHITFORD; SAN YSIDRO PORT DIRECTOR FRANK JARAMILLO; UNITED STATES CUSTOMS & BORDER PROTECTION OFFICERS DOES 1 through 15; and DOES 16 through 50.

**From:** [efile\\_information@casd.uscourts.gov](mailto:efile_information@casd.uscourts.gov)  
**To:** [CourtMail@casd.uscourts.gov](mailto:CourtMail@casd.uscourts.gov)  
**Subject:** Activity in Case 3:12-cv-02600-W-BLM Askins et al v. United States Department of Homeland Security et al  
Complaint  
**Date:** Thursday, October 25, 2012 10:09:52 AM

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**U.S. District Court  
Southern District of California**

**Notice of Electronic Filing**

The following transaction was entered on 10/25/2012 at 10:08 AM PDT and filed on 10/24/2012

**Case Name:** Askins et al v. United States Department of Homeland Security et al  
**Case Number:** [3:12-cv-02600-W-BLM](#)  
**Filer:** Christian Ramirez  
Ray Askins  
**Document Number:** [1](#)

**Docket Text:**

**[COMPLAINT with Jury Demand against All Defendants \( Filing fee \\$ 350 receipt number 0974-5278217.\), filed by Christian Ramirez, Ray Askins. \(Attachments: # \(1\) Exhibit A, # \(2\) Exhibit B, # \(3\) Exhibit C, # \(4\) Civil Cover Sheet\)](#)**

**[The new case number is 3:12-cv-2600-W-BLM. Judge Thomas J. Whelan and Magistrate Judge Barbara Lynn Major are assigned to the case. \(Woodmansee, Mark\)\(vam\)](#)**

**3:12-cv-02600-W-BLM Notice has been electronically mailed to:**

U S Attorney CV Efile.dkt.civ@usdoj.gov

Mark Andrew Woodmansee mawoodmansee@mofocom, dcoletti@mofocom, sdprdrive@mofocom

**3:12-cv-02600-W-BLM Electronically filed documents must be served conventionally by the filer to:**

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1106146653 [Date=10/25/2012] [FileNumber=6659590-0] [121294e75920afbb81bb6100a23c46e193cea124e5b7de706761abd4c2109206a24fe0259a1e551bd751cd373041c16d9c28bf25ea5e97ca6adb169c674c128a]]

**Document description:**Exhibit A

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1106146653 [Date=10/25/2012] [FileNumber=6659590-1] [12d7da401201e609882e21940b210dbb26b2e51167bf3078fe91a5fa770a4f6740d44c06adf531033b0da903dbc55cb99d6249cab4cb9888e832f113d1dd8dc0]]

**Document description:**Exhibit B

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1106146653 [Date=10/25/2012] [FileNumber=6659590-2] [3b680969bb96ffef6388faa62e338c1cceb6d5240c766b339df479e2545c8d71c0d907791b2264ee72fbef9fd6b9e743d683e8a49a676c4702300a5a0e88bc97]]

**Document description:**Exhibit C

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1106146653 [Date=10/25/2012] [FileNumber=6659590-3] [53702f5d5a1eac6ef60cad39d0be941794d2d24b2174b4980a50ce3324779034dcfd2681c7963a18fcd530367c79118678413025f7ed2ba3577473c45789681a]]

**Document description:** Civil Cover Sheet

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1106146653 [Date=10/25/2012] [FileNumber=6659590-4] [1e1738b03b047c8af76eb7259ddabe9631232b3e980de2c265b6a7833dc768740b8d844551231d9c09a889e8cb334b30b8c11fe5fee4d2b65abcbd59c304d75e]]