APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 21-1827

DIJON SHARPE,

Plaintiff – Appellant,

v.

WINTERVILLE POLICE DEPARTMENT; WILLIAM BLAKE ELLIS, in his official capacity only; MYERS PARKER HELMS, IV, in his individual and official capacity,

Defendant – Appellees.

NATIONAL POLICE ACCOUNTABILITY PROJECT; THE INSTITUTE FOR JUSTICE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC; THE DUKE UNIVERSITY SCHOOL OF LAW FIRST AMENDMENT CLINIC; ELECTRONIC PRIVACY INFORMATION CENTER; ELECTRONIC FRONTIER FOUNDATION; CATO INSTITUTE,

Amici Supporting Appellant.

SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION,

Amicus Supporting Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Denver III, District Judge. (4:19-cv-00157-D)

Argued: October 27, 2022 Decided: February 7, 2023

Before NIEMEYER and RICHARDSON, Circuit Judges, and Michael S. NACHMANOFF, United States District Judge for the Eastern District of Virginia, sitting by designation.

Vacated in part, affirmed in part, and remanded by published opinion. Judge Richardson wrote the opinion, in which Judge Nachmanoff joined. Judge Niemeyer wrote an opinion concurring in the judgment.

ARGUED: Andrew Tutt, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C., for Appellant. Dan M. Hartzog, Jr., HARTZOG LAW GROUP LLP, Raleigh, North Carolina, for Appellees. Joseph Michael McGuinness, THE MCGUINNESS LAW FIRM, Elizabethtown, North Carolina, for Amicus The Southern States Police Benevolent Association. **ON BRIEF:** T. Greg Doucette, THE LAW OFFICES OF T. GREG DOUCETTE PLLC, Durham, North Carolina; Jing Wang, Palo Alto, California, John A. Freedman, David McMullen, Washington, D.C., Isaac Ramsey, ARNOLD

& PORTER KAY SCHOLER LLP, San Francisco, California, for Appellant. Katherine M. Barber-Jones, HARTZOG LAW GROUP LLP, Raleigh, North Carolina, for Appellees. Lauren Bonds, NATIONAL POLICE ACCOUNTABILITY PROJECT, New Orleans, Louisiana; J. Christopher Mills, J. CHRISTOPHER MILLS, LLC, Columbia, South Carolina; David Milton, Boston, Massachusetts, for Amicus National Police Accountability Project. Victoria Clark, Austin, Texas, William Aronin, INSTITUTE FOR JUSTICE, Arlington, Virginia, for Amicus The Institute for Justice. Vera Eidelman, Carl Takei, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Irena Como, Kristi Graunke, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, Raleigh, North Carolina, for Amici American Civil Liberties Union and American Civil Liberties Union of North Carolina. Mickey H. Osterreicher, Buffalo, New York, Alicia Wagner Calzada, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, San Antonio, Texas; Lin Weeks, Gabriel Rottman, Ian C. Kalish, First Amendment Clinic, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia; Sarah Ludington, First Amendment Clinic, DUKE UNIVERSITY SCHOOL OF LAW, Durham, North Carolina, for Amici National Press Photographers Association, the University of Virginia School of Law First Amendment Clinic, and the Duke University School of Law First Amendment Clinic. Megan Iorio, Jake Weiner, ELECTRONIC PRIVACY INFORMATION CENTER, Washington, D.C., for Amicus Electronic Privacy Information Center. Sophia Cope, Mukund Rathi, ELECTRONIC FRONTIER FOUNDATION, San Francisco, California, for Amicus Electronic Frontier Foundation. Clark M. Neily III, Jay R. Schweikert,

CATO INSTITUTE, Washington, D.C., for Amicus The Cato Institute

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RICHARDSON, Circuit Judge:

This case asks whether a town's alleged policy that bans video livestreaming certain interactions with law enforcement violates the First Amendment. It also asks whether a police officer who, during a traffic stop, attempted to stop a passenger from livestreaming the encounter may be successfully sued under § 1983 for violating the passenger's First Amendment rights.

On the first question, Defendants have thus far failed to establish that the alleged livestreaming policy is sufficiently grounded in, and tailored to, strong governmental interests to survive First Amendment scrutiny. So we vacate the district court's order declaring the policy constitutional and remand for further proceedings. But on the second question, we affirm the district court's order holding that qualified immunity protects the officer. When the stop occurred, it was not clearly established that the officer's actions violated the passenger's First Amendment rights. So qualified immunity bars that claim.

I. Background

Officer Myers Helms of the Winterville Police Department tried to stop passenger Dijon Sharpe from livestreaming his own traffic stop. [J.A. 9–10, 34–35.] Sharpe started streaming to Facebook Live shortly after the car he was riding in was pulled over. [J.A. 9.] Officer Helms noticed this activity and attempted to take Sharpe's phone, reaching through Sharpe's open car window. [J.A. 9, 55, 75.] Officer Helms and his partner Officer William Ellis then told Sharpe he could record the

stop but could not stream it to Facebook Live because that threatened officer safety. The officers also made it clear that if Sharpe tried to livestream a future police encounter, he would have his phone taken away or be arrested.[1] [J.A. 9–10, 34–35.]

Sharpe sued under 42 U.S.C. § 1983. He sued the officers in their official capacities—effectively suing the Town of Winterville—for allegedly having a policy that prohibits recording and livestreaming public police interactions in violation of the First Amendment.[2] [J.A. 10.] He also sued Officer Helms in his individual capacity. [J.A. 11.] The district court awarded Defendants judgment on the pleadings after finding that the policy, as alleged, did not violate the First Amendment.[3] [J.A. 78–86.] And the court dismissed the individual-capacity claim against Officer Helms as barred by qualified immunity. [J.A. 59–66.]

II. Discussion

Sharpe plausibly alleges that the Town of Winterville has a policy preventing someone in a stopped vehicle from livestreaming their traffic stop. If that policy exists, it

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[1] When asked whether this was a law, Officer Ellis responded, "That's the RDO," J.A. 34, likely referring to N.C. Gen. Stat. Ann. § 14-233, a statute that criminalizes "resisting, delaying, or obstructing" an officer.

[2] *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985) ("Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" (quoting *Monell v. New York City Dept. of Soc. Ser's.*, 436 U.S. 658, 690 n.55 (1978))). Sharpe also sued the Winterville Police Department. [J.A. 10.] But the district court dismissed this claim, finding the Winterville Police Department could not be sued under North Carolina law. [J.A. 57–59.] Sharpe has not appealed this dismissal.

[3] We use "Defendants" to refer to the officers in their official capacities and, effectively, the Town.

reaches protected speech. So to survive First Amendment scrutiny, the Town needs to justify the alleged policy by proving it is tailored to weighty enough interests. The Town has not yet met that burden. So Sharpe's claim that the Town's livestreaming policy violates the First Amendment survives.

Sharpe also appeals the district court's dismissal of his individual-capacity claim against Officer Helms. He asserts that it was clearly established that Officer Helms's actions violated his First Amendment rights. So, he says, Officer Helms is not immune. We disagree. At the time of Sharpe's traffic stop, it was not clearly established that the First Amendment prohibited an officer from preventing a passenger who is stopped from livestreaming their traffic stop. Officer Helms is therefore entitled to qualified immunity, and Sharpe's individual-capacity claim was properly dismissed.

A. Sharpe Plausibly Alleges a First Amendment Violation

For his claim against the Town to survive the pleading stage, Sharpe need only plausibly allege (1) that the Town has a policy preventing a passenger from livestreaming their traffic stop and (2) that such a policy violates his First Amendment rights.[4] He has done so.

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[4] At this stage of the litigation, we are merely testing the sufficiency of the complaint, not resolving its merits or any factual disputes. *See Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014). So long as Sharpe has pleaded enough facts that, when assumed to be true, state a plausible First Amendment violation, then his official-capacity claim should survive Defendants' Rule 12(c) challenge. *See id.*; *Owens v. Balt. City State's Attys. Office*, 767 F.3d 379, 403 (4th Cir. 2014) ("Although prevailing on the merits of a *Monell* claim is difficult, simply alleging such a claim is, by definition, easier . . . The recitation

Sharpe must first plausibly allege that the Town has a policy or custom barring a car's occupant from livestreaming their traffic stop. The Town, as a local government, is only "liable under § 1983 for its own violations of federal law." *Los Angeles Cty. v. Humphries*, 562 U.S. 29, 36 (2010). So unless Sharpe's alleged injury came from executing a Town "policy or custom," the Town cannot be sued under § 1983. *Monell*, 436 U.S. at 694 ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

Sharpe has alleged that the Town has a policy that prohibits an occupant from livestreaming their own traffic stop. And Sharpe's allegation is plausible.[5] He supports

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of facts need not be particularly detailed, and the chance of success need not be particularly high.").

[5] Sharpe alleges a broader policy that prevents both "recording and livestreaming" and reaches all public interactions with police. J.A. 11. Yet it is implausible that the Town's policy prevents recording without livestreaming. The officers made it clear that Sharpe was free to record, he just could not livestream. So he has plausibly alleged a policy that bars livestreaming, but not one that bars only recording. He thus lacks standing to seek, as he does, a declaration that "he has a First Amendment-protected right to record police officers in the public performance of their duties." J.A. 11; *see Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021). And while he may plausibly allege that the policy reaches all public police interactions, we know that if the policy exists it covers Sharpe's circumstances. Since that is enough for Sharpe to prevail here, that is the only scenario we consider.

Additionally, Sharpe's complaint technically alleges that the Winterville Police Department has this alleged policy and not the

his allegation by asserting: (1) Officer Helms tried to seize his phone upon learning Sharpe was streaming to Facebook Live; (2) Officer Ellis said that in the future if Sharpe broadcasts on Facebook Live his phone will be taken from him and, if Sharpe refuses to give up his phone, he will go to jail; and (3) both officers justified their efforts to prevent livestreaming using the same officer-safety rationale. It is a reasonable inference that absent a policy the two officers would not have taken the same course, for the same reason, nor would those officers have known in advance that Sharpe would face the same treatment if he tried to livestream another officer in the future. *See Mays v. Sprinkle*, 992 F.3d 295, 299 (4th Cir. 2021) (reminding us that at this stage we must draw "all reasonable factual inferences in plaintiff's favor").[6]

Town. [J.A. 11.] But *Monell* liability, by definition, requires that the policy be attributable to the municipality itself—including via an individual or entity that has final policymaking authority for the municipality. *See Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 469–70 (4th Cir. 2013); *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529, 533 (4th Cir. 2022). And Sharpe brings a *Monell* claim challenging the Police Department's policy. So he is really alleging that the Winterville Police Department's allegedly unconstitutional policy is attributable to the Town. *See Spell v. McDaniel*, 824 F.2d 1380, 1394–95 (4th Cir. 1987) (assessing whether a police chief was a final policymaker for *Monell* liability).

[6] That Officer Ellis seemingly claimed to be acting under North Carolina's statute prohibiting resisting, delaying, or obstructing an officer does not change this analysis. Even if Officer Ellis thought his authority to seize Sharpe's phone or arrest him came from this statute, it is still a plausible inference that he could only know the statute would enable these sanctions if there was a policy to prevent livestreaming. To know in advance that livestreaming would be treated as obstruction or that Sharpe would be ordered to stop livestreaming and so face arrest for resisting that order still suggests that there is a policy against livestreaming.

But plausibly alleging a policy is not enough. The policy that Sharpe alleges must also violate the First Amendment. In other words, livestreaming one's own traffic stop must be protected speech, and barring it must impermissibly abridge that speech. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Wood v. Moss*, 572 U.S. 744, 757 (2014). Sharpe bears the burden to show that his protected speech was restricted by governmental action. *See Reynolds v. Middleton*, 779 F.3d 222, 226 (4th Cir. 2015). The burden then shifts to the government to prove the speech restriction is constitutionally permissible. *Id.*

Sharpe has met his initial burden by showing that the alleged policy restricts his protected speech. Creating and disseminating information is protected speech under the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). "'[A] major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)). And other courts have routinely recognized these principles extend the First Amendment to cover recording—particularly when the information involves matters of public interest like police encounters. *See, e.g.*, *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) ("The act[] of . . . recording videos [is] entitled to First Amendment protection because [it is] an important stage of the speech process that ends with the dissemination of information about a public controversy."). We agree. Recording police encounters creates information that contributes to discussion about governmental affairs. So too does livestreaming disseminate that information, often creating its own record. We thus hold that livestreaming a police traffic stop is speech protected by the First Amendment.

But not all regulation of protected speech violates the First Amendment. The burden now flips to Defendants. And the Town's speech regulation only survives First Amendment scrutiny if Defendants demonstrate that: (1) the Town has weighty enough interests at stake; (2) the policy furthers those interest; and (3) the policy is sufficiently tailored to furthering those interests. *See Reynolds*, 779 F.3d at 228–29.[7]

To meet this burden here, Defendants may point to common sense and caselaw to establish that the Town has a valid interest, and can rely on any "obvious" connection between the asserted interest and the challenged regulation to show that their policy was appropriately "tailored" to that interest. *See id.* at 227–228, 228 n.4. But "mere conjecture" is inadequate to carry their burden. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000). Defendants must demonstrate that the Town's policy passes First Amendment scrutiny or else Sharpe's allegation is plausible and his claim survives at this stage. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 211 (2014) (reversing dismissal of First Amendment claim because government had "not carried its burden of

[7] The exact formulation of how weighty these interests must be varies according to what type of regulation is at issue. *Compare Am. Ass'n of Pol. Consultants, Inc. v. FCC*, 923 F.3d 159, 167 (4th Cir. 2019) (content-based restrictions are upheld only if "narrowly tailored to further a compelling governmental interest"), *with City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1475–76 (2022) (content-neutral restrictions are upheld only if "narrowly tailored to serve a significant governmental interest" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))). But the burden remains on the government regardless of the regulation's classification.

demonstrating" its regulation furthered its asserted interest).[8]

The Town purports to justify the policy based on officer safety. [Appellees' Response Brief at 55.] According to Defendants, livestreaming a traffic stop endangers officers because viewers can locate the officers and intervene in the encounter. [J.A. 9.] They support this claim by arguing, with help from amici, that violence against police officers has been increasing—including planned violence that uses new technologies. [*See, e.g.*, Amicus Brief of the Southern States Police Benevolent Association at 9.] On Defendants' view, banning livestreaming prevents attacks or related disruptions that threaten officer safety.

This officer-safety interest might be enough to sustain the policy. But on this record we cannot yet tell. There is "undoubtedly a strong government interest" in officer safety. *Riley v. California*, 573 U.S. 373, 387 (2014). And risks to officers are particularly acute during traffic stops. *See Maryland v. Wilson*, 519 U.S. 408, 414 (1997); *Michigan v. Long*, 463 U.S. 1032, 1047 (1983).[9] But

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[8] *See also Billups v. City of Charleston*, 961 F.3d 673, 690 (4th Cir. 2020) (declaring speech restriction unconstitutional after a bench trial because government "failed to provide evidence" of sufficient tailoring); *Indep. News, Inc. v. City of Charlotte*, 568 F.3d 148, 157 (4th Cir. 2009) (upholding grant of partial judgment on the pleadings because government had a "sufficient evidentiary basis" to justify speech restriction); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002) (affirming in part preliminary injunction because government "produced no evidence" speech restriction furthered its interest).

[9] Our citation to Fourth Amendment caselaw throughout this opinion does not mean that Fourth Amendment standards determine the outcome. (Continued)

even though the Town has a strong interest in protecting its officers, Defendants have not done enough to show that this policy furthers or is tailored to that interest. Nor is that gap filled here by common sense or caselaw. *See Reynolds*, 779 F.3d at 228–29. So we cannot conclude, at this stage, that the policy survives First Amendment scrutiny. *See Billups*, 961 F.3d at 687.[10] Instead, we hold that Sharpe has plausibly alleged that the Town adopted a livestreaming policy that violates the First Amendment.

Government action may pass scrutiny under the Fourth Amendment but still offend the First. *See, e.g.*, *Trulock v. Freeh*, 275 F.3d 391, 403–06 (4th Cir. 2001) (holding that officer-defendants enjoyed qualified immunity on Fourth Amendment claims but not First Amendment claims). The Fourth and First Amendments do not *authorize* government actions. They *limit* them. So finding that certain police intrusions on liberty comply with the Fourth Amendment does not bless those actions as permissible restraints on speech. *See Tobey v. Jones*, 706 F.3d 379, 390 n.5 (4th Cir. 2013) (finding "no authority for [the] argument that government action that is reasonable within the meaning of the Fourth Amendment is necessarily therefore reasonable for purposes of First Amendment analysis").

At the same time, the governmental interests relevant to a Fourth Amendment inquiry can be relevant to a First Amendment inquiry. *See Sause v. Bauer*, 138 S. Ct. 2561, 2562–63 (2018) (per curiam) (illustrating that Fourth Amendment interests can be critical to resolving First Amendment questions); *United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972) (recognizing that sometimes there can be "a convergence of First and Fourth Amendment values"). And here the interests that animate some Fourth Amendment cases bear on the governmental interest in this First Amendment arena.

[10] At this stage, the claim survives whether the policy is content-neutral or content-based. So we need not decide whether the district court properly found the policy to be content neutral and applied intermediate scrutiny. On remand, the district court will be able to consider the policy's nature as more information about it is revealed.

B. Officer Helms is Entitled to Qualified Immunity

Having determined that the official-capacity claim against the Town must survive, we turn to the individual-capacity claim against Officer Helms. When a government official is sued in their individual capacity, qualified immunity protects them "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To determine whether qualified immunity applies, we ask both "whether a constitutional violation occurred" and "whether the right violated was clearly established" at the time of the official's conduct. *Melgar ex rel. Melgar v. Greene*, 593 F.3d 348, 353 (4th Cir. 2010).

A right can be clearly established by cases of controlling authority in this jurisdiction or by a consensus of persuasive authority from other jurisdictions. *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 280 (4th Cir. 2004). Either way, these sources "must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam)). This standard does not require "a case directly on point." *Id.* But the right's contours must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Cannon v. Vill. of Bald Head Island*, 891 F.3d 489, 497 (4th Cir. 2018) (quoting *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 313 (4th Cir. 2006)).

So we must define the right at issue with specificity. *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019). And the particulars matter. A reasonable officer

will be unable to "determine how the relevant legal doctrine . . . will apply to the factual situation" if the circumstances differ too much from prior cases. *See Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).

The First Amendment right here is a passenger's alleged right to livestream their own traffic stop. And there is no "controlling authority" in this jurisdiction that establishes Sharpe had this right when his car was pulled over. *See Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017). Sharpe's attempt to construct such controlling authority fails. He cites an array of cases from various contexts, including from election law, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), access to the courts, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and medical data, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). These cases provide general guidance about First Amendment doctrine. But they offer no concrete direction to the reasonable officer tasked with applying that doctrine to the situation Officer Helms confronted. So they do not clearly establish the specific right at issue. *See Mullenix*, 577 U.S. at 12.

Nor is there any consensus of persuasive authority to establish this right. *See Lott*, 372 F.3d at 280. None of Sharpe's out-of-jurisdiction case citations address a passenger livestreaming a police officer during their own traffic stop. Instead, they generally are about video recordings, not livestreams. *See, e.g.*, *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (discussing the "right to record the police"). And the people doing the recording tend to be bystanders, not the subjects of the stop itself. *See, e.g.*, *Fields v. City of Philadelphia*, 862 F.3d 353, 359–60 (3d Cir. 2017) (discussing "bystander videos").

Here, those two distinctions make all the difference. The constitutionality of a speech restriction rests on balancing interests. A different balance is struck when an officer prevents a bystander from recording someone else's traffic stop than when the officer prevents a passenger from livestreaming their own stop. *See, e.g.*, *Long*, 463 U.S. at 1047–48 (explaining that officers often face increased risk during traffic stops from passengers in the stopped vehicles); J.A. 34 (officers asserting that livestreaming was more dangerous to law enforcement than recording). Without a consensus of cases barring the latter, Sharpe cannot show that a reasonable official in Officer Helms's shoes would understand that his actions violated the First Amendment. *See Cannon*, 891 F.3d at 497.[11]

Qualified immunity protects Officer Helms unless it was clearly established at the time of the traffic stop that forbidding a passenger from livestreaming their own traffic stop violated the First Amendment. Here, no precedent in this Circuit nor consensus of authority from the other Circuits established that Officer Helms's actions were unconstitutional. The district court was thus correct to dismiss the § 1983 claim against him in his individual capacity.

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Plaintiffs seeking redress under § 1983 for a violation of their constitutional rights must walk through a narrow

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[11] For the same reason, we cannot accept Sharpe's attempt to broadly define the right as "a First Amendment right to film police in the discharge of their duties in public" that "ha[s] no blanket carve-out for vehicle passengers and no special exception for live broadcasting." Appellant's Reply at 1. Such framing contravenes the Supreme Court's admonition to avoid defining the right at too high a level of generality. *See Ashcroft v. alKidd*, 563 U.S. 731, 742 (2011).

gate. The doctrines of qualified immunity and *Monell* liability for local governments substantially diminish their chances. Both doctrines are controversial. They have been criticized for being atextual, ahistorical, and driven by policy considerations.[12] But they are also binding.

Here, faithful application of the doctrines leads to divergent results. On the one hand, Sharpe's official-capacity claim can proceed. He has sufficiently alleged that the Town has a policy barring livestreaming one's own traffic stop that violates the First Amendment. He must now show this policy exists. And, if it does, the Town will have the chance to prove that it does not violate the First Amendment. On the other hand, although Officer Helms was allegedly acting under the policy that plausibly violates the First Amendment, Sharpe's claim against him in his personal capacity fails. It was not clearly established that Officer Helms's actions violated Sharpe's First Amendment rights and so he is protected by qualified immunity.

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[12] For criticism of qualified immunity, *see, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment); William Baude, *Is Qualified Immunity Unlawful*, 106 CAL. L. REV. 45 (2018). For criticism of *Monell* liability, *see, e.g.*, *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 835–38 (Stevens, J., dissenting); David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 CARDOZO L. REV. DE NOVO 90, 108–14 (2022). A more textual and historical analysis of § 1983 may still yield some protection for officials and municipalities. *See, e.g.*, David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2185–86 (2005); Larry B. Kramer & Alan O. Sykes, *Municipal Liability under 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 262 (1987); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1864–70 (2018).

VACATED IN PART,
AFFIRMED IN PART,
AND REMANDED.

NIEMEYER, Circuit Judge, concurring in the judgment:

I agree with the holding of the majority opinion that Officer Myers Helms is entitled to qualified immunity. I also agree that a remand is in order to determine whether the Town of Winterville had a policy prohibiting livestreaming by persons detained and, if it did, whether the policy is unconstitutional. I write separately because the majority opinion hardly acknowledges the role of the Fourth Amendment in the relevant analysis and the relationship of the Fourth Amendment to other constitutionally protected rights, including First Amendment rights. Yet, the issues in this case arose in the context of a lawful Fourth Amendment seizure — a traffic stop — during which a person seized refused to obey the order of law enforcement officers to cease using a cell phone to communicate with others during the course of the stop. The restriction on cell-phone use *was thus an aspect of the seizure*, and therefore the lawfulness of the restriction is regulated by the Fourth Amendment and its jurisprudence recognizing that, when conducting traffic stops, law enforcement officers may intrude on the liberty interests of those who have been stopped, so long as the intrusion is *reasonable*.

The issue therefore should be restated, I submit, to whether, during a lawful traffic stop, law enforcement officers may lawfully prohibit the person detained from conducting electronic communications with others. This is a nuanced, but meaningful, adjustment to the issue addressed in the majority opinion, which is whether restrictions on electronic communications of persons

detained are justified under a traditional, free-standing First Amendment analysis. While the two analyses might, but need not, lead to the same conclusion, I believe that we should apply the reasonableness test of the Fourth Amendment because the restrictions about which the plaintiff complains were imposed as a part of a lawful Fourth Amendment seizure.

I.

The factual context is routine but is important to demonstrate my point. On October 9, 2018, Officer William Ellis and Officer Helms conducted a lawful traffic stop of a vehicle driven by Juankesta Staton, in which Dijon Sharpe was a passenger. At the beginning of the stop, Sharpe, as alleged in his complaint, "turned on the video recording function of his smartphone and began livestreaming — broadcasting in real-time — via Facebook Live to his Facebook account," which reached a live audience and provoked live responses. One viewer posted, "Be Safe Bro!" and another asked, "Where y'all at." Other comments included "SWINE" and "They don't like you Dijon." Those viewing the livestream could hear Staton say that the police had been following them for some time and that they had been racially profiled — that the officers had "seen two black people, and . . . [t]hey thinking drug dealer. . . . That's called harassment."

During the stop, Officer Helms told Sharpe, "We ain't gonna do Facebook Live, because that's an officer safety issue." At the same time, he attempted to grab Sharpe's phone, but Sharpe moved it further inside the vehicle, out of Helms's reach, and stated, apparently to his Facebook Live audience, "Look at your boy. Look at your boy." Officer Ellis then addressed Sharpe's livestreaming, stating to both Staton and Sharpe, "In the future, guys, this Facebook Live stuff, . . . we're not gonna have, okay,

because that lets everybody y'all follow on Facebook [know] that we're out here. There might be just one [officer] next time . . . [and] [i]t lets everybody know where y'all are at. We're not gonna have that." Officer Ellis continued, "If you were recording, that is just fine. . . . We record, too," but "in the future, if you're on Facebook Live, your phone is gonna be taken from you, . . . [a]nd if you don't want to give up your phone, you'll go to jail." When Staton explained that Sharpe was using Facebook Live because they didn't "trust . . . cops," Officer Ellis sympathized with the concerns, but nonetheless reiterated, "[Y]ou can record on your phone . . . but Facebook Live is not gonna happen."

A little over a year after the stop, Sharpe commenced this action under 42 U.S.C. § 1983 against the Winterville Police Department and both officers, alleging that the defendants had violated his First Amendment rights by seeking to enforce a prohibition against livestreaming during traffic stops. On the defendants' motion, the district court dismissed Sharpe's claim against Officer Helms in his individual capacity on the ground that Helms was entitled to qualified immunity, explaining that "Sharpe's right to record and real-time broadcast his encounter with police" while he was "a passenger in a stopped vehicle" was not "clearly established on October 9, 2018." The court also dismissed Sharpe's claims against the officers in their official capacities, concluding that the First Amendment did not entitle an individual who was the subject of a lawful Fourth Amendment seizure to livestream the stop while it was in process.

II.

The narrow activity on review before us is an officer's prohibiting a person detained from livestreaming the encounter while detained. And with respect to the

individual-capacity claim against Officer Helms, we must ask whether every reasonable officer would know that imposing such a restriction as part of the seizure made during a traffic stop was unlawful, *i.e.*, whether clearly established law made it so. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). That question can be addressed only in the context of what a reasonable officer knows about the broader activity from clearly established law and whether, during a traffic stop, he can take control of the situation by imposing certain restrictions for purposes of officer safety, including restrictions on electronic communications.

At the time of the traffic stop in this case, it was clearly established to every reasonable police officer that when an officer conducts a traffic stop, "everyone in the vehicle" is seized within the meaning of the Fourth Amendment, "'even though the purpose of the stop is limited and the resulting detention quite brief.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). A reasonable officer also knew that "whenever police officers use their authority to effect a stop, they subject themselves to a risk of harm." *United States v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017) (en banc). Traffic stops in particular, the Supreme Court has long emphasized, are "especially fraught with danger to police officers." *Michigan v. Long*, 463 U.S. 1032, 1047 (1983); *see also Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (recognizing the "inordinate risk confronting an officer as he approaches a person seated in an automobile"). "[T]he risk of a violent encounter in a traffic-stop setting 'stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.'" *Arizona v. Johnson*, 555 U.S. 323, 331 (2009) (quoting *Maryland v.*

Wilson, 519 U.S. 408, 414 (1997)). And when a traffic stop involves one or more passengers, that fact only "increases the possible sources of harm to the officer," as "the motivation of a passenger to employ violence . . . is every bit as great as that of the driver." *Wilson*, 519 U.S. at 413, 414.

Every reasonable officer also knew at the time of this stop that to lower the risk inherent in all traffic stops, the officer is authorized to "*routinely exercise unquestioned command of the situation*." *Wilson*, 519 U.S. at 414 (emphasis added) (quoting *Michigan v. Summers*, 452 U.S. 692, 703 (1981)); *see also Johnson*, 555 U.S. at 330. To this end, clearly established law informed officers that they may take reasonable steps to protect themselves during traffic stops, *even if such steps intrude on the liberty interests* of those who have been stopped. For instance, the Supreme Court has held that "as a matter of course," police officers may order the driver and all passengers of a lawfully stopped vehicle "to get out of the car pending completion of the stop," reasoning that the government's "legitimate and weighty" interest in "officer safety" outweighs the "minimal" "additional intrusion" that such an order imposes on the vehicle's occupants. *Wilson*, 519 U.S. at 410, 412, 415 (cleaned up); *see also Johnson*, 555 U.S. at 331–32. It has also held that police officers may frisk *any occupant* of the stopped vehicle whom the officer reasonably suspects of being armed and dangerous, precisely because the vehicle's occupants, unlike any nearby bystanders, are subject to "a lawful investigatory stop." *Johnson*, 555 U.S. at 327; *see also Robinson*, 846 F.3d at 696 ("[A]n officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene"). Similarly, it has held that "an

officer [may] search a vehicle's passenger compartment when he has reasonable suspicion that an individual . . . is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.'" *Arizona v. Gant*, 556 U.S. 332, 346–47 (2009) (quoting *Long*, 463 U.S. at 1049).

Finally, every reasonable officer knew by clearly established law that the standard for assessing such intrusions on personal liberty during traffic stops is "reasonableness." *Wilson*, 519 U.S. at 411 ("[T]he touchstone of [the] analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (quoting *Mimms*, 434 U.S. at 108–09)).

In this case, Officer Helms and Officer Ellis indeed invoked "officer safety" as the reason why they sought, during the stop, to prohibit Sharpe from livestreaming while the stop was ongoing. Providing further explanation as to why it was reasonable for him to perceive officer safety as being implicated, Officer Helms asserts that livestreaming "add[s] additional hazards" to traffic stops by "allow[ing] anyone watching" — an unknown but potentially large number of people — "to know where an officer is and what he or she is doing in real time." In this manner, he contends, livestreaming via a platform like Facebook Live by someone inside a stopped vehicle has a unique capacity to "turn a routine traffic stop into a crowd-control operation, leaving the officer in an unsafe position." But what was not clearly known to Officer Helms was whether his efforts to prohibit livestreaming during a traffic stop for officer safety violated Sharpe's First Amendment rights. Indeed, no one has cited any case that addresses such conduct — whether in the Fourth Amendment context or, for that matter, in the First Amendment context. In the absence of such law,

Officer Helms was entitled to qualified immunity, as the majority opinion holds, albeit following a different analysis.

The majority opinion applies a free-standing First Amendment analysis to the communication restriction, focusing on but a component of the seizure without addressing the seizure itself and its implication of the Fourth Amendment. Thus, with its narrower focus, the opinion states that "livestreaming a police traffic stop is speech protected by the First Amendment," such that the burden shifts to the police officer to show that he had "weighty enough interests at stake," the prohibition "furthers those interests," and the prohibition is "sufficiently tailored to furthering those interests." *Ante* at 8–9. That is a traditional, freestanding First Amendment analysis that fails to account for the fact that the communication restriction was but a component of a seizure. If the opinion were to recognize the Fourth Amendment context based on the overall activity involved, it would have articulated a Fourth Amendment analysis that would determine — somewhat different from the narrower First Amendment analysis — whether the restriction on livestreaming was "reasonable." *Wilson*, 519 U.S. at 411 ("[T]he touchstone of [the] analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (quoting *Mimms*, 434 U.S. at 108–09)). And this approach would be the traditional one taken. When, during a lawful seizure, an officer demands identification, or orders a passenger to get out of the vehicle and remain at a distance from the driver, or orders an occupant to hand over a firearm temporarily during the stop — arguably implicating the First and Second Amendments, respectively — courts traditionally conduct a Fourth

Amendment analysis to determine whether the restrictions on otherwise protected conduct are reasonable.

While the majority opinion's free-standing First Amendment analysis might, but need not, ultimately lead to the same result, the Fourth Amendment analysis is grounded on a straightforward concept of reasonableness. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons . . . against *unreasonable* . . . seizures, shall not be violated" (emphasis added)). And therefore in this case, the question would ultimately be whether prohibiting livestreaming by persons seized during traffic stops was reasonable, regardless of whether the restriction was imposed by individual officers or by town policy.

In any event, Sharpe has not identified any caselaw that clearly establishes that such a communication restriction was unreasonable. Moreover, the question of whether such a restriction was Town of Winterville policy remains an open question. I therefore concur in the judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
EASTERN DIVISION

DIJON SHARPE, Plaintiff, v. OFFICER WILLIAM BLAKE ELLIS, in his official capacity, and OFFICER MYLES PARKER HELMS IV, in his official capacity, Defendants.	*	Civil Action No. 4:19-CV-157-D

* * * * * * * * *

ORDER

On October 9, 2018, Dijon Sharpe ("Sharpe" or "plaintiff") was a passenger in a car that Town of Winterville police officers William Blake Ellis ("Ellis" or "defendant") and Myers Parker Helms IV ("Helms" or "defendant") properly stopped for a traffic violation. As the police officers approached the car, Sharpe began recording and livestreaming the traffic stop from inside the car. Officer Helms told Sharpe that he could record the traffic stop from inside the car during the traffic stop but not livestream the traffic stop from inside the car during the traffic stop. Sharpe now seeks damages from the officers and the Town of Winterville and contends that the officers and the Town of Winterville violated 42 U.S.C.

§ 1983 and the First Amendment by only allowing Sharpe to record the traffic stop from inside the car during the traffic stop.

As explained below, assuming without deciding that the First Amendment entitled Sharpe to record the traffic stop from inside the car during the traffic stop, the First Amendment did not entitle Sharpe to livestream the traffic stop from inside the car during the traffic stop. Thus, defendants did not violate the First Amendment, and the court grants defendants' motion for judgment on the pleadings. The court also denies as moot Sharpe's motion for entry of judgment.

I.

Sharpe resides in Pitt County, North Carolina. See Compl. [D.E. 1] ¶ 7. On October 9 , 2018, Helms and Ellis, as officers of Winterville Police Department ("WPD"), properly stopped a car for a traffic violation. Sharpe was riding in the front passenger seat of the car. See id. ¶¶ 19–20. While still in the car and during the traffic stop, Sharpe "turned on the video recording function of his smartphone and began livestreaming—broadcasting in real-time—via Facebook Live to his Facebook account." Id. ¶ 22. During the traffic stop, Helms approached the car and asked Sharpe his name, which Sharpe declined to provide. See id. ¶ 24. Helms and Ellis then returned to their patrol car. See id. ¶ 25. When Helms returned to Sharpe's car, he asked Sharpe, "What have we got? Facebook Live, cous?" Id. ¶ 27 (alteration omitted); see Pl.'s Ex. A [D.E. 1-2] 17. Sharpe responded: "Yeah." Pl.'s Ex. A [D.E.1-2] 17; see Compl. ¶ 28. Helms reached into the car through the open window and attempted to grab Sharpe's phone, pulling on his seatbelt and shirt in the process. See Compl. ¶ 28. Helms stated, "We ain't gonna do Facebook Live, because that's an officer safety issue."

Pl.'s Ex. A [D.E. 1-2] 17. Later, Ellis remarked: "Facebook Live . . . we're not gonna have, okay, because that lets everybody y'all follow on Facebook [know] that we're out here. There might be just one me next time [sic] . . . It lets everybody know where y'all are at. We're not gonna have that." Id. at 19–20.[1] Ellis continued: "If you were recording, that is just fine . . . . We record, too. So in the future, if you're on Facebook Live, your phone is gonna be taken from you[] . . . [a]nd if you don't want to give up your phone, you'll go to jail." Id. at 20. Towards the end of the stop, Ellis stated, "But to let you know, you can record on your phone . . . but Facebook Live is not gonna happen." Id. at 21.

In his complaint, Sharpe makes two claims. First, Sharpe alleges a violation of 42 U.S.C. § 1983 and the First Amendment against Helms and Ellis, in their official capacities, and WPD. See Compl. ¶¶ 37–43. As for Helms and Ellis, Sharpe contends that they "physically attacked" him and "threatened to deprive" him of his First Amendment right to record and real-time broadcast his interactions with law enforcement. Id. ¶ 40. As for WPD, Sharpe cites Monell v. Department of Social Services of New York, 436 U.S. 658 (1978), and alleges "an unconstitutional policy, custom, or practice of preventing citizens from recording and livestreaming their interactions with police officers in the public performance of their duties." Id. ¶ 41. Second, Sharpe alleges a violation of section 1983 and the First Amendment against Helms in his individual capacity. See id. ¶¶ 44–48.

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[1] Ellis was correct. See Compl. ¶ 23; https://www.facebook.com/d.r.sharpe/videos/2251012878304654/ (last visited Aug. 14, 2020) (listing "Realtime Comments" including, inter alia, "Keep your live on," "It keep pausing," "Where ya'll at," "What kind of bull is going on now," "Did he just grab your phone!???," and "Handle it once it's off"). Sharpe has since deleted the video.

Specifically, Sharpe asserts that "[t]he physical attack by Officer Helms on Mr. Sharpe" violated the First Amendment. Id. ¶ 47; see [D.E. 19] 6–8.

On February 3, 2020, the defendants moved to dismiss the claims against WPD and against Helms in his individual capacity. See [D.E. 15]. On August 20, 2020, after briefing and oral argument, the court dismissed with prejudice Sharpe's claims against WPD and Helms in his individual capacity, holding that WPD is not an entity that may be sued under North Carolina law and that qualified immunity barred Sharpe's claim against Helms. See [D.E. 33] 4–6, 12–13.

Sharpe's remaining claims are against Helms and Myers in their official capacities (which really means the claims are against the Town of Winterville). Sharpe seeks nominal damages, reasonable attorney's fees, costs, and a declaratory judgment concerning whether during the traffic stop and from inside the stopped car Sharpe "has the right, protected by the First Amendment . . . to both (a) record police officers in the public performance of their duties and (b) broadcast such recording in real-time." Compl. at 8. Defendants seek judgment on the pleadings on Sharpe's remaining claims. See [D.E. 36].

II.

A.

A party may move for judgment on the pleadings at any time "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). A court should grant the motion if "the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, 442 F.3d 1239, 1244 (10th Cir. 2006) (quotation

omitted), abrogated on other grounds by Magnus, Inc. v. Diamond State Ins. Co., 545 F. App'x 750 (10th Cir. 2013) (unpublished); see Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, lnc., 674 F.3d 369, 375 (4th Cir. 2012); Burbach Broad. Co. of Del. v. Elkins Radio Corp., 278 F.3d 401, 405–06 (4th Cir. 2002). A court may consider the pleadings and any materials referenced in or attached to the pleadings, which are incorporated by reference. See Fed. R. Civ. P. 10(c); Fayetteville Invs. v. Com. Builders, Inc., 936 F.2d 1462, 1465 (4th Cir. 1991). A court also may consider "matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 322 (2007).

The same standard applies under Rule 12(c) and Rule 12(b)(6). See Mayfield, 674 F.3d at 375; Burbach Broad. Co., 278 F.3d at 405–06. Thus, a motion under Rule 12(c) tests the legal and factual sufficiency of the claim. See, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 677–80, 684 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–63 (2007); Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30 (2012); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). To withstand a Rule 12(c) motion, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (quotation omitted); see Twombly, 550 U.S. at 570; Giarratano, 521 F.3d at 302. In considering the motion, the court must construe the facts and reasonable inferences in the "light most favorable to the [nonmoving party]." Massey v. Ojaniit, 759 F.3d 343, 347, 352–53 (4th Cir. 2014) (quotation omitted); see Clatterbuck v. City of Charlottesville, 708 F.3d 549, 557 (4th Cir. 2013), abrogated on other grounds by Reed v. Town of Gilbert, 576 U.S. 155 (2015); Burbach Broad. Co., 278 F.3d at 406. A court need not accept as true a complaint's legal

conclusions, "unwarranted inferences, unreasonable conclusions, or arguments." Giarratano, 521 F.3d at 302 (quotation omitted); see Iqbal, 556 U.S. at 678–79. Rather, a plaintiff's allegations must "nudge[] [his] claims," Twombly, 550 U.S. at 570, beyond the realm of "mere possibility" into "plausibility." Iqbal, 556 U.S. at 673–79.

B.

Sharpe's remaining claims are section 1983 claims against Helms and Myers in their official capacities. To prevail on a section 1983 claim, a plaintiff must show that he was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49–50 (1999); see Thomas v. Salvation Army S. Territory, 841 F.3d 632, 637 (4th Cir. 2016); Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003).

Sharpe's claims against Helms and Myers in their official capacities are really claims against the Town of Winterville. See Kentucky v. Graham, 473 U.S. 159, 165–66 (1985); Santos v. Frederick Cnty. Bd. of Comm'rs, 725 F.3d 451, 469 (4th Cir. 2013); Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 307 n.13 (4th Cir. 2006); Love-Lane v. Martin, 355 F.3d 766, 783 (4th Cir. 2004). Accordingly, Sharpe must plausibly allege that a "policy or custom" attributable to the Town of Winterville caused the violation of his federally protected rights. See Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 403 (1997); Hafer v. Melo, 502 U.S. 21, 25 (1991); Graham, 473 U.S. at 166; Monell, 436 U.S. at 690–94; King v. Rubenstein, 825 F.3d 206, 223 (4th Cir. 2016); Santos, 725 F.3d at 469–70.

The court assumes without deciding that Sharpe has plausibly alleged a policy or custom attributable to the Town of Winterville under Monell that prohibited a person during a traffic stop and from inside the stopped

car to livestream the traffic stop. Cf. Lytle, 326 F.3d at 471 (detailing the four ways in which liability for a policy or custom may arise). Sharpe, however, still must demonstrate that the alleged policy deprived Sharpe of a right secured by the Constitution or laws of the United States on October 9, 2018. See, e.g., Sullivan 526 U.S. at 49–50.

Sharpe claims that the Town of Winterville's alleged policy or custom deprived him of his First Amendment right on October 9, 2018. According to Sharpe, during the traffic stop and from inside the stopped car, he possessed a First Amendment right to "record police in the public performance of their duties and to broadcast such recordings in real-time." Compl. ¶ 35 (emphasis added); cf. Pl's Ex. A [D.E. 1-2] 20–21 (recounting that Helms and Meyers told Sharpe he could record, but was not allowed to livestream).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The First Amendment's protections extend beyond the text's proscriptions on laws abridging freedom of speech or of the press and encompass "a range of conduct related to the gathering and dissemination of information." Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011); see First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Turner v. Lieutenant Driver, 848 F.3d 678, 688–89 (5th Cir. 2017). The First Amendment generally "prohibit[s] the government from limiting the stock of information from which members of the public may draw." First Nat'l Bank, 435 U.S. at 783; see Turner, 848 F.3d at 688. The First Amendment protects a right to gather information "from any source by means within the law." Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (quotation omitted); see Glik, 655 F.3d at 82. Gathering

information about government officials in a form that can be readily disseminated "serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014) (quotation omitted); see Mills v. Alabama, 384 U.S. 214, 218–19 (1966); cf. Tobey v. Jones, 706 F.3d 379, 391 (4th.Cir. 2013). "Protecting that right of information gathering not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." Gericke, 753 F.3d at 7; see Project Veritas Action Fund v. Rollins, 982 F.3d 813, 831(1st Cir. 2020), petition for cert. filed, (U.S. May 17, 2020) (No. 20-1598).

Several federal circuit courts have held that the First Amendment generally protects the right to record the police in performing their public duties. See Fields v. City of Phila., 862 F.3d 353, 355–56, 358–60 (3d Cir. 2017) (taking pictures with a camera and iPhone camera); Turner, 848 F.3d at 683–84, 690 (videotaping); Gericke, 753 F.3d at 3–4, 7–9 ("audio-video record[ing]" with a camera); Am. Civ. Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 595–97 (7th Cir. 2012) ("[a]udio recording"); Glik, 655 F.3d at 79–80, 82–83 (video recording on cell phone); Smith v. City of Cumming, 212 F.3d 1332, 1332–33 (11th Cir. 2000) (videotaping); Fordyce v. City of Seattle, 55 F.3d 436, 438 (9th Cir. 1995) (same). This court agrees with that general principle and assumes without deciding that on October 9, 2018, the First Amendment entitled Sharpe to record the traffic stop from inside the car during the traffic stop. However, the United States Court of Appeals for the Fourth Circuit has not yet addressed whether the First Amendment protects the right to record the police in performing their public duties, let alone whether the First Amendment protects the right of a person from inside a stopped car to

livestream the police performing a traffic stop. See Szymecki v. Houck, 353 F. App'x 852, 852 (4th Cir. 2009) (per curiam) (unpublished); Hulbert v. Pope, No. SAG-18-00461, 2021 WL 1599219, at *8 (D. Md. Apr. 22, 2021) (unpublished), appeal docketed, No. 21-1608 (4th Cir. May 24, 2021).

Sharpe contends that the cases from other federal circuit courts holding that the First Amendment includes a right to record the police performing their public duties established his right to livestream the traffic stop from inside the stopped car on October 9, 2018. See Compl. ¶¶ 35–36; [D.E. 39] 6–10. These cases, however, do not address, much less resolve Sharpe's claim. Recording a traffic stop for publication after the traffic stop versus livestreaming an ongoing traffic stop from inside the stopped car during the traffic stop are significantly different. See [D.E. 33] 9–11 (describing the significant differences between recording and livestreaming). Indeed, during the traffic stop, Ellis made precisely this distinction. Ellis told Sharpe he could record the traffic stop from inside the stopped car during the traffic stop, but that he could not livestream it. See Pl.'s Ex. A [D.E. 1-2] 19–20. Notably, recording a public interaction with the police preserves that interaction for the recorder's later use. In contrast, livestreaming the interaction from inside the stopped car during the traffic stop contemporaneously broadcasts the interaction to another recipient. Moreover, broadcasting the interaction from inside the stopped car during the traffic stop in real-time with contemporaneous geolocation information conveys both the interaction and the location where it is occurring. Furthermore, contemporaneous messaging allows the individual livestreaming, and those watching, to know the location of the interaction, to comment on and discuss in real-time the interaction, and to provide the perspective

from inside the stopped car. The perspective from inside the stopped car, for example, would allow a viewer to see weapons from inside the stopped car that an officer might not be able to see and thereby embolden a coordinated attack on the police. Although Sharpe cites cases recognizing a First Amendment right to record the police performing their public duties, Sharpe cites no authority to support his contention that on October 9, 2018, the First Amendment provided a right to livestream a traffic stop from inside the stopped car during the traffic stop. Cf. [D.E. 39] 6–7.

As mentioned, the Fourth Circuit has not yet recognized a First Amendment right to record police performing their public duties, much less to livestream a traffic stop from inside the stopped car during the traffic stop. Cf. Szymecki, 353 F. App'x at 852. Tellingly, even the federal circuit courts that have recognized a right to record the police performing their public duties have explicitly declined to address "the limits of this constitutional right." Fields, 862 F.3d at 360; see Turner, 848 F.3d at 690; Gericke, 753 F.3d at 7–9. For example, the Third Circuit opined that an activity "interfer[ing] with police activity" such that the recording "put[s] a life at stake" might not be protected. Fields, 862 F.3d at 360. Likewise, the United States District Court for the District of Maryland recognized the First Amendment right to record police performing their public duties, but held that such recording is subject to time, place, and manner restrictions. See Hulbert, 2021 WL 1599219, at *8. In light of existing precedent and the differences between recording and livestreaming from inside the stopped car during the traffic stop, the court rejects Sharpe's argument that the First Amendment provided him a right to livestream a traffic stop from inside the stopped car on October 9, 2018. Accordingly, the court holds that Sharpe

has failed to allege a deprivation of a right secured by the Constitution or laws of the United States on October 9, 2018. Thus, the court grants defendants' motion for judgment on the pleadings.

Alternatively, Sharpe's claim fails because the alleged policy survives intermediate scrutiny. The validity of Sharpe's section 1983 claim hinges on his allegations that the Town of Winterville has an unconstitutional policy that prohibited Sharpe from livestreaming his encounter with the police officer during the traffic stop from inside the stopped car on October 9, 2018. See Compl. ¶ 41. As alleged, this policy restricted protected speech in public fora, and the court applies the "time, place, and manner doctrine" to determine whether the policy violates the First Amendment. Ross v. Early, 746 F.3d 546, 552 (4th Cir. 2014); see Fields, 862 F.3d at 360; Turner, 848 F.3d at 690; Gericke, 753 F.3d at 7–9; Alvarez, 679 F.3d at 605; Glik, 655 F.3d at 84; Smith, 212 F.3d at 1333. The policy is content-neutral because it is "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quotation omitted); see Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Accordingly, the court analyzes whether the policy is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." Ward, 491 U.S. at 791 (1989) (quotation omitted); see Clark, 468 U.S. at 293; Ross, 746 F.3d at 552. A policy is narrowly tailored if it "promotes a substantial government interest" and "does not burden substantially more speech than is necessary to further the government's legitimate interests." Ross, 746 F.3d at 552–53; see Ward, 491 U.S. at 791, 799; United States v. Albertini, 472 U.S. 675, 689 (1985).

The court first determines whether the alleged policy promotes "a substantial government interest." Here, the alleged purpose of the policy is officer and public safety. See Pl.'s Ex. A [D.E. 1-2] 17, 19–20 (Helms and Meyers told Sharpe that he could not livestream from inside the car during the traffic stop because livestreaming threatens officer and public safety).[2] The public has a

[2] "[W]hen it is obvious that a challenged law serves a significant governmental interest, . . . the government [is not required] to produce evidence" demonstrating that the law serves a substantial government interest. Billups v. City of Charleston, 961 F.3d 673, 685 (4th Cir. 2020). Rather, the government may demonstrate a significant interest "by reference to case law." Reynolds v. Middleton, 779 F.3d 222, 228 & n.4 (4th Cir. 2015). Here, the pleadings and case law demonstrate that the Town of Winterville's policy serves its substantial interest in officer and public safety. A review of Sharpe's video indicates that Sharpe's livestreaming from inside the stopped car permitted live broadcast from inside the car of the officers' movements, the perspective from within the stopped car, real-time comments from viewers, and geolocation data. See https://www.facebook.com/d.r.sharpe/videos/2251012878304654/ (last visited Aug. 14, 2020). These features undermine an officer's ability to exercise "command of the" traffic stop, thereby increasing the risks to officers and the public. Arizona v. Johnson, 555 U.S. 323, 330 (2009); see Maryland v. Wilson, 519 U.S. 408, 414 (1997); Michigan v. Summers, 452 U.S. 692, 702–03 (1981); see also United States v. Fager, 811 F.3d 381, 388–89 (10th Cir. 2016) (describing the increased threat of "coordinated attack[s]" on officers in the context of traffic stops); Bureau of Justice Assistance, Developing a Policy on the Use of Social Media in Intelligence and Investigative Activities: Guidance and Recommendations 1 (2013), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/developing_a_policy_on_the_use_of_social_media_in_intelligence_and_invs.pdf (last visited July 9, 2021) ("Social media sites are increasingly being used to instigate or conduct criminal activity[.]"). Accordingly, the alleged policy serves the substantial government interest of protecting officer and public safety because the policy eliminates a form of individual conduct from inside the stopped car that increases risks to officer and public safety. See Ross, 746 F.3d at 555–56.

"paramount interest in officer safety" and public safety. United States v. Stanfield, 109 F.3d 976, 979–80 (4th Cir. 1997); see Wilson, 519 U.S. at 412 (stating that the public interest in officer safety is "both legitimate and weighty" (quotation omitted)); Mahoney v. Sessions, 871 F.3d 873, 882 (9th Cir. 2017). Indeed, this substantial interest in officer and public safety is more pronounced during traffic stops where the Supreme Court repeatedly has recognized that police officers face unique dangers and that those dangers carry over to the public. See Rodriguez v. United States, 575 U.S. 348, 356–57 (2015); Johnson, 555 U.S. at 330–32; Wilson, 519 U.S. at 413–14; Michigan v. Long, 463 U.S. 1032, 1047–48 (1983).

Next, the court determines whether the policy "burdens substantially more speech than is necessary to further the government's legitimate interests." Ross, 746 F.3d at 557 (alteration and quotation omitted). To satisfy this standard, the alleged policy need not be "the least restrictive or least intrusive means." Ward, 491 U.S. at 798; see Turner, 848 F.3d at 690; Reynolds, 779 F.3d at 226. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Ward, 491 U.S. at 800; see Am. Entertainers, L.L.C. v. City of Rocky Mount, 888 F.3d 707, 717 (4th Cir. 2018); Ross, 746 F.3d at 557. Moreover, a policy is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." Albertini, 472 U.S. at 689.

Viewing the pleadings in the light most favorable to Sharpe, the alleged policy prohibited livestreaming a police encounter from inside the stopped car during the traffic stop. As such, the policy is limited in scope and

duration in that it only prohibited livestreaming from inside the stopped car during the traffic stop. Notably, the policy does not ban recording police officers from inside the stopped car during the traffic stop. See Pl.'s Ex. A [D.E. 1-2] 20–21 ("If you were recording, that is just fine . . . . We record, too."). The policy also does not prohibit a person who is not the subject of the traffic stop and who is not inside the stopped car from recording and livestreaming the traffic stop. Accordingly, "[o]n its face, the [p]olicy does no more than target and eliminate the exact source of the evil it seeks to remedy." Ross, 746 F.3d at 557 (alterations and quotations omitted); see Frisby v. Schultz, 487 U.S. 474, 485 (1988). Given the substantial officer and public safety interest, the policy achieves the government's substantial interest by increasing officers' command of those inside the stopped car during the traffic stop by removing features such as live video, real-time commenting, and geolocation data, from being used from inside the stopped car to coordinate an attack on the officers and the public. "[T]herefore, it is apparent that the [policy] directly furthers the [Town's] legitimate governmental interests and that those interests would have been less well served in the absence of the [policy preventing livestreaming]." Ward, 491 U.S. at 801; see Albertini, 472 U.S. at 688–89.[3] Accordingly, the alleged

[3] Sharpe does not argue that there are less intrusive ways for the Town to achieve its officer and public safety interests. Cf. [D.E. 39] 6–10. Moreover, in light of the concerns associated with livestreaming from inside the stopped car during the traffic stop, there appear to be no less intrusive ways of achieving the public interest in officer and public safety short of barring the use of livestreaming from inside the stopped car during the traffic stop. Accordingly, the court concludes that defendants are not required to present proof that the Town tried other methods to address its officer and public safety concerns in order to demonstrate narrow tailoring. Cf. McCullen v. Coakley, 573

policy is not "substantially broader than necessary to achieve the government's interest." Am. Entertainers, 88 F.3d at 717 (quotation omitted). Thus, the court holds that the Town of Winterville's alleged policy is narrowly tailored to serve a substantial government interest.

Finally, the court analyzes whether the policy leaves open "ample alternative channels for communication of the information." Ward, 491 U.S. at 791; see Ross, 746 F.3d at 559. To satisfy this standard, the available alternatives need not "be the speaker's first or best choice or provide the same audience or impact for the speech." Ross, 746 F.3d at 559 (alteration and quotation omitted); Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000). Instead, the relevant inquiry focuses on whether the challenged policy "provides avenues for the more general dissemination of a message." Ross, 746 F.3d at 559 (quotation omitted); see Green v. City of Raleigh, 523 F.3d 293, 305 (4th Cir. 2008).

The alleged policy allows Sharpe to record the police encounters from inside the stopped car for later use, such as posting to Facebook a video recorded from inside the stopped car during the traffic stop or submitting the video to media outlets for broadcast. See Pl.'s Ex. A. [D.E. 1-2] 20–21 ("If you were recording, that is just fine. . . . We record, too."). As such, the policy does not "hinder [Sharpe's] ability to disseminate [his] message." Ross, 746 F.3d at 559. The policy also does not prohibit any person not inside the stopped car from recording and livestreaming the traffic stop. Thus, the policy leaves open ample alternatives of communication. Accordingly, the court holds that the alleged policy survives intermediate

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U.S. 464, 494–97 (2014) (requiring the government to present proof that it tried less intrusive methods where less intrusive means were actually available); Reynolds, 779 F.3d at 231–32 (same).

scrutiny and that the defendants are entitled to judgment as a matter of law.

C.

Sharpe also moves for entry of final judgment concerning this court's August 20, 2020 order dismissing Sharpe's section 1983 claim against Helms in his individual capacity. See [D.E. 34]; Fed. R. Civ. P. 54(b). In cases involving multiple claims or multiple parties, a "court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). All claims between the parties have been resolved, and the court's judgment is now final. Thus, the court dismisses as moot Sharpe's Rule 54(b) motion.

III.

In sum, the court GRANTS defendants' motion for judgment on the pleadings [D.E. 36] and DISMISSES AS MOOT plaintiff's motion for entry of final judgment [D.E. 34]. The clerk shall close the case.

SO ORDERED. This 9 day of July 2021.

_____/s/_____
JAMES C. DEVER III
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
EASTERN DIVISION

DIJON SHARPE, Plaintiff, v. WINTERVILLE POLICE DEPARTMENT, Officer WILLIAM BLAKE ELLIS, in his official capacity, and Officer MYLES PARKER HELMS IV, both individually and in his official capacity, Defendants.	*	Civil Action No. 4:19-CV-157-D

* * * * * * * * *

ORDER

On November 3, 2019, Dijon Sharpe ("plaintiff" or "Sharpe") filed a complaint against the Winterville Police Department ("WPD"), Officer William Blake Ellis ("Ellis") in his official capacity only, and Officer Myers Parker Helms IV ("Helms") in both his individual and official capacities (collectively, "defendants"), alleging violations of 42 U.S.C. § 1983 and the First Amendment that arise from Sharpe recording and real-time broadcasting a traffic stop involving Sharpe (who was a

passenger in the car), Helms, and Ellis. See Compl. [D.E. 1]. On February 3, 2020, the defendants filed a partial motion to dismiss and supporting memorandum, seeking dismissal of the claims against WPD and Helms in his individual capacity. See [D.E. 15, 16]. On February 24, 2020, Sharpe responded in opposition. See [D.E. 19]. On March 9, 2020, the defendants replied. See [D.E. 20]. On August 14, 2020, the court heard argument on the motion. As explained below, the court grants the defendants' partial motion to dismiss.

I.

Sharpe resides in Pitt County, North Carolina. See Compl. ¶ 7. On October 9, 2018, Helms and Ellis, as officers of WPD, properly stopped a car in which Sharpe was riding in the front-passenger seat. See id. at ¶¶ 19–20. Sharpe then "turned on the video recording function of his smartphone and began livestreaming — broadcasting in real-time — via Facebook Live to his Facebook account." Id. at ¶ 22. During the traffic stop, Helms approached the car and asked Sharpe his name, which he declined to provide. See id. at ¶ 24. Helms and Ellis then returned to their patrol car. See id. at ¶ 25. When Helms returned to Sharpe's car, he asked Sharpe, "What have we got? Facebook Live, cous?" Id. at ¶ 27 (alteration omitted); see Pl.'s Ex. A [D.E. 1-2] 17. Sharpe responded: "Yeah." Compl. at ¶ 28; see Pl.'s Ex. A at 17. Helms reached in and attempted to grab Sharpe's phone, pulling on his seatbelt and shirt in the process. See Compl. at ¶ 28. Helms stated, "We ain't gonna do Facebook Live, because that's an officer safety issue." Pl.'s Ex. A at 17. Later, Ellis remarked: "Facebook Live . . . we're not gonna have, okay, because that lets everybody y'all follow on Facebook that we're out here. There might be just one me next time [sic] . . . It lets everybody know where y'all are at. We're not

gonna have that." Id. at 19–20.[1] Ellis continued: "If you were recording, that is just fine. . . . We record, too. So in the future, if you're on Facebook Live, your phone is gonna be taken from you . . . [a]nd if you don't want to give up your phone, you'll go to jail." Id. at 20. Towards the end of the stop, Ellis stated, "But to let you know, you can record on your phone . . . but Facebook Live is not gonna happen." Id. at 21.

Sharpe makes two claims. First, Sharpe alleges a violation of 42 U.S.C. § 1983 and the First Amendment against Helms and Ellis, in their official capacities, and WPD. See Compl. at ¶¶ 37–43. As for Helms and Ellis, Sharpe states that they "physically attacked" him and "threatened to deprive" him of his First Amendment right to record and real-time broadcast his interactions with law enforcement Id. at ¶ 40. As for WPD, Sharpe cites Monell v. Department of Social Services of New York, 436 U.S. 658 (1978), and alleges "an unconstitutional policy, custom, or practice of preventing citizens from recording and livestreaming their interactions with police officers in the public performance of their duties." Id. at ¶ 41. Second, Sharpe alleges a violation of 42 U.S.C. § 1983 and the First Amendment against Helms in his individual capacity. See id. at ¶¶ 44–48. Specifically, Sharpe asserts that "[t]he physical attack by Officer Helms on Mr. Sharpe" violated his First Amendment rights. Id. at ¶ 47;

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[1] Ellis was correct. See Compl. at ¶ 23; https://www.facebook.com/d.r.sharpe/videos/2251012878304654/ (last visited Aug. 14, 2020) (listing "Realtime Comments" including, inter alia, "'Keep your live on", "It keep pausing", "Where ya'll at"', "What kind of bull is going on now", "Did he just grab your phone!???", and "Handle it once it's off").

see [D.E. 19] 6–7.[2] Sharpe seeks nominal damages, reasonable attorney's fees, costs, and a declaratory judgment concerning whether Sharpe "has the right, protected by the First Amendment . . . to both (a) record police officers in the public performance of their duties and (b) broadcast such recording in real-time." Compl. at 8.

II.

A motion to dismiss under Rule 12(b)(6) tests the complaint's legal and factual sufficiency. See Ashcroft v. Iqbal, 556 U.S. 662, 677–80 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–63 (2007); Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30 (2012); Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). To withstand a Rule 12(b)(6) motion, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (quotation omitted); see Twombly, 550 U.S. at 570; Giarratano, 521 F.3d at 302. In considering the motion, the court must construe the facts and reasonable inferences "in the light most favorable to the [nonmoving party]." Massey v. Ojaniit, 759 F.3d 343, 352 (4th Cir. 2014) (quotation omitted); see Clatterbuck v. City of Charlottesville, 708 F.3d 549, 557 (4th Cir. 2013), abrogated on other grounds by Reed v. Town of Gilbert, 576 U.S. 155 (2015). A court need not accept as true a complaint's legal conclusions, "unwarranted inferences, unreasonable conclusions, or arguments." Giarratano, 521

[2] In responding to defendants' motion to dismiss and at oral argument, Sharpe disclaimed reliance on the Fourth Amendment and stated that the complaint involves only "an issue of First-Amendment protected conduct." [D.E. 19] 6.

F.3d at 302 (quotation omitted); see Iqbal, 556 U.S. at 678–79. Rather, a plaintiff's allegations must "nudge[] [his] claims," Twombly, 550 U.S. at 570, beyond the realm of "mere possibility" into "plausibility." Iqbal, 556 U.S. at 678–79.

When evaluating a motion to dismiss, a court considers the pleadings and any materials "attached or incorporated into the complaint." E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 448 (4th Cir. 2011); see Fed. R. Civ. P. l0(c); Thompson v. Greene, 427 F.3d 263, 268 (4th Cir. 2005). A court also may consider a document submitted by a moving party if it is "integral to the complaint and there is no dispute about the document's authenticity" without converting the motion into one for summary judgment. Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 165–66 (4th Cir. 2016). Additionally, a court may take judicial notice of public records when evaluating a motion to dismiss for failure to state a claim. See, e.g., Fed. R. Evid. 201; Tellabs, Inc. v. Makor Issues & Rights. Ltd., 551 U.S. 308, 322 (2007); Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009).

III.

A.

Defendants move to dismiss WPD as a defendant under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See [D.E. 15] 1; [D.E. 20] 1–3. Defendants contend that Sharpe has failed to state a claim for which relief can be granted because WPD is not an entity that can be sued under North Carolina law. See [D.E. 20] 1–3. Sharpe responds that "[t]he inclusion of [WPD] as a separate named Defendant was a prophylactic measure . . . in the event the official capacity claims were somehow procedurally defective." [D.E. 19] 2. Thus, Sharpe "defers

to the Court's judgment regarding the motion to dismiss [WPD] as a discrete entity." Id. At oral argument, Sharpe conceded that WPD was not a proper entity to sue.

State law determines the capacity of a state governmental body to be sued in federal court. See Avery v. Burke Cty., 660 F.2d 111, 113–14 (4th Cir. 1981). Accordingly, this court must predict how the Supreme Court of North Carolina would rule on such a state law issue. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 369 (4th Cir. 2005). In doing so, the court must look first to opinions of the Supreme Court of North Carolina. See id.; Parkway 1046, LLC v. U.S. Home Corp., 961 F.3d 301, 306 (4th Cir. 2020); Stahle v. CTS Corp., 817 F.3d 96, 100 (4th Cir. 2016). If there are no governing opinions from that court, this court may consider the opinions of the North Carolina Court of Appeals, treatises, and "the practices of other states." Twin City Fire Ins. Co., 433 F.3d at 369 (quotation omitted).[3] In predicting how the highest court of a state would address an issue, this court must "follow the decision of an intermediate state appellate court unless there [are] persuasive data that the highest court would decide differently." Toloczko, 728 F.3d at 398 (quotation omitted); see Hicks v. Feiock, 485 U.S. 624, 630 & n.3 (1988). Moreover, in predicting how the highest court of a state would address an issue, this court "should not create or expand a [s]tate's public policy." Time Warner Ent.-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp., 506 F.3d 304, 314 (4th Cir. 2007) (alteration and quotation omitted); see Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per

[3] North Carolina does not have a mechanism to certify questions of state law to its Supreme Court. See Town of Nags Head v. Toloczko, 728 F.3d 391, 397–98 (4th Cir. 2013).

curiam); Wade v. Danek Med., Inc., 182 F.3d 281, 286 (4th Cir. 1999).

"The capacity of a governmental body to be sued in the federal courts is governed by the law of the state in which the district court is held." Avery, 660 F.2d at 113–14; see Fed. R Civ. P. 17(b). A North Carolina county is a legal entity which may be sued under certain circumstances. See N.C. Gen. Stat. § 153A–11. Likewise, a North Carolina city or town is a legal entity which may be sued under certain circumstances. See N.C. Gen. Stat. § 160A–485; see also id. § 160A-1(2) (noting that "'[c]ity' is interchangeable with the terms 'town'" for purposes of section 160A). However, there is no corresponding statute authorizing suit against a North Carolina county police department or town police department See, e.g., Parker v. Bladen Cty., 583 F. Supp. 2d 736, 740 (E.D.N.C. 2008); Moore v. City of Asheville, 290 F. Supp. 2d 664, 673 (W.D.N.C. 2003), aff'd, 396 F.3d 385 (4th Cir. 2005); Coleman v. Cooper, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, disc. review denied, 322 N.C. 834, 371 S.E.2d 275 (1988), overruled in part on other grounds by Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997). Accordingly, the court dismisses WPD as a defendant under Rule 12(b)(6).

B.

Defendants also move to dismiss the section 1983 claim against Helms in his individual capacity. See [D.E. 15] 2. In support, Helms asserts qualified immunity concerning the claim against him individually because Sharpe did not have a First Amendment right to record and real-time broadcast Helms and Ellis publicly performing their police duties on October 9, 2018. Alternatively, Helms asserts that such a right was not clearly established on October 9, 2018. See [D.E. 16] 4–11; [D.E. 20] 3–7. Sharpe disagrees. See [D.E. 19] 3–8.

Helms is entitled to qualified immunity under section 1983 unless "(l) [he] violated a federal statutory or constitutional right, and (2) the unlawfulness of [his] conduct was 'clearly established at the time.'" District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (quotation omitted); see Ray v. Roane, 948 F.3d 222, 226 (4th Cir. 2020). "'Clearly established' means that, at the time of the [official's] conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." Wesby, 138 S. Ct. at 589 (quotation omitted); see, e.g., City of Escondido v. Emmons, 139 S. Ct. 500, 503–04 (2019) (per curiam). "A court may consider either prong of the qualified immunity analysis first." Ray, 948 F.3d at 226; see Sims v. Labowitz, 885 F.3d 254, 260 (4th Cir. 2018).

Although the Supreme Court "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quotation and citation omitted); see Wesby 138 S. Ct. at 590; Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011). In the Fourth Circuit, "existing precedent" includes precedent of the United States Supreme Court, the Fourth Circuit, and the highest court of the state in which the action arose. See Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 176 (4th Cir. 2010).[4] "In the absence of 'directly on-point, binding

[4] The United States Supreme Court has held that its precedent qualifies as controlling for purposes of qualified immunity. See Wesby, 138 S. Ct. at 591–93 & n.8. The Supreme Court has reserved judgment on whether decisions of a federal court of appeals are a source of clearly established law for purposes of qualified immunity.

authority,' courts may also consider whether 'the right was clearly established based on general constitutional principles or a consensus of persuasive authority.'" Ray, 948 F.3d at229 (quoting Booker v. S.C. Dep't of Corr., 855 F.3d 533, 543 (4th Cir. 2017)).

As for the first prong of the qualified immunity analysis, Sharpe alleges that Helms retaliated against him in violation of the First Amendment by attempting to prevent the recording and real-time broadcasting of their encounter. See [D.E. 19] 6–8. "[A] First Amendment retaliation claim under § 1983 consists of three elements: (1) the plaintiff engaged in constitutionally protected First Amendment activity, (2) the defendant took an action that adversely affected that protected activity, and (3) there was a causal relationship between the plaintiff's protected activity and the defendant's conduct." Booker, 855 F.3d at 537; see Raub v. Campbell, 785 F.3d 876, 885 (4th Cir. 2015).

As for the first element, the court assumes without deciding that Sharpe engaged in constitutionally-protected free speech when he recorded and real-time broadcasted his encounter with Helms. As for the second element, the court assumes without deciding that Helms "took an action that adversely affected" Sharpe's recording and real-time broadcasting activity. Booker, 855 F.3d at 537. Helms attempted to grab Sharpe's phone during the encounter. Sharpe pulled away and Helms grabbed Sharpe's seatbelt. See Pl.'s Ex. A at 17–21. This conduct did not interrupt Sharpe's recording and real-time broadcasting, and Sharpe recorded and broadcast

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See id.; Kisela, 138 S. Ct. at 1152–54; Taylor v. Barkes, 135 S. Ct. 2042, 2044–45 (2015) (per curiam); City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1776 (2015); Carroll v. Carman, 574 U.S. 13, 16–17 (2014) (per curiam).

the entire encounter. Nonetheless, such conduct "may tend to chill individuals' exercise of constitutional rights." Am. Civ. Liberties Union of Md., Inc. v. Wicomico Cty., 999 F.2d 780, 785 (4th Cir. 1993); see Perry v. Sindermann, 408 U.S. 593, 597 (1972), overruled on other grounds by Rust v. Sullivan, 500 U.S. 173 (1991). A police officer reaching into a vehicle to grab a phone that is real-time broadcasting "would likely deter a person of ordinary firmness from the exercise of First Amendment rights." Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005) (quotation omitted) (collecting cases).

As for the third element, the court assumes without deciding that a clear causal relationship exists between Sharpe's recording and real-time broadcasting and Helms's conduct. "In order to establish this causal connection, a plaintiff in a retaliation case must show, at the very least, that the defendant was aware of [plaintiff's] protected activity." Id. at 501; see Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998). A plaintiff must also show temporal proximity between defendant's awareness of the plaintiff's protected activity and the adverse action. See Constantine, 411 F.3d at 501. Here, Helms asked Sharpe: "What have we got? Facebook Live, cous?" Pl.'s Ex. A [D.E. 1-2] 17. Sharpe responded, "Yeah." [D.E. 1-2] 17. Immediately after this exchange, Helms attempted to grab Sharpe's phone. See id. Helms then stated, "We ain't gonna do Facebook Live, because that's an officer safety issue." Id. The allegations demonstrate both knowledge and temporal proximity. Helms grabbed at Sharpe's phone only after learning that Sharpe was recording and real-time broadcasting. Accordingly, the court assumes

without deciding that Sharpe has adequately pleaded a First Amendment retaliation claim.[5]

As for the "clearly established" prong of the qualified immunity analysis, Sharpe's right to record and real-time broadcast his encounter with police must have been clearly established on October 9, 2018. See, e.g., Wesby, 138 S. Ct. at 589; Emmons, 139 S. Ct. at 503–04. It was not. There is no precedent from the Supreme Court, the Fourth Circuit, or the Supreme Court of North Carolina that clearly established this legal right on October 9, 2018. The closest Supreme Court or Fourth Circuit case is Szymecki v. Houck, 353 F. App'x 852 (4th Cir. 2009) (per curiam) (unpublished). In Szymecki, the Fourth Circuit affirmed a district court's conclusion "'that [plaintiff's] asserted First Amendment 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. Of course, "the absence of controlling authority holding identical conduct unlawful does not guarantee qualified immunity." Owens ex rel. Owens v. Lott, 372 F.3d 267, 279 (4th Cir. 2004). But the Supreme Court has repeatedly counseled that "'clearly established law' should not be defined 'at a high level of generality.'" White v. Pauly, 137 S. Ct. 548, 552 (2017) (quoting al-Kidd, 563 U.S. at 742); see, e.g., Wesby, 138 S. Ct. at 590; Plumhoff v. Rickard, 572 U.S. 765, 779 (2014); Ray, 948 F.3d at 229.

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[5] This assumption does not affect the "clearly established" prong of the court's analysis. See, e.g., Fields v. City of Phila., 862 F.3d 353, 360–62 (3d Cir. 2017); Turner v. Lieutenant Driver, 848 F.3d 678, 685–90 (5th Cir. 2017); Gericke v. Begin, 753 F.3d 1, 7–10 (1st Cir. 2014); Am. Civ. Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 594–603 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78, 82–85 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332, 1332–33 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436, 439–40 (9th Cir. 1995).

Sharpe's activity not only involves the right of a passenger in a stopped vehicle during a traffic stop to record police, but also to real-time broadcast such a recording during the traffic stop. Cf. White, 137 S. Ct. at 552 ("As [the Supreme] Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case."). Indeed, Ellis made precisely this distinction—Sharpe recording versus recording and real-time broadcasting—during the traffic stop. See Pl.'s Ex. A at 19–20. Although other circuit courts have published opinions recognizing the right to record police in performing their public duties, no circuit court has addressed the right of a passenger in a stopped vehicle during a traffic stop to record and real-time broadcast police in performing their public duties.[6] On October 9, 2018, when Helms attempted to grab Sharpe's phone to prevent Sharpe from recording and real-time broadcasting during the traffic stop, it would not have been "clear to a reasonable officer that his conduct was unlawful [under the First Amendment] in the situation he confronted." Saucier v. Katz, 533 U.S. 194, 202 (2001), overruled on other grounds by Pearson, 555 U.S. 223, 231–43 (2009). Accordingly, Helms is entitled to qualified immunity.[7]

In opposition, Sharpe argues that anyone recording any traffic stop is the same as anyone real-time broadcasting any traffic stop. Sharpe then cites Ray and

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[6] This conclusion applies even under a generous reading of "consensus of persuasive authority" that includes sister circuits. Ray, 948 F.3d at 229 (quotation omitted).

[7] The court recognizes the current state of qualified immunity doctrine, and the debate about whether the Supreme Court or Congress should change it. See, e.g., [D.E. 19] 8 & n.6; William Baude, Is Qualified Immunity Unlawful?, 106 Cal. L. Rev. 45 (2018). As a lower court, however, this court must follow binding precedent.

argues that "general constitutional principles or a consensus of persuasive authority" clearly established that First Amendment right on October 9, 2018. See Ray, 948 F.3d at 229.

The court rejects Sharpe's argument. As Sharpe admits, the Fourth Circuit has not held in a published opinion that an individual's right under the First Amendment to record a traffic stop is clearly established, much less held that an individual has a right to record and real-time broadcast a traffic stop from within the stopped car. Cf. Szymecki, 353 F. App'x at 852. Moreover, evolutions in technology help to defeat Sharpe's contention that recording a traffic stop from within the stopped car equals real-time broadcasting that traffic stop. It does not suffice for a court simply to determine whether an individual's behavior constitutes "recording" or not "recording" a traffic stop. After all, such "recording" may fall within five, distinct factual scenarios: (1) recording; (2) recording and real-time broadcasting; (3) recording and real-time broadcasting with geo-location information; (4) recording and real-time broadcasting with the ability to interact via messaging applications in real-time with those watching; and (5) recording and real-time broadcasting with geolocation information and the ability to interact via messaging applications in real-time with those watching. Recording an interaction preserves that interaction for the recorder's later use. In contrast, broadcasting the interaction contemporaneously conveys the interaction to another recipient. Broadcasting the interaction contemporaneously, with contemporaneous geo-location information, conveys both the interaction and the location at which it is occurring. And contemporaneous messaging applications allow the individual recording, and those watching, to know the location of the interaction and to

comment on and discuss in real-time the interaction. The circuit courts to which Sharpe points in support of his argument address an onlooker recording a police encounter as contemplated in the first scenario.[8] Thus, even assuming those cases indicate a "consensus of persuasive authority" concerning the first scenario, they do not address the other four scenarios. Additionally, none of those cases involved a recording by a passenger in a stopped vehicle during a traffic stop.

Sharpe's conduct falls within either the fourth or fifth scenario. Even broadly applying Ray, a "consensus of persuasive authority" cannot form on an issue the courts did not address. Sharpe invites the court to sweep all five scenarios into a simple "recording" category, but the court declines the invitation. To do so would ignore clear distinctions among the five scenarios, as well as the distinction between an onlooker versus a passenger in a stopped vehicle during a traffic stop. To do so also would ignore binding Supreme Court precedent and analyze an individual's First Amendment right to record a traffic stop from within a stopped vehicle at too high a level of generality. See, e.g., Wesby, 138 S. Ct at 590; Pauly, 137 S. Ct at 552; Plumhoff, 572 U.S. at 779.

That this case involved Sharpe recording and real-time broadcasting with the ability to interact via messaging applications in real-time with those watching a traffic stop from inside the stopped vehicle also animates this court's conclusion that Helms is entitled to qualified

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[8] See Fields, 862 F.3d at 356 (taking pictures with a camera and iPhone camera); Turner, 848 F.3d at 683–84 ("videotaping"); Gericke, 753 F.3d at 3–4 ("audio and video record[ing]" with a camera); Alvarez, 679 F.3d at 588 ("audio recording"); Glik, 655 F.3d at 79–80 (video recording on cell phone); Smith, 212 F.3d at 1332 ("videotaping"); Fordyce, 55 F.3d at 438 (videotaping).

immunity. Each circuit court to analyze an individual's First Amendment right to record a police encounter noted that the right to record a police encounter is not unbounded, and that the right "may be subject to reasonable time, place, and manner restrictions." Turner, 848 F.3d at 690 (quotation omitted); see Fields, 862 F.3d at 353; Gericke, 753 F.3d at 9; Alvarez, 679 F.3d at 605; Glik, 655 F.3d at 84; Smith, 212 F.3d at 1333.[9] Moreover, those circuit courts have explicitly declined to address "the limits of this constitutional right." See, e.g., Fields, 862 F.3d at 360; Turner, 848 F.3d at 690; Gericke, 753 F.3d at 9. Furthermore, the Third Circuit opined that an activity "interfer[ing] with policy activity" such that the recording "put[s] a life at stake" might not be protected. Fields, 862 F.3d at 360.

The Supreme Court has long recognized that police officers face unique dangers during traffic stops. See Rodriguez v. United States, 575 U.S. 348, 356–57 (2015); Arizona v. Johnson, 555 U.S. 323, 330–32 (2009); Maryland v. Wilson, 519 U.S. 408, 413 (1997); Michigan v. Long, 463 U.S. 1032, 1047–48 (1997). "The risk of harm to the police and the occupants of a stopped vehicle is minimized . . . if

[9] Only Gericke involved a person recording a traffic stop. See Gericke, 753 F.3d at 7. In Gericke, the person who was recording the interaction was not in the car subject to the traffic stop. Id. Rather, she was in a different car and attempted to record the interaction from a school parking lot adjacent to where the other car was stopped on the street Id.; cf. Fields, 862 F.3d at 356 (observer on public sidewalk recoding police disperse a house party); Turner, 848 F.3d at 683 (observer on public sidewalk recording a police station); Alvarez, 679 F.3d at 586 (pre-enforcement challenge to Illinois eavesdropping statute in order to prevent Illinois prosecutors from enforcing the eavesdropping statute against people openly recording police officers performing their official duties in public); Glik, 655 F.3d at 79–80 (observer on public sidewalk recording an arrest of another individual).

the officers routinely exercise unquestioned command of the situation." Johnson, 555 U.S. at 330 (quotations omitted); Wilson, 519 U.S. at 414; Michigan v. Summers, 452 U.S. 692, 702–03 (1981). Indeed, during the officers' interaction with Sharpe, Helms stated that Sharpe's recording and real-time broadcasting of the traffic stop from within the stopped car was an "officer safety issue." Pl.'s Ex. A at 17. To be sure, a police officer's "command of the situation" during a traffic stop is not a license to violate the Constitution, including the First Amendment. Nonetheless, the court rejects Sharpe's argument and holds that, on October 9, 2018, during the traffic stop, Sharpe did not have a clearly established First Amendment right to record and real-time broadcast with the ability to interact via messaging applications with those watching in real-time. Thus, qualified immunity bars Sharpe's First Amendment claim against Helms in his individual capacity.[10]

C.

The only claims that remain are Sharpe's official capacity claims against Helms and Ellis under section 1983. Defendants did not move to dismiss Sharpe's claims under section 1983 against Helms and Ellis in their official capacities. Cf. [D.E. I5, 16, 20]. Nonetheless, if Sharpe lacks a legal basis on which to proceed with those claims, the court may address the claims in the interests of judicial economy. See, e.g., Erline Co. S.A. v. Johnson, 440 F.3d 648, 654 (4th Cir. 2006); cf. Grier v. United States, 57 F.3d 1066, 1995 WL 361271, at *1 (4th Cir. 1995) (per curiam) (unpublished table decision) ("Because it is clear

[10] This order does not address any First Amendment issue arising from an onlooker who is not within a stopped vehicle from recording and real-time broadcasting a traffic stop on a public road. Cf. Gericke, 753 F.3d at 7.

as a matter of law that no relief could be granted under any set of facts that could be proved consistent with the allegations in [the] complaint, the court would have been warranted in either granting Defendants' motion to dismiss for failure to state a claim or ordering dismissal sua sponte, both under Rule 12(b)(6).").

A claim against a public official sued in his official capacity is "essentially a claim against" the government entity the official represents. Kentucky v. Graham, 473 U.S. 159, 165–66 (1985); Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 307 n.13 (4th Cir. 2006); Love-Lane v. Martin, 355 F.3d 766, 783 (4th Cir. 2004). Because Sharpe cannot sue WPD, Sharpe's claims against Helms and Ellis in their official capacities are functionally brought against the Town of Winterville. See Compl. at ¶¶ 37–43; Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 469 ("For purposes of section 1983, these official capacity suits [against government officials] are treated as suits against the municipality." (quotation and alteration omitted)); see also Hafer v. Melo, 502 U.S. 21, 25 (1991).

Municipal entities cannot be held liable under section 1983 solely because they employed a tortfeasor. Rather, when a municipal entity is sued—directly or in an official-capacity suit—the plaintiff must plausibly allege that a "policy or custom" attributable to the municipal entity caused the violation of the plaintiff's federally protected rights. See Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997); Hafer, 502 U.S. at 25 (1991); Graham, 473 U.S. at 166; Monell, 436 U.S. 658, 690–94 (1978); King v. Rubenstein, 825 F.3d 206, 223 (4th Cir. 2016); Santos, 725 F.3d at 469–70; Carter v. Morris, 164 F.3d 215, 218–19 (4th Cir. 1999). A violation results from a municipal entity's "policy or custom" if the violation resulted from "a policy statement, ordinance, regulation, or decision

officially adopted and promulgated by that body's officers." Monell, 436 U.S. at 690–91, 694; see City of St. Louis v. Praprotnik, 485 U.S. 112, 121 (1988).

Not every municipal official's action or inaction represents municipal policy. Rather, the inquiry focuses on whether the municipal official possessed final policymaking authority under state law concerning the action or inaction. See, e.g., McMillian v. Monroe Cty., 520 U.S. 781, 785–86 (1997); Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986); Riddick v. Sch. Bd., 238 F.3d 518, 523 (4th Cir. 2000). Furthermore, even if a section 1983 plaintiff can identify the requisite final policymaking authority under state law, a municipality is not liable simply because a section 1983 plaintiff "is able to identify conduct attributable to the municipality." Riddick, 238 F.3d at 524. Instead, a section 1983 "plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." Brown, 520 U.S. at 404 (emphasis omitted); see City of Canton v. Harris, 489 U.S. 378, 389–90 (1989); Riddick, 238 F.3d at 524. Thus, to avoid imposing respondeat superior liability on municipalities, a section 1983 plaintiff must show that "a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." Brown, 520 U.S. at 411; see Harris, 489 U.S. at 392; Riddick, 238 F.3d at 524; Carter, 164 F.3d at 218–19.

"Deliberate indifference is a very high standard—a showing of mere negligence will not meet it." Grayson v. Peed, 195 F.3d 692, 695 (4th Cir. 1999). Deliberate indifference requires "proof that a municipal actor disregarded a known or obvious consequence of his action" or inaction. Brown, 520 U.S. at 410. Moreover, even if a section 1983 plaintiff can show the requisite

culpability, a section 1983 plaintiff also must show "a direct causal link between the municipal action [or inaction] and the deprivation of federal rights." Id. at 404. Thus, deliberate indifference and causation are separate requirements. See id.

A single act of a municipal official may result in municipal liability if that official has final policymaking authority under state law concerning the act. See Pembaur, 475 U.S. at 481; Lytle v. Doyle, 326 F.3d 463, 472 (4th Cir. 2003); Riddick, 238 F.3d at 523. An official has final policymaking authority if, under state law, the official has final authority "to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government." Riddick, 238 F.3d at 523 (quotation omitted); see McMillian, 520 U.S. at 785–86; Lytle 326 F.3d at 472; Spell v. McDaniel, 824 F.2d 1380, 1386 (4th Cir. 1987).

"[A] municipality is only liable under section 1983 if it causes [a constitutional] deprivation through an official policy or custom." Carter, 164 F.3d at 218; see, e.g., Brown, 520 U.S. at 403–04. This requirement limits municipal liability under section 1983 to those actions for which the municipality is actually responsible by distinguishing between acts attributable to the municipality and acts attributable only to municipal employees. See, e.g., Brown, 520 U.S. at 403–04; Riddick, 238 F.3d at 523. Therefore, a municipality may not be found liable under section 1983 based on a theory of respondeat superior or simply for employing a tortfeasor. See, e.g., Brown, 520 U.S. at 403.

To the extent Sharpe relies on respondeat superior for his claims against Helms and Ellis in their official capacities under section 1983, the Town of Winterville is

not liable on that theory. See, e.g., Brown, 520 U.S. at 403. Accordingly, the court dismisses Sharpe's official capacity claims to the extent that he relies on a theory of respondeat superior.

To the extent Sharpe alleges a Monell claim based on a policy, custom, or practice of the Town of Winterville, the court must first determine whether Sharpe plausibly alleged that Helms and Ellis possess final policymaking authority under state law. See McMillian, 520 U.S. at 785–86; Pembaur, 475 U.S. at 481; Riddick, 238 F.3d at 523. In the complaint, Sharpe alleges that Ellis and Helms acted pursuant to a policy prohibiting recording and real-time broadcasting of police-citizen encounters. See Compl. at ¶¶ 40–41. As alleged, Ellis and Helms implemented the alleged policy, but did not create it. Moreover, under North Carolina law, police officers do not possess final policymaking authority. See, e.g., Glenn-Robinson v. Acker, 140 N.C. App. 606, 631, 538 S.E.2d 601, 618–19 (2000); Rogerson v. Fitzpatrick, 121 N.C. App. 728, 732–33, 468 S.E.2d 447, 450–52 (1996); see also McMillian, 520 U.S. at 785–86; Lytle, 326 F.3d at 472; Riddick, 238 F.3d at 523; Spell, 824 F.2d at 1386. Accordingly, Sharpe cannot base his Monell claim against the Town of Winterville on his single interaction with Helms and Ellis during the traffic stop. See McMillian, 520 U.S. at 785–86; Pembaur, 475 U.S. at 481; Riddick, 238 F.3d at 523.

Given that defendants did not move to dismiss the official capacity claim against the officers, the court will not dismiss the claim against the Town of Winterville. Whether this claim will survive a motion for summary judgment is an issue for another day. Cf. Smith v. Atkins, 777 F. Supp. 2d 955, 966–68 (E.D.N.C. 2011) (granting summary judgment to a municipality on a Monell claim.).

IV.

In sum, the court GRANTS defendants' motion to dismiss [D.E. 15] and DISMISSES WITH PREJUDICE plaintiff's claim against WPD and plaintiff's claim against Helms in his individual capacity.

SO ORDERED. This 20 day of August 2020.

_____/s/_____
JAMES C. DEVER III
United States District Judge

APPENDIX D

FILED: April 21, 2023

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 21-1827
(4:19-cv-00157-D)

DIJON SHARPE,

Plaintiff - Appellant,

v.

WINTERVILLE POLICE DEPARTMENT; WILLIAM BLAKE ELLIS, in his official capacity only; MYERS PARKER HELMS, IV, in his individual and official capacity,

Defendant - Appellees.

NATIONAL POLICE ACCOUNTABILITY PROJECT; THE INSTITUTE FOR JUSTICE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC; THE DUKE UNIVERSITY SCHOOL OF LAW FIRST AMENDMENT CLINIC; ELECTRONIC PRIVACY INFORMATION CENTER; ELECTRONIC FRONTIER FOUNDATION; CATO INSTITUTE

Amici Supporting Appellant

SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION

Amicus Supporting Appellee

ORDER

The petitions for rehearing en banc were circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petitions for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
EASTERN DIVISION

DIJON SHARPE, Plaintiff, v. WINTERVILLE POLICE DEPARTMENT; Officer WILLIAM BLAKE ELLIS, in his official capacity only; and Officer MYLES PARKER HELMS IV, both individually and in his official capacity, Defendants.	*	VERIFIED COMPLAINT *[COMP]*

* * * * * * * * *

NOW COMES the Plaintiff Dijon Sharpe ("Mr. Sharpe"), by and through undersigned counsel T. Greg Doucette, and complains of the above-captioned Defendants as follows:

I. SUMMARY OF THE CASE

1. The proliferation of smartphones – mobile phones with internet connectivity and the ability to record video – has revolutionized the ability of citizens to monitor

public servants in the public performance of their duties, and to hold those servants accountable for abuse.

2. The power of these devices has been amplified by "livestreaming" platforms such as Twitter's Periscope and Facebook Live, which enable smartphone owners to broadcast video in real-time to interested audiences in a fashion similar to traditional television stations.

3. This combination of real-time smartphone recording coupled with live broadcast has dramatically raised public awareness of violence committed by law enforcement. See, e.g., the police killings of Philando Castile[1] and Alton Sterling[2] in the same 48-hour period of July 2016.

4. Six of the federal Circuit Courts of Appeals – the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits – have each found that recording police during the performance of their duties is protected by the First Amendment to the Constitution of the United States, subject to only minor limitations.[3]

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[1] *Graphic video shows aftermath of shooting by police officer in Falcon Heights*, Minneapolis Star-Trib. (Jul. 7, 2016, 3:13 PM), http://www.startribune.com/graphic-video-shows-aftermath-of-shooting-by-police-officer-in-falcon-heights/385791431/

[2] Maya Lau and Bryn Stole, *Video shows fatal confrontation between Alton Sterling, Baton Rouge police officer*, New Orleans Advocate (Jul. 5, 2016, 11:28 PM), https://www.theadvocate.com/baton_rouge/news/alton_sterling/article_7a1711be-1d0a-5f98-9274-113b819b7431.html

[3] Fields v. City of Phila., 862 F.3d 353 (3rd Cir. 2017) (clearly establishing right to record police, holding "[s]imply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public"); Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017) (clearly establishing right to record police, holding "[w]e conclude that First

5. While the Fourth Circuit Court of Appeals has not yet considered whether such a right to record police exists, nor whether a hypothetical right to record would also encompass the ability to broadcast that recording in real-time via a livestreaming platform, the rare unanimity among so many of its sister circuits – now spanning two decades – is such that the right to record police is clearly established in the Fourth Circuit as well.

6. Mr. Sharpe is a black male who records and broadcasts his interactions with law enforcement for his own protection, yet was physically attacked by Officer Helms when Mr. Sharpe disclosed that he was livestreaming his interaction with the officer, and was

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Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions"); Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014) (expanding Glik, *infra*, to traffic stops and holding "a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties"); Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012) (invalidating wiretap statute, holding "the First Amendment limits the extent to which Illinois may restrict audio and audiovisual recording of utterances that occur in public") ; Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) (finding a "clearly established" right to record police, concluding "[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [First Amendment] principles"); Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000) (holding "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest"); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995) (vacating and remanding for trial where genuine issue of fact existed as to whether police "attempt[ed] to prevent or dissuade [Fordyce] from exercising his First Amendment right to film matters of public interest").

then threatened with arrest by Officer Blake if Mr. Sharpe attempted to broadcast such interactions again in the future.

II. PARTIES

7. The Plaintiff Dijon Sharpe ("Mr. Sharpe") is a citizen and resident of Pitt County, North Carolina.

8. The Defendant Winterville Police Department ("the Defendant Police Department") is a unit of the town of Winterville in Pitt County, North Carolina. Winterville is a municipal corporation established pursuant to Article VII, Section 1 of the North Carolina State Constitution.

9. Upon information and belief, the Defendant William Blake Ellis ("Officer Ellis") is a citizen and resident of Pitt County, North Carolina.

10. Upon information and belief, the Defendant Myers Parker Helms IV ("Officer Helms") is a citizen and resident of Pitt County, North Carolina.

11. Upon information and belief, on or about 9 October 2018, the Defendant Police Department employed both Officer Ellis and Officer Helms, who were each acting within the course and scope of their respective employment as law enforcement officers during the interactions described herein.

III. JURISDICTION AND VENUE

12. This Court has personal jurisdiction over the Defendants under Fed. R. Civ. P. 4(k) and N.C. Gen. Stat. § 1-75.4.

13. This Court has original subject matter jurisdiction under 28 U.S.C. § 1331 as Plaintiff's claim arises under the Constitution and laws of the United States.

14. Venue in this Court is proper under 28 U.S.C. § 1391(b).

IV. FACTS

15. On or about 29 November 2017, Mr. Sharpe was the passenger in a vehicle that was pulled over by law enforcement in Greenville, North Carolina (the "Greenville incident").

16. During the traffic stop, Mr. Sharpe was forced by law enforcement to exit the vehicle, whereupon he was tased, choked, and severely beaten by the responding officers. Mr. Sharpe was then charged with two counts of violating N.C. Gen. Stat. § 14-223 (misdemeanor resisting a public officer) and one count of violating N.C. Gen. Stat. § 14-34.7(C)(1) (felony assault inflicting physical injury on a law enforcement officer).

17. All charges against Mr. Sharpe relating to the Greenville incident were dismissed by the District Attorney.

18. Mr. Sharpe's experience during the Greenville incident spurred him to become a civic activist promoting greater accountability for law enforcement. Mr. Sharpe also took precautions to ensure any future interactions he had with law enforcement would be recorded for protection.

19. On or about 9 October 2018, Mr. Sharpe was again the passenger in a vehicle pulled over by law enforcement.

20. The Defendant Police Department's officers, Officer Ellis and Officer Helms, conducted the traffic stop.

21. While the driver and Mr. Sharpe waited for police to first approach the vehicle, the driver called an unidentified party on his mobile phone so the party was aware the vehicle had been pulled over by police.

22. At the same time, Mr. Sharpe turned on the video recording function of his smartphone and began

livestreaming – broadcasting in real-time – via Facebook Live to his Facebook account.

23. Mr. Sharpe's original Facebook Live video can be accessed by the Court directly at https://www.facebook.com/d.r.sharpe/videos/2251012878304654/. In addition, a certified transcript of the Facebook Live video is attached hereto as Plaintiff's Exhibit A.

24. During the interaction with Officer Helms at approximately the [04:44] mark in the video, Mr. Sharpe declined to provide his name when asked. Exhibit A, pp. 8-9.

25. The officers later return to their patrol car, presumably to run the driver's license and write up the resulting citations.

26. During this period Mr. Sharpe notes his practice of recording his interactions with law enforcement, stating at the [08:52] mark "I'm recording every time we get stopped." Id., p. 14.

27. Near the [11:42] mark of the video, Officer Helms returns to the vehicle and asks Mr. Sharpe "What have we got? Facebook Live, cous[in]?" Id., p. 17.

28. Mr. Sharpe responds in the affirmative, at which point Officer Helms abruptly reaches into the vehicle and attempts to grab Mr. Sharpe's phone, and later pulls on both Mr. Sharpe's seatbelt and Mr. Sharpe's shirt in a further attempt to seize the phone. Id.

29. During this assault on Mr. Sharpe, Officer Helms claims "We ain't gonna do Facebook Live, because that's an officer safety issue." Id.

30. Separately, after Officer Ellis issued citations to the driver, he stated near the [12:40] mark of the video "Facebook Live … we're not gonna have, okay, because

that lets everybody y'all follow on Facebook that we're out here … It lets everybody know where y'all are at. We're not gonna have that." Id., pp. 19-20.

31. Officer Ellis continued at [12:50]: "If you were recording, that is just fine … We record, too. So in the future, if you're on Facebook Live, your phone is gonna be taken from you[.] … And if you don't want to give up your phone, you'll go to jail." Id., p. 20.

32. Later, Officer Ellis later repeated at [13:16]: "[Y]ou can record on your phone … but Facebook Live is not gonna happen." Id., p. 21.

33. At the time of these interactions, Officer Helms was acting under color of law.

34. At the time of these interactions, Officer Ellis was acting under color of law.

35. The physical attack by Officer Helms, and threat of future arrest by Officer Ellis, deprived Mr. Sharpe of his rights protected by the First Amendment to the Constitution of the United States, including his right to record police in the public performance of their duties and to broadcast such recordings in real-time.

36. Mr. Sharpe is entitled to record any future public interactions he has with law enforcement and to broadcast such interactions via Facebook Live or another livestreaming platform, and Mr. Sharpe is protected by the First Amendment to do so without having his phone confiscated or him being jailed.

V. FIRST CAUSE OF ACTION:
VIOLATION OF 42 U.S.C. § 1983 – DECLARATORY JUDGMENT *(Official Capacity Claims & Monell Claim Against Defendant Police Department)*

37. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 36 of this Complaint as if fully set forth herein.

38. Mr. Sharpe is a citizen of the United States within the meaning of 42 U.S.C. § 1983.

39. The Defendant Police Department's agents acted under color of law within the meaning of 42 U.S.C. § 1983 during the interactions described above.

40. Defendant Police Department's agents physically attacked Mr. Sharpe for exercising his "rights, privileges, or immunities secured by the Constitution and laws" within the meaning of 42 U.S.C. § 1983, and further threatened to deprive Mr. Sharpe of those same rights if Mr. Sharpe attempted to broadcast in real-time any future interactions with law enforcement.

41. Upon information and belief, based on Officer Ellis's representations to Mr. Sharpe, the Defendant Police Department has an unconstitutional policy, custom, or practice of preventing citizens from recording and livestreaming their interactions with police officers in the public performance of their duties.

42. This Court is empowered by Fed. R. Civ. P. 57 and 28 U.S.C. § 2201(a) to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

43. Mr. Sharpe seeks a declaration that (a) he has a First Amendment-protected right to record police during the public performance of their duties and (b) his right to record police also includes the right to broadcast such recordings in real-time, regardless of whether or not any other individuals view such a broadcast.

VI. SECOND CAUSE OF ACTION: VIOLATION OF 42 U.S.C. § 1983

(Individual Capacity Claim Against Officer Helms)

44. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 43 of this Complaint as if fully set forth herein.

45. Mr. Sharpe is a citizen of the United States within the meaning of 42 U.S.C. § 1983.

46. Officer Helms acted under color of law within the meaning of 42 U.S.C. § 1983 during the interactions described above.

47. The physical attack by Officer Helms on Mr. Sharpe in an attempt to seize Mr. Sharpe's smartphone, including grabbing Mr. Sharpe's seatbelt and shirt, deprived Mr. Sharpe of his "rights, privileges, or immunities secured by the Constitution and laws" within the meaning of 42 U.S.C. § 1983.

48. Mr. Sharpe is entitled to nominal damages for Officer Helms's violation of Mr. Sharpe's rights.

VII. PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, the Plaintiff respectfully prays that:

1. The Court find each of the Defendants liable to Mr. Sharpe for the respective causes of action outlined above;

2. Mr. Sharpe have and recover of the Defendants nominal damages in the amount of $1.00 for the infringement of his constitutional rights;

3. The Court issue a judgment declaring Plaintiff has the right, protected by the First Amendment to the Constitution of the United States, to both (a) record police

officers in the public performance of their duties and (b) broadcast such recording in real-time;

4. The Court exercise its discretion to award Plaintiff reasonable attorney's fees as permitted under 42 U.S.C. § 1988(b);

5. The costs of this action be taxed against the Defendants; and,

6. The Court grant any such additional and further relief as it deems proper and just.

Respectfully submitted this the 4th day of November, 2019.

THE LAW OFFICES OF T. GREG DOUCETTE PLLC

/s/ T. Greg Doucette

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North Carolina Bar No. 44351

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APPENDIX F

TRANSCRIPT OF FACEBOOK LIVE VIDEO
ACCOUNT OF DIJON SHARPE
DATED OCTOBER 9, 2018
[Exhibit A to Complaint filed November 3, 2019]

[VIDEO BEGINS]

00:00 OFFICER ELLIS: ... you ain't got your seatbelt on.

MR. STATON: Okay.

00:02 OFFICER ELLIS: You got your ID on you?

MR. STATON: No. You can run my license, though.

00:07 OFFICER ELLIS: You got your ID number?

MR. STATON: No. I'll give you my name. Juankesta Staton.

00:13 OFFICER HELMS: Pulled right out in front of that officer too, didn't you?

MR. STATON: He had a stop sign, didn't he?

MR. SHARPE: What officer?

00:19 MR. STATON: I thought I saw a stop sign right there.

MR. SHARPE: There is a stop sign right there.

00:22 MR. STATON: Yeah, I know.
OFFICER ELLIS: What's your name?
MR. STATON: Juankesta Staton. J-u-a-n --
OFFICER ELLIS: J-u --
00:23 MR. STATON: -- K-e-s-t-a, S-t-a-t-o-n.
OFFICER ELLIS: J-u-a-n –
OFFICER HELMS: You got your ID on you?
00:34 OFFICER ELLIS: -- K-e-s-t-a what?
MR. STATON: J-u-a-n-k-e-s
OFFICER HELMS: Hey.
00:37 MR. STATON: -- T-a.
OFFICER ELLIS: Right.
MR. STATON: Juankesta Staton, S-t-a-t-o-n.
00:41 OFFICER ELLIS: Date of birth?
MR. STATON: 7/ 3/80.
OFFICER ELLIS: All right. Just hang
00:48 tight, all right?
MR. STATON: Uh-huh. You know there was a damn stop sign on the other side.
00:54 MR. SHARPE: It was a stop sign.
MR. STATON: They looked at it.
01:14 OFFICER HELMS: Where y'all live?
MR. STATON: I live in Greenville.
OFFICER HELMS: All right. What are

01:17 you doing over here?

MR. STATON: Um --

MR. SHARPE: Handling business.

01:21 MR. STATON: Going to the neighborhood to put tires on my car I just bought.

OFFICER HELMS: All right. What's

01:26 that mean, handling business?

MR. SHARPE: Handling our business.

MR. STATON: [Inaudible]

01:29 OFFICER HELMS: Okay. Why isn't your seatbelt on?

MR. STATON: I'm in Winterville.

01:33 MR. SHARPE: Just took it off when your man came up.

OFFICER HELMS: All right.

01:37 MR. STATON: I'm in Winterville. I guess the police officer running my license. I guess that police officer running my li -- well,

01:46 he gonna pull it up. The police officer a police officer told me he was running my license.

01:53 I don't know if he had a -- huh. Oh, no, it's not. It has something on [inaudible].

02:01 We've got the tires on the car. We just came from Wal-Mart, going to put the tires on the car.

02:07 We went through -- I went through your direction in Winterville instead of going the highway.

02:15 And one of them was following me the whole while, and I passed y'all house.

02:20 Um, Blount and somewhere else. It looks straight to be by the school, the same way you be going, where we just went yesterday to

02:27 go get the car. Me and Dijon. The same thing again, right? I said the same thing, man. The same thing.

02:47 Oh -- right here by the alley by the Police department and all of that, passing that little school.

02:54 Yeah. Same thing again. But I told him he could run my license; it's good. We [inaudible] we -- my license good. I'm trying

03:12 to get to my car, man. I didn't think about none of that mess. I'm saying -- what am I

03:16 doing? I got tires in the car. Two in the back seat and two in the boot.

03:21 MR. SHARPE: They say we ran a stop light -- I mean, we ran a stop sign?

OFFICER HELMS: Ran a stop sign,

03:24 and the driver didn't have his seatbelt on.

MR. SHARPE: We stopped at the stop sign.

OFFICER HELMS: You ran right out

03:27 in front of a police officer --
MR. STATON: They said I ran --
OFFICER HELMS: That's why --
03:28 MR. SHARPE: Y'all got a stop sign too.
MR. STATON: I stopped at the stop sign. The officer pulled --
03:30 OFFICER HELMS: Huh?
MR. SHARPE: Y'all got a stop sign too.
OFFICER HELMS: Yep.
03:32 MR. STATON: Oh, you ran the stop sign --
MR. SHARPE: So how we run in front of y'all, if y'all got a stop sign?
03:34 OFFICER HELMS: You were right in front of us. You ran the stop sign in front of the other officer --
03:37 MR. STATON: I was at a stop sign. He was coming --
OFFICER HELMS: The other officer
03:39 stopped y'all before we could.
MR. STATON: No, I was
MR. SHARPE: He did not stop us.
03:42 OFFICER HELMS: Huh?
MR. STATON: [inaudible] stop sign.
MR. SHARPE: We're y'all stopped us.
03:43 MR. STATON: I was at the stop sign. He was coming to one.
OFFICER HELMS: That way doesn't

03:44 have a stop sign.

MR. STATON: They said I --

MR. SHARPE: Can we walk to it right now?

03:48 OFFICER HELMS: No.

MR. STATON: So they called --

MR. SHARPE: Y'all got a stop sign.

03:51 MR. STATON: -- two, three cars now.

OFFICER HELMS: Well, you had a sign behind you. You ran that one, and no seatbelt.

03:55 MR. STATON: So he called in two, three cars, the same thing they did last time.

MR. SHARPE: We stopped at both stop signs.

04:01 MR. STATON: Yeah, we did. Stopped at a whole lot of stop signs. He was --

MR. SHARPE: That car --

04:03 MR. STATON: -- the one that pulled out.

MR. SHARPE: The car came across the tracks, and then we went, and then y'all came

04:07 from the right side. And y'all – y'all had a stop sign, so then how did we stop in front of y'all?

04:12 MR. STATON: I'm telling you guys, that's why I should have went the highway, man. I do not got time for this. And they're

04:16 calling -- they got three, four cars.

OFFICER ELLIS: Did you put that one on there? Stop sign, seat belt.

04:22 MR. STATON: Man, we ain't got it -- we clean. I got a good drivers license. It's the same thing they did last time, all [inaudible]

04:29 OFFICER HELMS: Hey, you got an ID on you?

MR. STATON: No, I ain't -- I'm about tired of this mess, man. It's the same thing they

04:37 did last time, and they acted like they didn't do nothing to us whenever -- when we had to go to court behind it.

04:42 MR. SHARPE: Naw --

MR. STATON: It's the same thing.

OFFICER HELMS: What's that?

04:44 MR. SHARPE: No.

OFFICER HELMS: Okay. What's your name.

MR. SHARPE: For what?

04:48 MR. STATON: He should have ran my license, seen that --

OFFICER HELMS: I just like to know

04:49 who I'm out with.

MR. STATON: -- we was good, and let us go.

MR. SHARPE: I'm good.

04:52 OFFICER HELMS: Okay. All right. [Inaudible]

MR. STATON: Talking about I didn't
04:54 have a seat belt on and all this. He should have ran -- man, that ain't got nothing to do with it. That ain't got nothing to do with it.

05:02 You gonna give me a seat belt ticket, give me a ticket and let me go. That's all he gotta do.

05:07 MR. SHARPE: And they pulling off four or five cars --

MR. STATON: Yeah, you pulling off
05:08 four or five cars --

MR. SHARPE: Here we go again.

MR. STATON: -- to give me a seat belt ticket.

05:10 MR. SHARPE: We got tires in the back.

MR. STATON: He ain't gotta do all that, man. All he gotta do is give me a seat belt
05:13 ticket and let me go.

MR. SHARPE: We just came from the Wal-Mart --

05:18 MR. STATON: They called three, four cars --

MR. SHARPE: -- getting new tires put on --

MR. STATON: I'm getting tired of this

05:19 police mess, man. I'm trying to get my car and [inaudible]

MR. SHARPE: They said we ran a stop sign.

05:23 We stopped at a stop sign.

MR. STATON: Good God.

MR. SHARPE: After we leave, I'm

05:27 gonna show y'all exactly what -- where we went at.

MR. STATON: I'm so tired. I seen one of them follow me the whole while, from the

05:37 time I turned left by your house, following a car because they see two black people, man. I'm on [inaudible]

05:46 I ain't worried. I got no [inaudible]. I need -- I need them to let me go. You done ran my stuff. Dijon already recording.

05:59 I'm so tired to have to keep messing with these folk, man. Good God. I'm gonna definitely get names this time, though.

06:10 MR. SHARPE: They say we ran the stop sign.

MR. STATON: They talking about ran the stop sign.

06:12 MR. SHARPE: And we stopped.

MR. STATON: We didn't run no [inaudible] stop sign. I stopped, and another

06:16 cop was trying to go straight in front of us. I think they were already calling them, because he followed me three, four stop signs down.
06:23 Who? How are we spending time --

MR. SHARPE: [inaudible]

MR. STATON: My tires are brand new,
06:31 and I got the Wal-Mart --

MR. SHARPE: We went and got the tires nowhere near here.

06:35 MR. STATON: [Inaudible] I'm tired, man. He supposed to run my name and see that I'm straight and let us go. That's what he's
06:41 supposed to do.

They doin' all this extra mess, talking about no seat belt. Give me a seat belt ticket
06:47 and let me leave, then.

You clearly see we got brand new tires in the car, so what could we be doing with four
06:53 tires in the car? I have. I'm getting tired of getting pulled over. These dudes petty, man.
07:02 Y'all gonna [inaudible]

MR. SHARPE: They got us out here -- this is all on running a stop light -- I
07:07 mean, running -- running your license.

MR. STATON: I don't know what y'all are talking about. Let them do this -- this right
07:11 here is holding me up from getting my car.

Clearly -- he talking about what we're doing, and you see two tires in the back and
07:17 two tires in the boot. It ain't no yelp. Whoever back there yelping, it ain't no stop lights by the
07:35 school. They stop signs.

Talking about we didn't run a [inaudible] stop sign. I watched the dude follow me every
07:42 time. That would have been stupid to run the stop sign. He been following me the whole while.

07:47 That man seen two black people, and Dijon with some glasses on. They thinking drug dealer.

07:52 I'm a [inaudible] but I know that's what it is. And I'm out here with a long-sleeved shirt on and some basketball shorts. Talking about
07:58 where we going, and you see tires in the car. No. That's called harassment. Ain't no running
08:05 no stop sign, ain't no lights, no stoplights on the --

MR. SHARPE: We definitely stopped.

MR. STATON: We ain't even on the
08:08 main street. We on the street with the school. There ain't no stoplights out there. And it take
08:15 them that long to run the li -- he out here talking to his buddy in the back, [inaudible] him call three, four cars. And the truck that asked me for my name, he leave.

08:22 So if you gonna give me a ticket for no seat belt, you know what you're supposed to do? You hold him until -- you not gonna get
08:27 nothing. Ain't nobody got no charge or no warrants. Come on, man, let me go. If you're gonna give me a ticket, give me a ticket and
08:32 let me go.

Man, the tires are right there in the boot. You gonna tell me that -- that man can
08:38 see that I got the paper right in my hand.

MR. SHARPE: And walked right up to the car.

MR. STATON: -- and walked right up to
08:42 the car. You holding us here just to hold -- that man, he was coming from behind, converges. He seen us turn, and he turned right behind us.
08:52 MR. SHARPE: We've [inaudible] y'all. We just gonna -- I'm recording every time we get stopped.
08:55 MR. STATON: Yeah, he converges when I –

MR. SHARPE: as well as y'all should.

MR. STATON: -- [inaudible] Regional,
08:57 whatever it's called. He was waiting over there.

MR. SHARPE: We good so far, but --
09:00 MR. STATON: So, what kind of stoplight? There ain't no stoplights in the middle --

MR. SHARPE: We didn't run no stop
09:03 sign, though.
MR. STATON: There ain't no stop lights --
MR. SHARPE: I definitely know that.
09:05 MR. STATON: Regional. Yeah. Regional accepted. So where a stop light at? Ain't no stop lights, man.
09:12 You gonna give me a ticket, give it to me. He pulled behind because he seen two young black people driving. That what it was.
09:18 There's no stoplights on this street nowhere. I stopped at all three stop signs. Yeah, I know
09:31 that. Yeah. And I was getting ready to go left like you did on that [inaudible] street and pick up my car and keep moving. That's all.
09:46 By Sam's and Fred's? I don't even know Sam's and Fred's. I didn't even go that way. I went straight across from Regional, past --
09:53 down past the school like you did, and make that left over the railroad track and go down that straight road.
10:06 Back there talking. They could have clearly gave me a ticket if I -- if it was a seatbelt ticket and said okay, you guys have a
10:12 good day.
Because the one that called me -- or asked my name and took all of the information,

10:15 he took off in the truck --

MR. SHARPE: After he asked --

MR. STATON: Two other ones

10:18 came -- after he asked.

MR. SHARPE: And then somebody else come and see --

10:21 MR. STATON: And it looked like the officer they got for [inaudible]

MR. SHARPE: Ring around the rosies

10:22 here, they got going on.

MR. STATON: -- the one that was in the truck, I recognized him. Big, tall, with like

10:26 receding hairline.

MR. SHARPE: Tim Green.

MR. STATON: Tim Green. No, man

10:37 [inaudible] he probably got like suspended or something. All they supposed to do is give me a ticket and let me move. That's it. That dude

10:51 seen black folk, man. If he was gonna stop me for a seat belt, he would have been stopping me.

MR. SHARPE: He would have been came back.

10:55 MR. STATON: He followed me the whole while.

MR. SHARPE: -- and gave us the ticket.

MR. STATON: He was at the stoplight

10:57 at Regional. He was at the stop sign. When I turned left, he -- a car came.

He waited, and then he rode behind me
11:03 all the way down the whole street. And -- I know it. Three cars come from three different ways. That's crazy. I know there ain't no
11:14 stoplight or [inaudible] anything, man, that [inaudible] was just gonna go for it. No, sir, I ain't going for it.
11:20 I already know what it is. Stereotyping. They see Dijon looking like he cool [inaudible] glasses and all that, and thought he had
11:28 something.

And I'm here with a dirty shirt on and some basketball shorts, no socks, so you know I
11:33 can't do but so much. And he done called three officers. You know I can't do but so much, man.
11:42 OFFICER HELMS: What have we got? Facebook Live, cous?

MR. SHARPE: Yeah --
11:44 OFFICER HELMS: We ain't gonna do Facebook Live, because that's an officer safety issue.

MR. SHARPE: Man, get off my phone,
11:49 man. Look at your boy. Look at your boy.

MR. STATON: I'm saying, why you grabbing on him, man? Because he got his

11:54 phone on? You can't be grabbing on him, dog.

OFFICER ELLIS: Look at me. You got three citations.

11:57 MR. STATON: Okay.

OFFICER ELLIS: Failure to wear your seatbelt --

11:58 MR. STATON: Okay.

OFFICER ELLIS: -- failure to yield at the stop sign right there --

12:00 MR. STATON: Okay.

OFFICER ELLIS: and you got failure to carry your drivers license.

12:06 MR. STATON: Okay, that's cool.

OFFICER ELLIS: All three of those citations, you can go online right there --

12:08 MR. STATON: I will. I know exactly how it works. Thank you, man.

OFFICER ELLIS: You got any

12:11 questions for me?

MR. STATON: No. I'm good.

OFFICER ELLIS: Okay. In the future, guys, this Facebook Live stuff, if you recording --

12:16 MR. STATON: Hey, look, man --

OFFICER ELLIS: -- listen to me.

MR. STATON: Not -- not y'all, but boy

12:18 we had some shit going --

OFFICER ELLIS: Okay.

MR. STATON: -- on in Greenville,
12:21 policeman --
OFFICER ELLIS: Okay. That's --
MR. SHARPE: We got some shit going
12:23 on with you, too. I don't know why you grabbing me. I don't know why you grabbing me.
MR. STATON: We ain't trying to say
12:28 today, no [inaudible]
MR. SHARPE: Your man just grabbed me -- you seen him grab my -- my seat belt and
12:32 grab on me and everything.
OFFICER ELLIS: Facebook Live --
MR. SHARPE: P. Helms --
12:33 OFFICER ELLIS: Hey, I'm talking to you.
MR. STATON: He talking -- he talking to the other dude.
12:36 MR. SHARPE: No, you talking to him.
OFFICER ELLIS: I'm talking to you.
MR. SHARPE: Okay, but --
12:40 OFFICER ELLIS: Facebook Live
MR. STATON: Yeah.
OFFICER ELLIS: we're not gonna
12:41 have, okay, because that lets everybody y'all follow on Facebook that we're out here. There might be just one me next time –

12:47 MR. STATON: Yeah.

OFFICER ELLIS: -- okay. It lets everybody know where y'all are at. We're not

12:50 gonna have that.

MR. STATON: Right.

OFFICER ELLIS: If you were

12:51 recording, that is just fine.

MR. STATON: Okay.

OFFICER ELLIS: We record, too. So

12:55 in the future, if you're on Facebook Live, your phone is gonna be taken from you?

MR. SHARPE: How? Is that a law?

12:58 OFFICER ELLIS: And if you don't want to give up your phone, you'll go to jail.

MR. SHARPE: Is that a law?

13:02 OFFICER ELLIS: That's an officer safety issue.

MR. STATON: You know --

13:03 OFFICER ELLIS: That's the RDO.

MR. STATON: the last situation we had, the officer --

13:05 MR. SHARPE: That's not a law.

MR. STATON: -- beat a guy up --

OFFICER ELLIS: That's the RDO.

13:07 MR. STATON: -- and then didn't have his body cam on. I said, after that happened, man, I don't trust no cops.

13:11 OFFICER ELLIS: I understand that.
MR. STATON: I'm sorry.
OFFICER ELLIS: If I had that happen
13:14 to me, I'd probably --
MR. STATON: Yeah.
OFFICER ELLIS: -- be in the same situation.
13:16 MR. STATON: Yeah, man.
OFFICER ELLIS: But to let you know, you can record on your phone --
13:18 MR. STATON: And you got to, for a precaution.
OFFICER ELLIS: -- but Facebook
13:19 Live is not gonna happen.
MR. STATON: Okay. That's cool.
OFFICER ELLIS: Do you understand,
13:21 passenger?
MR. SHARPE: I got you.
OFFICER ELLIS: If I see it again, you
13:24 ain't gonna have that. All right?
MR. SHARPE: Wait, let me put my seatbelt on.
13:27 MR. STATON: Now come on. I'm telling you, [inaudible] Facebook Live, I don't see how.
MR. SHARPE: P. Helms getting a lawsuit.

13:34 MR. STATON: You heard all that mess, didn't you?

MR. SHARPE: P. Helms getting a lawsuit.

13:35 MR. STATON: All of these [inaudible] cases --

MR. SHARPE: Y'all heard what they

13:37 just said.

MR. STATON: I'm telling Dijon, then the officer

13:39 MR. SHARPE: Did you hear what they just said? Did you just see the man grabbing on me? Y'all see what the fuck I be talking about.

13:45 Y'all see what the fuck I be talking about. Y'all think we just be lying and shit. Y'all just seen the nigger grab on me, on Live, grab

13:50 the phone, grab the seat belt, and grab my shirt. Y'all just seen this shit. P. Helms. P. Helms will be getting a lawsuit. Will be

13:58 getting a lawsuit. Share my fucking shit.

Y'all think niggers be lying and shit. Y'all think niggers be really lying. This is

14:06 what's going on in Greenville. This is what's going on in Greenville, Greenville/Winterville. This is what's going on in Greenville and

14:12 Winterville.

This is what happened to us. Greenville Police Department, a police department y'all

14:18 love, Protect and Serve, and they harassing they just gave this man three citations for no reason. For no reason.

14:27 MR. STATON: [inaudible] no stop sign. If he couldn't search and find that and all that --

MR. SHARPE: For no reason.

14:29 MR. STATON: My license was clean.

MR. SHARPE: Y'all just seen the man grab on me.

14:31 MR. STATON: You tell me you stop me for a seat belt, but you didn't --

MR. SHARPE: Y'all just seen the man

14:33 grab on me.

MR. STATON: And then you [inaudible]

MR. SHARPE: Now, what the fuck we

14:37 gonna do about it?

MR. STATON: -- reached in the car to Dijon phone and then grabbed the guy's seat belt.

14:41 MR. SHARPE: What are we gonna do about it? The same way they did in Greenville. The same way they did in Greenville. Share my

14:48 shit. Stop playing with me, man. That's what the fuck I'm talking about. That's why I'm doing what the fuck I'm doing.

14:50 Y'all just seen exactly what they would have had. What if he went into -- he didn't decide to reach? He would have reached for his
14:55 gun instead.

Come on, man. Hey, you on camera. They don't give a fuck. Y'all crazy, man. That
15:02 shit crazy. I know y'all just seen this shit. That shit crazy. We got tires in the back.

MR. STATON: They always trying to
15:11 fuck with somebody.

MR. SHARPE: We got tires in the back. We got tires in the back, man. Hey, look --
15:16 MR. STATON: I ain't going to jail -- I ain't going to no damn jail.

[END OF VIDEO]

CERTIFICATE

State of North Carolina
County of Johnston

I, Nicole Fleming, do hereby certify that the foregoing pages represent a true and accurate transcription of the above-referenced recording to the best of my ability.

I further certify that I am not counsel for, nor in the employment of any of the parties to this action; that I am not related by blood or marriage to any of the parties, nor am I interested, either directly or indirectly, in the results of this action.

In witness whereof, I have hereto set my hand, this the 13th day of February, 2019.

/s/ Nicole Fleming
Nicole Fleming
Court Reporter