IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0462

CITY OF KALISPELL,

Plaintiff and Appellee,

v.

SEAN MICHAEL DOMAN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Robert Allison, Presiding

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STATEMENT OF THE ISSUE

1. Sean Doman peacefully filmed a traffic stop from afar, he did not approach the officer conducting the stop, and he was standing on a public sidewalk. Ultimately, the stop was conducted without any delay. Could a reasonable juror find that Sean hindered the enforcement of criminal law?

2. Sean was exercising his First Amendment right to record in public; for recording an officer conduct a traffic stop, he was convicted of obstructing a peace officer. Was § 45-7-302 constitutionally applied to the facts of Sean's case?

STATEMENT OF THE CASE

On Sunday, July 17, 2022, Sean Doman was riding his bike in Kalispell, Montana, when he stopped and used his phone to record an officer who had pulled over a Native American male. (St.'s Ex. 1, at Video 1[1]; 03/08/2023 Trial Audio Recording (Tr. Audio at 03:55:00).)

[1] The City's exhibit 1 includes three videos: Video 1 is Officer Willey's bodycam; Video 2 is Officer Willey's dashcam; and Video 3 is Officer Minaglia's bodycam. Instead of repeating St.'s Ex. in each citation, all further citations will cite directly to the videos.

Sean was charged with obstructing a peace officer. (Muni. Doc. 37.)[2] He was convicted at trial and sentenced to 180 days in jail, all but one day suspended. (Muni. Doc. 8; attached as Appellant's Exhibit A.) He was fined $400 with $200 suspended and ordered to pay $50 for the cost of prosecution and $288 in jury fees. (*Id.*) Sean appealed to the Eleventh Judicial District Court, which affirmed his conviction. (D.C. Doc. 5; attached as Appellant's Exhibit B.) Sean timely appealed to this Court. (D.C. Doc. 7.) His sentence is stayed pending appeal. (Muni. Doc. 3.)

STATEMENT OF THE FACTS

Sean was riding his bike down First Avenue, a residential street, on a sunny, Sunday afternoon when he saw Officer Dustin Willey conducting a traffic stop. (Video 1; Tr. Audio, at 02:52:00–02:53:00.) Willey pulled over Lucas Bearchild for failing to use his blinker and because Bearchild's license was suspended. (Tr. Audio at 02:52:00–02:53:00.) Bearchild provided proof of insurance and confirmed his

[2] Citations to "Muni. Doc." refer to the documents listed in the receipt from the Kalispell municipal court that are listed in reverse chronological order with the probable cause affidavit being the last document (Muni. Doc. 38) and the letter of transmittal certification being the first, (Muni. Doc. 1.). Citations to "D.C. Doc." refer to documents in the Flathead County register of action listing, which includes documents one through nine in chronological order.

identity but could not provide his license. Willey confirmed he had "all the info [he] need[ed]" and returned to his patrol car. (Video 1, at 00:00:45–00:02:21.)

Sean stopped his bicycle on the sidewalk on the passenger's side of the car, opposite from where Willey had approached the vehicle, stood fifteen feet away, straddled his bicycle, and started to film the stop on his cell phone. (Video 2, at 00:04:40–0:04:55; Tr. Audio at 04:46:00–04:47:00.) Sean did not approach Willey or his patrol car, but he did make a brief hand gesture towards the passenger, whose window was rolled up and who did not respond. Willey learned from dispatch that Bearchild did not have any violent history or outstanding warrants. (Tr. Audio at 03:46:00–03:47:00.) Regardless, he had a "gut feeling" Bearchild was "a little sketchy" and he is trained to ask for backup when someone is filming, so he radioed dispatch for backup because "someone was rolling up filming." (Video 1, at 00:04:00–00:04:12; Tr. Audio at 03:13:00–03:15:00.)

Officer George Minaglia sped to the scene, hitting the curb as he parked behind Willey's patrol car. (Tr. Audio at 00:05:16–00:05:17.) Without talking to Willey first, he hurried towards Sean and

immediately told him to back up. (Video 3, at 00:00:15–00:00:30.) Sean, sitting on his bike, complied and rolled away from the traffic stop until he was behind Bearchild's vehicle and across from the backend of Willey's car. (Video 3, at 00:00:18–00:00:36.) He then stopped, told Minaglia he was simply filming on a public sidewalk, and stated three times that he was not interfering with the stop. (Video 3, at 00:00:30–00:01:00.) Minaglia demanded that Sean move even further down the sidewalk to an area across from the backend of Minaglia's car, more than three car lengths away from the stop. (*Id.*) Sean repeated that he wanted to be able to record audio, and Minaglia quickly grew frustrated. (*Id.*) After only 49 seconds of talking to Sean, Minaglia grabbed Sean's phone out of his hand, tossed it to the ground, and shoved Sean forward. (Video 3, at 00:00:40–00:01:15.)

Sean slowly dismounted his bike, picked his cell phone up off the ground, and told Minaglia he would "sue the fuck out of him." (Video 3, at 00:00:40–00:01:15.) Sean repeatedly asked Minaglia where he wanted him to stand and Minaglia told him to "keep moving." (Video 3, at 00:01:16–00:01:34.) Minaglia never told Sean there were "officer safety concerns" and instead claimed Sean's presence was "distracting"

him from helping Willey conduct the traffic stop. (Video 2, 00:00:23–00:01:52; Tr. Audio at 05:04:00–05:07:00.) Minaglia testified that he would not be able to hear from so far away. (Tr. Audio at 05:10:28–05:10:45) Regardless, Minaglia threatened "you can move over by the tree or you can be arrested," so Sean, while guiding his bike backwards by the handlebars, slowly backed up even further. (Video 3, at 00:01:38–00:01:48.)

As he walked backwards and away from the traffic stop, Sean called Minaglia a tyrant. (Video 3, at 00:01:48.) Even though Sean was still walking backwards, Minaglia told Sean to "stop," grabbed Sean's arms, and put them behind his back. (*Id.*). Sean laughed in disbelief, and said, "he's arresting me for calling him tyrant." Willey briefly came over to watch Minaglia place the handcuffs on Sean. The entire interaction from Minaglia's arrival to Sean's arrest lasted less than 90 seconds. (Video 3.)

In the citation, Minaglia claimed he was called to the traffic stop because "a subject was interfering with [Willey's] investigation." (Muni. Doc. 37.) However, Willey never told Minaglia through dispatch or otherwise that Sean was interfering. At trial, Willey explained that

Minaglia was called to the scene to "watch" Sean because it was protocol to call for backup when someone was filming. (Tr. Audio at 04:10:00–04:11:00.)

Similarly, Willey did not call Minaglia to the scene to assist in issuing a traffic ticket, and Willey conducted the stop without delay. (Tr. Audio at 04:10:00–04:11:00.) Even after Sean was arrested, Willey had to wait several minutes to issue the citation to Bearchild because he was still waiting for Bearchild's driving record from dispatch. (Tr. Audio at 04:15:00–00:4:16.) Additionally, a third officer, Officer Kronan arrived at the scene while Minaglia was ordering Sean to back up. Kronan never spoke with Sean and, although he was available to help Willey with the traffic stop, Willey did not need his help either. (*Id.*)

Minaglia claimed in the citation that Sean refused to "separate himself from the scene" and "ultimately refused" to back up. (Muni. Doc. 37.) But, at trial, Minaglia changed his tune and acknowledged that he arrested Sean while he was still backing up. Minaglia's bodycam showed that Sean had moved to an area far away from Bearchild's car and was still walking away when Minaglia decided to arrest him. (Video 3, at 00:00:25–00:01:56.) Instead, Minaglia claimed, at trial, that Sean

was moving "excessively slow," which he considered "passively resisting." (Tr. Audio at 05:03:00–05:06:00.) According to Minaglia, even though Sean was walking backwards and away from the traffic stop, as Minaglia had asked him to do, that did not "count as cooperation." (Tr. Audio at 05:03:00–05:06:00.)

Sean moved the municipal court to dismiss for insufficient evidence on the basis that there was no evidence Sean knowingly hindered the traffic stop, but the court denied the motion. (Tr. Audio at 06:03:00.)

STANDARDS OF REVIEW

This Court reviews de novo whether sufficient evidence supports a conviction. *State v. Christensen*, 2020 MT 237, ¶ 11, 401 Mont. 247, 472 P.3d 622. This Court considers the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Christensen*, ¶ 11.

The constitutionality of a statute is a question of law that this Court reviews de novo. *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469.

SUMMARY OF THE ARGUMENT

Sean did nothing more than peacefully record a traffic stop on his phone from a public sidewalk, consistent with his First Amendment right. Sean did not hinder the enforcement of criminal law. Nor was he "aware of a high probability" that his conduct would interfere with the traffic stop. He never approached Willey during the stop and, when approached by Minaglia, he thrice stated that he would not interfere. Minaglia was vague about why Sean needed to move back so far and never told Sean that he created a "safety risk." Sean had no reason to believe that his peaceful recording would prevent Willey from issuing Bearchild a citation.

Sean never refused to comply with Mangalia's order to back up, and Minaglia admitted as much at trial. And, Willey issued Bearchild the traffic citation without any delay. Sean was arrested because he questioned Minaglia and called him a tyrant, but Sean's speech cannot be the requisite act for the obstructing charge because it is protected speech under the First Amendment[3]. Sean did not hinder the stop, and

[3] Sean's raises his claims under both the Montana and United States Constitutions, but, for simplicity, his federal and state right to free speech is referred to as his First Amendment right throughout the brief.

the City of Kalispell failed to establish that Sean committed the offense of obstructing a peace officer.

Additionally, § 45-7-302 is unconstitutional as applied to Sean. Sean acted well within his First Amendment right to record. To impose a lawful restriction on Sean's First Amendment right to record, the restriction must be "actually necessary" to prevent a particular injury. Sean was peacefully filming from a comfortable distance, he did not approach or bother Willey, and he was in a public space; therefore, Minaglia had no basis to limit his act of recording.

Subsection (2) of § 45-7-302, Mont. Code Ann., was also unconstitutionally applied and, as a result, prevented Sean from asserting his First Amendment protections as a defense. The City relied on subsection (2) to argue—even if Sean was engaged in a constitutionally protected activity—his First Amendment guarantees were "no defense to a prosecution," because Minaglia was a police officer acting within his "official authority." However, subsection (2)'s legislative history clearly indicates that it only applies when the accused is using or threatening to use violence or force. Sean never used violence or force. Additionally, subsection (2) cannot mean that Sean's

First Amendment protections were not a defense, because the Montana Legislature does not have the authority to abrogate constitutional rights by statute. Sean's First Amendment protections were, in fact, a defense to the prosecution. However, the City's and district court's overbroad and unconstitutional application of subsection (2) left Sean unable to assert his First Amendment rights. Section 45-7-302 was unconstitutionally applied to Sean.

ARGUMENT

I. Sean did not knowingly hinder Officer Willey from issuing a traffic ticket. He recorded police activity from a public sidewalk.

To establish the charge of obstructing a peace officer, the City had to prove Sean was aware his conduct would hinder the enforcement of criminal law. Mont. Code Ann. §§ 45-7-302(1); 45-2-101(34). Section 45-7-302(1) states: "A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law[.]" A person acts knowingly when he is aware that there is a high probability that his conduct will cause a specific result. Mont. Code Ann. § 45-2-101(35); *State v.*

Secrease, 2021 MT 212, ¶ 12, 405 Mont. 229, 493 P.3d 335. Here, that result is hindering the enforcement of the criminal law.

In *State v. Bennett*, 2022 MT 73, 408 Mont. 209, 507 P.3d 1154, Officer Loya approached Bennett after someone reported to him that she entered Missoula's homeless shelter in violation of an order of protection. *Bennett*, ¶ 3. Loya only told Bennet he wanted to talk "about something that someone reported." *Bennett*, ¶ 4. Bennett responded that she did not "know what the fuck [Loya was] talking about," called him "dumb," and walked away. *Bennett*, ¶ 4. Loya arrested Bennett and charged her with obstructing a peace officer by "attempt[ing] to walk away from officers while being questioned." *Bennett*, ¶ 5. At trial, Bennett moved to dismiss the charge for insufficient evidence, but the motion was denied, and she was convicted. On appeal, the district court affirmed the conviction. *Bennett*, ¶ 6.

This Court reversed the conviction for insufficient evidence because nothing in the forty-second encounter established that Bennett hindered Loya's performance of his duty, "much less that she was aware her conduct was highly probable to hinder the performance of that duty." *Bennett*, ¶ 10. Loya did not tell Bennett she was under

investigation, only that he wanted to discuss "something that someone reported." Loya was vague in his inquiries and Bennett responded to his questions. *Bennett*, ¶ 11. Her being "coarse" and "lacking in etiquette" was not sufficient to support a conviction. *Bennett*, ¶¶ 10–11. Therefore, this Court ordered a judgment of acquittal be entered and the conviction reversed.

In *City of Kalispell v. Cameron*, 2002 MT 78, 309 Mont. 248, 46 P.3d 46, the accused was charged with obstructing a peace officer after refusing to abide by an officer's orders. Cameron was the passenger of a vehicle where the driver was being investigated for DUI. *Cameron*, ¶ 4. Officer Zimmerman and his partner approached the vehicle as Cameron walked away. *Cameron*, ¶ 5. Zimmerman repeatedly ordered Cameron to return, but Cameron was rude, disrespectful, and refused to comply. *Cameron*, ¶¶ 5, 21. As a result, Zimmerman put Cameron in a "control position" and charged him with obstructing a peace officer. *Cameron*, ¶ 5.

On appeal, this Court held Cameron did not commit the offense of obstructing a peace officer by being rude and not following Zimmerman's instructions. *Cameron*, ¶ 10. Zimmerman was not under

investigation and the officers were able to conduct the DUI investigation without delay. *Cameron*, ¶ 12. Both officers did not need to assist in the DUI stop; one could do it alone. *Cameron*, ¶ 12. Zimmerman needlessly escalated the situation by putting Cameron in the "control position." This Court reversed the conviction and ordered the lower court to enter a judgment of acquittal. *Cameron*, ¶ 13.

In *State v. Eisenzimer*, 2014 MT 208, 376 Mont. 157, 330 P.3d 1166, Eisenzimer was drunk at 2:00 a.m. and approached Officer Holbrook in his patrol car while he was conducting a traffic stop. *Eisenzimer*, ¶ 3. Eisenzimer repeatedly badgered Holbrook for a ride home. *Eisenzimer*, ¶ 3. Holbrook told Eisenzimer to "keep walking" and warned him several times that he would be arrested if he did not stop interfering with the traffic stop, but Eisenzimer refused to leave. *Eisenzimer*, ¶ 3. As a result, Holbrook could not complete the traffic stop, so he charged Eisenzimer with obstructing a peace officer. *Eisenzimer*, ¶ 4.

This Court upheld the conviction on appeal. Holbrook had to completely shift his attention from the traffic stop to Eisenzimer's drunken antics, and Holbrook was only able to complete the traffic stop

after arresting Eisenzimer. As such, there was sufficient evidence that Eisenzimer knowingly impeded the traffic stop. *Eisenzimer*, ¶ 11.

A. Sean did not act knowingly.

Here, Sean had no reason to believe that he was under investigation or that recording the traffic stop would hinder Willey's ability to issue a traffic citation. Sean was peacefully sitting on his bicycle while recording from 15 feet away. (Tr. Audio at 04:52:00–04:53:00; Video 2, at 00:05:18.) It was daytime, Willey could see Sean, and Sean was not intoxicated or acting unruly. (Video 2, at 00:05:18.) Sean, like Bennett and Cameron, was not under investigation. Unlike Eisenzimer, Sean did not approach Willey in his vehicle, and he was not drunkenly badgering the officer while he tried to conduct the traffic stop. Willey and Sean did not even interact before Minaglia arrived.

Minaglia was vague in why he was demanding Sean back up, just like Loya was vague about why he was questioning Bennett. Minaglia never told Sean that he was a "safety risk" and instead claimed he was "distracting," just like Loya claimed "something" was reported but never told Bennett that he was investigating an order of protection violation. Sean was going to be a "distraction" wherever he stood, because

Minaglia was called to the scene to "watch" Sean. Sean was not knowingly hindering the traffic stop; he was trying to exercise his First Amendment right to record.

B. Sean did not hinder Willey's investigation simply by recording the stop.

Sean did not "hinder" the traffic stop. Minaglia claimed he was "hindered from assisting officer Willey in his investigation," but Minaglia's only purpose for being at the scene was to "watch" Sean. (Tr. Audio at 04:10:00 & 05:05:00.) Willey did not ask for Minaglia's help to conduct the traffic stop, and the stop was ultimately completed without any delay, despite Minaglia never providing any assistance. (Tr. Audio at 03:52:00–03:54:00.)

Sean did not delay Willey from issuing Bearchild a citation. During the 90 seconds Minaglia interacted with Sean before arresting him, Willey was still waiting to receive Bearchild's driving history from dispatch so he could issue a citation. (Tr. Audio at 03:52:00–03:54:00.) The brief time Willey watched Sean's arrest was inconsequential to the traffic stop, because dispatch did not return Bearchild's information for several more minutes and he could not issue the citation without it. (*Id.*)

Officer Kronan could have helped either Willey in the traffic stop or Minaglia "watch" Sean, but neither officer sought his help. Kronan was not enlisted for help until after Sean was arrested and only for the limited purpose of transporting his bike. (Tr. Audio at 04:15:00–04:16:00.) The fact that neither Willey nor Minaglia asked this extra officer for help with the traffic stop or with moving Sean away from the scene shows Sean was not, in fact, hindering Willey's investigation.

Initially, Minaglia claimed he arrested Sean because he "ultimately refused" to back up. (Muni. Doc. 37.) But, both Minaglia's and Willey's bodycams show Sean walking backwards when he was arrested, and Minaglia's story changed at trial. (Videos 1 & 3.) Minaglia testified that Sean was moving "excessively slow" and "somewhat passively resisting." (Tr. Audio at 05:03:00–05:06:00.) Minaglia acknowledged that Sean was walking down the street and away from the traffic stop when he was arrested but claimed that did not "count as cooperation." (Tr. Audio at 05:05:00.)

Minaglia should have but failed to "respond with restraint." *See City of Houston v. Hill*, 482 U.S. 451, 471 (1987). He incorrectly assumed that Sean was a problem. Willey told dispatch that he had

"someone rolling up filming," (Video 1, at 00:04:07–00:004:12), but Minaglia incorrectly equated that to "a subject interfering with [Willey's] investigation." (Muni. Doc. 37.) Willey never told Minaglia or dispatch that Sean was interfering and Minaglia never took the opportunity to chat with Willey. (Video 3, at 00:00:15–00:00:25.) Instead, he rushed to assume Sean was interfering, rushed towards Sean, and rushed to order Sean to move so far away that he would not be able to record audio. (*Id*.)

Sean did not knowingly hinder the investigation by questioning why he was being told to back up so far. Sean's First Amendment protections allow him to "verbally oppose or challenge police action without thereby risking arrest[.]" *Hill*, 482 U.S. at 463. Sean wanted to record the audio—an aspect of police activity that has been critical in capturing the depth of police misconduct. He was allowed to briefly question why his right was being repressed without being subject to arrest, *see infra*.

Although Sean questioned some of Minaglia's orders, Sean was ultimately cooperative. After Minaglia told Sean to back up, Sean steadily moved away from the scene, never towards it. It was Minaglia

who—only 49 seconds into their interaction—grabbed Sean's phone, threw it to the ground, and pushed Sean. (Video 3, at 00:00:59–00:01:10.) Sean responded by raising his hands in the air and then slowly bending down to pick his phone up off the ground. (Video 3, at 00:01:10–00:01:16.) Sean then continued to back up even further so that he was across from Minaglia's car, which was behind Willey's car, which was behind Bearchild's car, when he was arrested. (Video 3, at 00:01:40–00:01:55.) Minaglia arrested Sean because he called Minaglia a tyrant. (Video 3, at 00:01:48–00:01:55.) Although Sean's statement was rude, it was not an act of obstruction. Minaglia was expected to endure this modest "verbal criticism," not arrest Sean for his disrespectful comment. *Hill*, 482 U.S. at 461.

Minaglia also claimed that Sean's presence hindered the investigation because it created a safety risk, but the City failed to offer any evidence explaining how Sean endangered Willey's or Minaglia's safety. It also failed to explain how Sean could have known that his presence created a safety risk. Willey never expressed any concern about Sean posing a safety risk. Minaglia claimed in the citation that he told Sean "he would need to separate himself from the scene due to

officer safety concerns," (Muni. Doc. 37) but Minaglia's bodycam video shows that he never told Sean he had "safety concerns" and, at trial, Minaglia admitted he never told Sean that he had "safety concerns." (Video 3; Tr. Audio at 05:08:00–05:11:00.) Rather, Minaglia told Sean that his presence was "distracting him" and only developed his "officer safety" story for trial. (Video 3, at 00:00:57.) Sean was not posing a safety risk, and he had no reason to believe the officers considered him a threat.

Even when viewed in the City's favor, the evidence fails to establish that Sean knowingly hindered the traffic stop. Minaglia rushed to judgment and assumed incorrectly that Sean was a hindrance to Willey's investigation, when he wasn't. As a result, Minaglia immediately and needlessly escalated the situation. Despite grabbing Sean's phone and pushing him, Sean ultimately complied with Minaglia's request to back up. The City could not convict Sean of obstructing a peace officer just because he questioned why his First Amendment right to record was being restricted or because he called Minaglia a tyrant. Sean did not knowingly hinder Willey from issuing

Bearchild a traffic citation. As such, this Court should remand this case to the municipal court with an order to enter a judgment of acquittal.

II. Alternatively, the obstructing a peace officer statute is unconstitutional as applied to Sean, because he was convicted despite lawfully exercising his First Amendment right to record police activity in public.

The First Amendment of the United States Constitution prohibits the government from making any law "abridging the freedom of speech, or of the press[.]" U.S. Const. Amend. I. First Amendment protections are incorporated to the states through the Fourteenth Amendment. *NAACP v. Alabama*, 377 U.S. 288 (1964).

The Montana Constitution declares: "No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty." Mont. Const. art. II, § 7. The right is fundamental and triggers the highest level of protection from this Court.

A. Sean's right to record police is well-established and serves an important public interest.

Encompassed in the right to free speech are the corollary rights to gather information and to record and share that information. The right

to "[g]ather[] information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

The right to gather information extends beyond the press to average citizens. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). An individual's right to collect information is increasingly important because "changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw." *Glik*, 655 F.3d at 84. With nearly every adult equipped with a cell phone and its camera, "images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew," and society does not rely on major newspapers to break stories, because they are "just as likely to be broken by a blogger at her computer[.]" *Glik*, 655 F.3d at 84.

The First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). Allowing an

unfettered "stock of information" is a central tenant of the First Amendment. The "stock of information," relevant in this case—recording police activity in public—promotes important public interests.

"Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally[.]" *Glik*, 655 F.3d at 82 (citing *Gentile v. State Bar of Nev.,* 501 U.S. 1030, 1034–. 1036 (1991); *Press Enter Co. v. Superior Ct.*, 478 U.S. 1, 8 (1986)). "And just the act of recording, regardless of what is recorded, may improve policing." *Fields v. Philadelphia*, 862 F.3d 353, 360 (3rd Cir. 2017). For example, the year after the 2020 police killing of George Floyd, which was captured on a bystander's cell phone camera, 25 states passed legislation directly addressing police misconduct. Subramanian, Ram; Arzy, Leily, The Brennan Center for Justice, *State Policing Reforms Since George Floyd's Murder* (May 21, 2021).

Every Circuit Court of Appeals to consider the issue has held the First Amendment includes the right to record police activity in public. *Fields*, 862 F.3d at 355; *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *ACLU of Ill. v.*

Alvarez, 679 F.3d 583 (7th Cir. 2012); *Glik*, 655 F.3d 78; *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). Numerous federal district courts have also upheld an individual's right to record police activity in public. *Demarest v. Athol/Orange Cmty. Television, Inc.,* 188 F.Supp.2d 82, 94–95 (D.Mass.2002); *Channel 10, Inc. v. Gunnarson,* 337 F.Supp. 634, 638 (D.Minn.1972); *Connell v. Town of Hudson,* 733 F.Supp. 465, 471–72 (D.N.H.1990).

Sean's right to record is "well-established," equal to that of a reporter, and it serves an important public interest.

B. Sean was well within the bounds of his First Amendment protections when he quietly recorded the traffic stop from a comfortable distance on a public sidewalk.

In *Glik*, the accused was filming police officers arresting a man in a Boston park from approximately ten feet away. *Glik*, 655 F.3d at 79–80. After confirming that he was recording with audio, the police officers arrested Glik and charged him with violating Massachusetts' wiretapping statute, disturbing the peace, and aiding in the escape of a prisoner. *Glik*, 655 F.3d at 80. Eventually, all three charges were dismissed for lacking probable cause. The municipal court noted that

"the fact that the 'officers were unhappy they were being recorded during an arrest ... does not make a lawful exercise of a First Amendment right a crime.'" *Glik*, 655 F.3d at 80.

Glik filed a civil suit against the officers and the City of Boston, alleging his First Amendment right to record was violated. The officers moved to dismiss the complaint and argued the officers were entitled to qualified immunity because the right to record was not well-settled. *Glik*, 655 F.3d at 80. The district court denied the officers' motion to dismiss, and the First Circuit affirmed that decision, reasoning that the First Amendment right to record government officials in public places "is a basic, vital, and well-established liberty safeguarded by the First Amendment." *Glik*, 655 F.3d at 85.

Although the First Circuit recognized that the right to record could be subject to reasonable time, place, and manner restrictions, there was no reason to consider whether restrictions were appropriate in Glik's case. *Glik*, 655 F.3d at 84. When being recorded or verbally challenged, "officers and municipalities must respond with restraint." *Hill*, 482 U.S. at 471, and only impose restrictions "when the circumstances justify them." *Gericke*, 753 F.3d at 7–8. Glik was

exercising his First Amendment right "well within the bounds of the Constitution's protections." *Glik*, 655 F.3d at 84. His actions were constitutionally protected because: (1) he "filmed [the officers] from a comfortable remove;" (2) he "neither spoke to nor molested them in any way" (except in directly responding to the officers when they addressed him); and (3) he was peacefully recording in a public space. As such, his conduct could not be "reasonably subject to limitation." *Glik*, 655 F.3d at 84.

Here, Sean was well within the bounds of his First Amendment protections. Glik was standing only ten feet away while filming someone being violently forced into custody, whereas Sean was standing 15 feet away from a minor traffic stop with a cooperative driver and moved even further away when directed. Glik was surrounded by other bystanders, who were also protesting the arrest and yelling at the officers. *Glik*, 655 F.3d at 79. Sean was alone and quiet.

Sean, like Glik, was not talking to or molesting Willey. Willey was sitting in his vehicle and had a clear line of sight to both the traffic stop and Sean. Sean did not interact with the officers until they engaged him. When Minaglia came rushing out of this car, Sean told him he just

wanted to record and would not interfere, acknowledging that he could not involve himself in the stop. (Video 3, at 00:00:30–00:01:00.)

Both Glik and Sean were standing in "the apotheosis of a public forum"—a park and a sidewalk— where "the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'" *Glik*, 655 F.3d at 84 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983)).

Sean's actions, like Glik's actions, were constitutionally protected because: (1) he "filmed [the officers] from a comfortable remove;" (2) he "neither spoke to nor molested them in any way" (except in directly responding to the officers when they addressed him); and (3) he was peacefully recording in a public space. Because Sean's act of recording the police in public was constitutionally protected, he could not be "reasonably subject to limitation." *Glik*, 655 F.3d at 84. Therefore, Sean should not have been subject to time place, and manner restrictions *at all*.

C. Ordering Sean to move so far away was not "actually necessary;" therefore, Minaglia's orders were an unreasonable restriction on Sean's First Amendment rights.

Like in *Glik*, this Court does not need to determine if Minaglia's order to back up were reasonable time, place, and manner restriction because the restriction was not necessary in the first place. Before the government can restrict speech at all, it must establish that the restriction was "actually necessary to achieve its interest." *U.S. v. Alvarez*, 567 U.S. 709, 725 (2012). To be "actually necessary," "there must be a direct causal link between the restriction imposed and the injury to be prevented." *U.S. v. Alvarez*, 567 U.S. at 709.

An officer can only restrict a person who is filming police activity in public "if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with [the officer's] duties." *Gericke*, 753 F.3d at 8. If an officer imposes restrictions, they must be narrowly tailored to mitigate the actual danger or risk posed by the recording and leave open ample alternate channels for accessing and disseminating information on the police activity. *Hawai'i v. Russo*, 141 Hawai'i 181, 193, 407 P.3d 137, 149 (Hawai'i 2017) (citing to *Turner*, 848 F.3d at 690; *ACLU of Ill. v. Alvarez*, 679 F.3d at 605, 607; *Gericke*, 753 F.3d at 7).

Here, Minaglia erroneously assumed Sean was interfering with Willey's investigation just because he was recording on the sidewalk—despite Willey never saying Sean was interfering. Because Minaglia rushed to judgment and falsely equated "someone rolling up filming" (Willey's words) with "subject was interfering" (Minaglia's words), he failed to realize that restraining Sean's First Amendment right to peacefully record was not "actually necessary."

After the fact, Minaglia claimed that Sean was a safety risk, but Minaglia never explained how he "reasonably concluded that [Sean's] filming itself [was] interfering, or [was] about to interfere" with Willey's duties. Minaglia failed to explain the "actual danger or risk posed" by Sean's recording. *See Russo*, 141 Hawai'i at 193, 407 P.3d at 149 (citing to *Turner*, 848 F.3d at 690; *ACLU of Ill. v. Alvarez*, 679 F.3d at 605, 607; *Gericke*, 753 F.3d at 7). The officers were not walking on the sidewalk, there was no evidence near Sean that needed to be collected, and Sean was not impeding any other traffic or bystanders. Sean was initially standing approximately 15 feet away from Bearchild's car and did not even verbally interact with Willey. By the time he was arrested, he was even further away. There were three officers on the scene, and

Sean was alone. Sean was not armed, drunk, or threatening violence. And although he asserted his right to record, Sean simultaneously obeyed Minaglia's requests to move down the sidewalk and away from the traffic stop. Additionally, Minaglia could have asked Kronan, if necessary, to assist in "watching" Sean. He did not do that, because Sean did not pose an "actual danger or risk" by recording from the sidewalk.

Even if restricting Sean's First Amendment rights was "actually necessary," which it was not, Minaglia had to "narrowly tailor" the restrictions and "leave open ample alternate channels for accessing and disseminating information" about the traffic stop. *See Russo*, 141 Hawai'i at 193, 407 P.3d at 149 (citing to *Turner*, 848 F.3d at 690; *ACLU of Illinois v. Alvarez*, 679 F.3d at 605, 607; *Gericke*, 753 F.3d at 7). The right to record *audio* is "necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *ACLU of Illinois v. Alvarez*, 679 F.3d at 595. However, when Sean tried to explain that he would not be able to hear from further down the sidewalk, Minaglia became aggressive and refused to consider whether Sean could be

"watched" where he was standing, like Willey initially intended. Instead, Minaglia insisted that Sean go to an area that would make it very hard, if not impossible, to see the driver and police interact and eliminated Sean's ability to record audio. Minaglia became aggressive and threw Sean's phone on the ground. Minaglia's restrictions were not "narrowly tailored" and did not preserve "alternate channels" for Sean to exercise his right to record video and audio of Willey's traffic stop.

D. Sean briefly questioning Minaglia's orders and calling him a tyrant was not obstructing; it was protected speech.

Maintaining public order is critical, but "a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom but must itself be protected if [the First Amendment] freedom would survive." *Hill*, 482 U.S. at 472. The right to "verbally oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Hill*, 482 U.S. at 463. Knowingly frustrating or challenging an officer is not sufficient to support a conviction for obstructing a peace officer. *State v. Johnston*, 2010 MT 152, ¶¶ 12–14, 357 Mont. 46, 237 P.3d 70.

More specifically, a person may "voic[e] his objection to what he obviously views as a highly questionable detention [or directive] by a police officer" without risking arrest. *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973). Police officers are expected to endure "a significant amount of verbal criticism and challenge[.]" *Hill*, 482 U.S. at 461. The officers must "respond with restraint" so they do not needlessly escalate the situation. *Gericke*, 753 F.3d at 7–8.

In *Hill,* the accused shouted at an officer to divert the officer's attention away from the accused's friend. *Hill*, 482 U.S. at 454. Hill was charged with violating a city ordinance for "willfully or intentionally interrupt[ing] a city policeman ... by verbal challenge during an investigation." *Hill*, 482 U.S. at 454. At trial, Hill was acquitted. He then brought suit in federal court to declare the ordinance unconstitutional both facially and as applied to him. *Hill*, 482 U.S. at 455. The district court denied Hill's claim, but the appellate court reversed and found that the statute was substantially overbroad. *Hill*, 482 U.S. at 455–56.

The United States Supreme Court affirmed the appellate court's finding that the ordinance was substantially overbroad. The First

Amendment "protects a significant amount of verbal criticism and challenge directed at police officers." *Hill*, 482 U.S. at 461. Furthermore, "[s]peech is often provocative and challenging.... [But it] is nevertheless protected against censorship or punishment." *Hill*, 482 U.S. at 461. Speech is protected, unless it is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Hill*, 482 U.S. at 461.

Speech may only be criminalized if it falls within a "well-defined and narrowly limited" exception. *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 438, 704 P.2d 1021, 1024 (Mont. 1985) (citing *Chaplinsky v. N.H.*, 315 U.S. 568 (1942)). One such exception includes "fighting words," which by their "very utterance inflict injury or tend to incite an immediate breach of the peace." *O'Shaughnessy,* 216 Mont. at 438, 704 P.2d at 1024 (citing *Chaplinsky*, 315 U.S. at 572). "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." *Chaplinsky,* 315 U.S. at 573. Although the United States Supreme Court created the exception, it has "not upheld a conviction under the fighting-words doctrine in 80 years," indicating it rejects restricting speech, even when the

underlying statements are offensive or repugnant. *Counterman v. Colorado*, 600 U.S. 66, 121, fn. 4 (2023).

Sean calling Minaglia a "tyrant" and briefly questioning why he was being ordered to back up was protected speech and cannot serve as the factual basis for the offense. Sean's ability to question Minaglia's orders "without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *See Hill*, 482 U.S. at 463. As a police officer, Minaglia is expected to endure "a significant amount of verbal criticism and challenge" and "respond with restraint." *See Hill*, 482 U.S. at 461; *Gericke*, 753 F.3d at 7–8.

Here, like in *Hill*, the statute was applied in a substantially overbroad manner. At trial, the City argued that Willey and Minaglia having to "divide" their attention because Sean was asking questions was a hinderance significant enough to support a conviction. (Tr. Audio at 03:23:00–03:25:30 & 06:26:00–06:28:30.) But, as in *Hill*, a statute cannot be so broadly applied that just diverting an officer's attention creates a crime. The First Amendment "protects a significant amount of verbal criticism and challenge directed at police officers." Sean's speech

did not rise to the level of producing a "clear and present danger of serious substantive evil[.]" *See Hill*, 482 U.S. at 461. He simply questioned why he was being ordered to back up more than three car lengths away when he wanted to record.

Similarly, the "well-defined or narrowly limited" fighting words exception does not apply to Sean's comments, because the benign name calling was not "likely to cause an average addressee to fight." Calling Minaglia a name should not conjure up a violent response. Furthermore, the Supreme Court's 80-year long refusal to uphold criminal convictions under the fighting words doctrine demonstrates that Sean's name-calling would need to be much more severe than calling Minaglia a "tyrant" to satisfy such a narrowly drawn exception.

E. Contrary to the City's instruction and argument, subsection (2) of § 45-7-302 only applies when a defendant threatens or uses force or violence.

At the City's behest, the municipal court instructed the jury that subsection (2) of § 45-7-302 reads, "it is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority," but it did not provide any additional

clarification. Mont. Code Ann. § 45-7-302(2). The subsection was adopted from § 4506 of the Michigan Revised Criminal Code, proposed in 1967, which stated "it is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided he was acting under color of his official authority." Mich. Rev. Crim. Code § 4506(2) (Final Draft 1967); *See also* Mont. Code Ann. 45-7-302 Cmmn. Cmnts. (citing the source as Proposed Mich. C. C. 1967, § 4506.)

The Committee[4] that proposed Michigan's § 4506 wanted it specifically "limited to intentional obstruction of governmental function through the use, or threat to use, physical force or violence." Mich. Rev. Crim. Code § 4506(2), Comm. Cmnts. (Final Draft 1967). In explaining the proposal, it announced, "the Committee has followed the basic premise that a private individual should not take the law into his own hands, i.e., he should not seek to remedy what he considers illegal administration of the law by self-help." Mich. Rev. Crim. Code § 4506(2), Comm. Cmnts. (Final Draft 1967). The Committee provided specific examples of the force and violence it intended to preclude,

[4] The Michigan Revised Criminal Code of 1967 was drafted by the Special Committee of the Michigan State Bar for the Revision of the Criminal Code and Committee on Criminal Jurisprudence, State Bar of Michigan.

including, "throwing bricks at a patrol car or even by letting the air out of police tires," because "the use of self-help in these situations only leads to escalation of force and in the end to possible injury to the actor." Mich. Rev. Crim. Code § 4506(2), Comm. Cmnts. (Final Draft 1967). Instead, private citizens should rely on "legal remedies." Mich. Rev. Crim. Code § 4506(2), Comm. Cmnts. (Final Draft 1967). However, the proposed legislation was never adopted into Michigan law. Mich. Comp. Laws § 750.81d (indicating it was initially adopted in 1931 and amended next in 2002 and, most recently, in 2006).

In 1973, the Montana legislature mimicked the language in § 4506(2) and adopted it as subsection (2) of § 45-7-302. The 1973 statute read, "[i]t is no defense to a prosecution under this section that the peace officer was acting in an illegal manner provided he was acting under color of his official authority." Mont. H.B. 321, 55th Legis. (March 17, 1997) (amending this version of the statute to read as it does today). In 1997, the Legislature made "minor changes in style" and adopted § 45-7-302's current text. Mont. H.B. 321, 55th Legis. (March 17, 1997)

Section 45-7-302, including subsection (2), must be interpreted in a manner that protects free speech. *See e.g. City of Whitefish v.*

O'Shaughnessy, 216 Mont. 433, 442, 704 P.2d 1021, 1027 (1985) (upholding a Whitefish City ordinance only because it was narrowly construed, and the district court insured that the defendant was "convicted for expressive conduct only if it included the required element of violence.") The Montana Legislature may not enact laws that abrogate an individual's constitutional rights. The Supremacy Clause reads, "[t]his Constitution…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Dannels v. BNSF Railway Co.*, 2021 MT 71, ¶ 14, 403 Mont. 437, 483 P.3d 495 (*Hillsborough Cty. v. Auto. Med. Laboratories, Inc.*, 471 U.S. 707 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (1824) (Marshall, C.J.)).

Here, this Court must interpret subsection (2) narrowly to mean that citizens cannot resort to violence or a threat of violence when threatened with illegal police activity, like the Michigan Committee intended and the Montana Legislature understood when enacting the statute. Subsection (2) aims to prevent the escalation of violence, not to

criminalize, for example, individuals walking away from police, *see e.g. Bennett*, 2022 MT 73; *Cameron*, 2002 MT 78, or other benign, nonviolent behavior.

When applying a constitutionally sound interpretation of subsection (2), it cannot apply to the facts of this case. Sean did not use or threaten to use force or violence against Minaglia. Sean did not "take the law into his own hands." Instead, he told Minaglia he would "sue the fuck out of him," or use his *legal* remedies like the Michigan Legislature encouraged.

Subsection (2) does not mean, like the City argued, that Sean could not assert his First Amendment rights to record and free speech as a defense to prosecution. Interpreting subsection (2) so broadly conflicts with the Supremacy Clause. U.S. Const. art. VI, cl. 2; *Dannels*, ¶¶ 13, 14. Sean had a First Amendment right to record the traffic stop, and, because he was acting well-within his constitutional protections, *see supra* at Argument II.B, subsection (2) cannot mean that Minaglia was allowed to illegally repress Sean's right to record without challenge. Sean's right to record is the "supreme law of the land" and subsection (2) must be interpreted accordingly. Similarly, Sean had a First

Amendment right to free speech that protected him from arrest simply because he questioned Minaglia and called him a tyrant. Subsection (2) must be interpreted in a manner that upholds, not abrogates, those rights.

The City capitalized on an overbroad, unconstitutional application of subsection (2) when it told the jury to convict Sean even if it believed his actions were constitutionally protected because "it was no defense to a prosecution" that Minaglia's orders violated Sean's First Amendment rights. (Tr. Audio at 06:21:00–06:23:00). The jury should have been told that subsection (2) only applied to the use or threat to use physical force or violence. Without a narrow application of the law, the jury had no choice but to convict Sean, even if they believed Minaglia was unreasonably restricting Sean's right to record because it was not instructed that questioning Minaglia and calling him a tyrant was actually protected speech.

F. Plain error review is necessary because Sean's constitutional right to record was plainly violated, and this Court should discourage the practice of prosecuting obstruction charges to chill free speech.

Under the plain error doctrine, the Court "may discretionarily review claimed errors that implicate a criminal defendant's

fundamental constitutional rights, even if no contemporaneous objection was made, 'where failing to review the claimed error may result in a manifest miscarriage of justice…or may compromise the integrity of the judicial process.'" *State v. Wagner*, 2009 MT 256, ¶ 12, 352 Mont. 1, 215 P.3d 20 (en banc).

When First Amendment freedoms are being exercised against the government itself, "the State has a special incentive to repress opposition and wields a more effective power of suppression." *Glik*, 655 F.3d at 82 (quoting *Bellotti*, 435 U.S. at 777, n. 11, 783. Police officers are particularly incentivized to repress speech that may be critical of them, and they are simultaneously empowered with "substantial discretion that may be misused to deprive individuals of their liberties." *Glik*, 655 F.3d at 82.

The sentiment that police activity should be publicly monitored is widespread—only 45% of American adults trust police and, the number declines significantly among non-white communities. Jones, Jeffrey M., *Confidence in U.S. Institutions Down; Average at New Low* (July 5, 2022). Police officers using body worn cameras is quickly becoming the national norm, indicating a widespread embrace of a new era of

transparency, National Institute of Justice, "Research on Body-Worn Cameras and Law Enforcement," January 7, 2022, nij.ojp.gov: https://nij.ojp.gov/topics/articles/research-body-worn-cameras-and-law-enforcement. Unfortunately, some officers, as in this case, may resist any perceived scrutiny of police behavior. The tension between a citizen-bystander exercising his First Amendment right to record and a police officer who perceived the act of recording as inherently problematic and insulting is how Sean became a Defendant-Appellant before this Court.

Plain error review is necessary here because failing to overturn Sean's conviction would be a manifest miscarriage of justice. Sean had a First Amendment right to record. Upholding this conviction would mean that Sean is subject to $538 in fines and fees and would have a criminal record, despite only ever engaging in constitutionally protected conduct. Sean's act of recording was intended to serve a public good. He wanted to monitor police activity in the off chance they engaged in misconduct. His act of recording promoted transparency, served an important public interest, and should be protected by this Court. To uphold this conviction would discourage citizens from engaging in a

constitutionally protected activity, and that would be a miscarriage of justice.

Additionally, failing to overturn this conviction would compromise the integrity of the judicial process. The City has a "special incentive to repress opposition" and speech that may be critical of it or expose its own malfeasance; it also "wields a more effective power of suppression." *Glik*, 655 F.3d at 82 (*Bellotti*, 435 U.S. at 777, n. 11, 783). This Court must limit the City's awesome power when it is wielded to chill free speech. The City of Kalispell, and potentially many other Montana cities, currently interprets subsection (2) of § 45-7-302 to override constitutional protections. This Court should not allow Montana localities to use the judicial system to repress citizens' lawful exercise of their First Amendment protections, because doing so compromises the integrity of the judicial system.

CONCLUSION

This Court should remand this case and order the municipal court to reverse the conviction and enter a judgment of acquittal, due to the insufficiency of the City's evidence. Alternatively, this Court should remand this case and order the municipal court to dismiss the case with

prejudice because § 45-7-302 is unconstitutional as applied to the facts of this case.

Respectfully submitted this 20th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,489, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Carolyn Gibadlo
Carolyn Gibadlo

APPENDIX

CERTIFICATE OF SERVICE

I, Carolyn Marlar Gibadlo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-20-2024:

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