SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-004910-10T3

KELLY RAMOS, Plaintiff/Appellant, v. HERBERT FLOWERS; TRENTON POLICE DEPARTMENT; THE CITY OF TRENTON; TRENTON POLICE DIRECTOR JOSEPH SANTIAGO, and JOHN DOES (1-99), Defendants/Appellees.	CIVIL ACTION ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY MERCER COUNTY, LAW DIVISION DOCKET NO. MER-L-1248-08 SAT BELOW: HON. PAUL J. INNES, P.J.S.C.

BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY
IN SUPPORT OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT..... 5

I. THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS THE RIGHT TO VIDEOTAPE PUBLIC ACTIVITY 5

A. Filming and photographing is protected under the First Amendment 6

B. The right to videotape in public places is subject only to reasonable time, place and manner restrictions that are content-neutral and narrowly tailored. 11

II. ARTICLE I, PARAGRAPH 6 OF THE NEW JERSEY CONSTITUTION PROVIDES EVEN MORE ROBUST PROTECTION FOR THE RIGHT TO VIDEOTAPE 17

III. THE LAW DIVISION ERRED BY DISMISSING PLAINTIFF'S CLAIMS ON THE BASIS OF QUALIFIED IMMUNITY 24

A. This Court should not create a new immunity shielding state officials from judicial enforcement of the State Constitution 27

B. The Law Division erred when it dismissed plaintiff's claims for injunctive relief on the basis of qualified immunity..... 37

CONCLUSION..... 37

TABLE OF AUTHORITIES

Page(s)

CASES

Abbamont v. Piscataway Twp. Bd. of Educ.,
138 *N.J.* 405 (1994) 35

Arar v. Ashcroft,
585 F.3d 559 (2d Cir. 2009), *cert. denied* 130 *S. Ct.* 3409 (2010) 28

Branzburg v. Hayes,
408 *U.S.* 665 (1972) 7

Brill v. Guardian Life Ins. Co. of Am.,
142 *N.J.* 520 (1995) 6

Brook v. April,
294 *N.J. Super.* 90 (App. Div. 1996) 36

Channel 10, Inc. v. Gunnarson,
337 *F. Supp.* 634 (D. Minn. 1972) 11, 15, 17

City of Houston v. Hill,
482 *U.S.* 451 (1987) 14

Connell v. Town of Hudson,
733 *F. Supp.* 465 (D.N.H. 1990) 11, 17

Csorny v. Shoreham-Wading River Cent. Sch. Dist.,
305 *A.D.*2d 83, 759 *N.Y.S.*2d 513 (2003) 20

Demarest v. Athol/Orange Cmty. TV, Inc.,
188 *F. Supp.* 2d 82 (D. Mass. 2002) 9, 11, 14

Dendrite Int'l, Inc. v. Doe No. 3,
342 *N.J. Super.* 134 (App. Div. 2001) 1

Fasching v. Kallinger,
211 *N.J. Super.* 26 (App. Div. 1986) 1

Fed. Deposit Ins. Corp. v. Meyer,
510 *U.S.* 471 (1994) 29

Fielder v. Stronack,
141 *N.J.* 101 (1995) 31

First Nat'l Bank of Boston v. Bellotti,
435 *U.S.* 765 (1978) 6

Fordyce v. City of Seattle,
55 *F.*3d 436 (9th Cir. 1995)..... 10, 13

Fuchilla v. Layman,
109 *N.J.* 319 (1988), *cert. denied sub nom. Univ. of Med. & Dentistry v. Fuchilla*, 488 *U.S.* 826 35

Garrison v. Louisiana,
379 *U.S.* 64 (1964) 14

Glik v. Cunniffe,
655 *F.*3d 78 (1st Cir. 2011)..... passim

Grafton v. Brooklyn Law School,
478 *F.*2d 1137 (2d Cir. 1973)..... 23

Greenway Dev. Co. v. Borough of Paramus,
163 *N.J.* 546 (2000) 30, 31

Harlow v. Fitzgerald,
457 *U.S.* 800 (1982) 24

Harris v. Pernsley,
755 *F.*2d 338 (3d Cir. 1985), *cert. denied*, 474 *U.S.* 965..... 27, 37

Houchins v. KQED, Inc.,
438 *U.S.* 1 (1978) 7

Hudgens v. NLRB,
424 *U.S.* 507 (1976) 23

Hustler Magazine v. Falwell,
485 *U.S.* 46 (1988) 14

Iacobucci v. Boulter,
193 *F.*3d 14 (1st Cir. 1999)..... 10, 13

Imprisoned Citizens Union v. Ridge,
169 *F.*3d 178 (3d Cir. 1999)..... 29

In re Lennox S. Hinds,
90 *N.J.* 604 (1982) 1

Johnson v. Fankell,
520 *U.S.* 911 (1997) 32

Joseph Burstyn Inc. v. Wilson,
343 *U.S.* 495 (1952) 9

Karins v. City of Atlantic,
152 *N.J.* 532 (1998) 18

Kelly v. Borough of Carlisle,
622 *F.*3d 248 (3d Cir. 2010)..... 12, 16, 26

Kelly v. California,
555 *U.S.* 1020, 1025 (2008)..... 9

King v. S. Jersey Nat'l Bank,
66 *N.J.* 161 (1974) 33

Kleindienst v. Mandel,
408 *U.S.* 753 (1972) 6

Lloyd v. Borough of Stone Harbor,
179 *N.J. Super.* 496 (Ch. Div. 1981) 31

Love v. N.J. Div. of Youth & Family Servs.,
No. 07-3661, 2010 *U.S. Dist. LEXIS* 73977 (D.N.J. July
22, 2011) 27

*Maurice River Twp. Bd. of Educ. v. Maurice River Twp.
Teach. Ass'n & N.J. Educ. Ass'n*,
187 *N.J. Super.* 566 (Ch. Div. 1982), *aff'd*, 193 *N.J.
Super.* 566 (App. Div. 1984)..... 19, 20

*Maurice River Twp. Bd. of Educ. v. Maurice River Twp.
Teach. Ass'n & N.J. Educ. Ass'n*,
193 *N.J. Super.* 488 (App. Div. 1984) 19

Miller v. French,
530 *U.S.* 327 (2000) 29

Morse v. Frederick,
551 *U.S.* 393 (2007) 27

*N.J. Coal. Against War in the Middle E. v. J.M.B.
Realty Corp.*,
138 *N.J.* 326 (1994), *cert. denied sub nom. Short
Hills Assocs. v. N.J. Coal. Against War in the Middle
E.*, 516 U.S. 812 (1995)..... 18, 23

Owen v. City of Independence,
445 *U.S.* 622 (1980) 24

Owens v. Feigin,
194 *N.J.* 607 (2008) 2, 30, 33, 35

Pearson v. Callahan,
555 *U.S. 223* (2009) 25

Peper v. Princeton Univ. Bd. of Trs.,
77 *N.J.* 55 (1978) 28

Perry Educ. Ass'n v. Perry Local Educ. Ass'n,
460 *U.S.* 37 (1983) 5, 12

Pomykacz v. Borough of W. Wildwood,
438 *F. Supp.* 2d 504 (D.N.J. 2006) 11, 14, 15

Regan v. Time, Inc.,
468 *U.S.* 641 (1984) 17

Rice v. Kemper,
374 *F.*3d 675 (8th Cir. 2004)..... 13

Robinson v. Fetterman,
378 *F. Supp.* 2d 534 (E.D. Pa. 2005) 11, 15

Schnell v. City of Chicago,
407 *F.*2d 1084 (7th Cir. 1969)..... 11, 13

Scott v. Harris,
550 *U.S.* 372 (2007) 7, 8, 10

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,
502 *U.S.* 105 (1991) 12, 17

Sisler v. Gannett Co., Inc.,
104 *N.J.* 256 (1986) 18

Smith v. City of Cumming,
212 *F.*3d 1332 (11th Cir. 2000), *cert. denied*, 531 *U.S.* 978 ..... 10, 13

Stanley v. Georgia,
394 *U.S.* 557 (1969) 6

State v. Abbati,
99 *N.J.* 418 (1985) 29

State v. Cook,
179 *N.J.* 533 (2005) 21, 22

State v. Mortimer,
135 *N.J.* 517 (1994) 1

State v. Novembrino,
105 *N.J.* 95 (1987) 2

State v. Schmid,
84 *N.J.* 535 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 *U.S.* 100 (1982) ..18, 23, 28, 33

Stephan v. State,
711 *P.*2d 1156 (Alaska 1985)..... 21

Tarus v. Borough of Pine Hill,
189 *N.J.* 497 (2007) ..... passim

Tarus v. Borough of Pine Hill,
381 *N.J. Super.* 412 (App. Div. 2005), *rev'd*, 189 *N.J.* 497 (2007) 19

Terminiello v. Chicago,
337 *U.S.* 1 (1949) 13

United States v. Kerley,
753 *F.*2d 617 (7th Cir. 1985)..... 13

United States v. Maynard,
615 *F.*3d 544 (D.C. Cir. 2010), *cert. granted sub nom. United States v. Jones*, 131 *S. Ct.* 3064 (2011) 14

Velez v. City of Jersey City,
180 *N.J.* 284 (2004) 30

Westmoreland v. Columbia Broad. Sys., Inc.,
752 *F.*2d 16 (2d Cir. 1984), *cert. denied sub nom. Cable News Network, Inc. v. U.S. Dist. Ct. for the S. Dist. of N.Y.*, 472 *U.S.* 1017 (1985) 13

Whiteland Woods, L.P. v. Twp. Of W. Whiteland,
193 *F.*3d. 177 (3d Cir. 1999)..... 26

Wilkie v. Robins,
551 *U.S.* 537 (2007) 28

Willis v. Dep't of Conservation & Econ. Dev.,
55 *N.J.* 534 (1970) 29

Wilson v. Layne,
526 *U.S.* 603 (1999) 12, 13

Wood v. Strickland,
420 *U.S.* 308 (1975) 37

STATUTES

42 *U.S.C.* § 1983 ..... passim

N.J.S.A. 10:6-2 ..... 3, 4, 25

N.J.S.A. 59:3-3 31

OTHER AUTHORITIES

Administrative Determination Re: Report of the Special Committee on the Recordation of Custodial Interrogation (N.J. Sup. Ct. Oct. 14, 2005) 22

Complaint, *Phillips v. City of Newark*, No. ESX-L-3995-11 (Super. Ct. Law Div. filed Mar. 28, 2011) 2

John Lewis & Michael D'Orso, *Walking with the Wind: A Memoir of the Movement*, 344 (1998) 9

N.J. Code of Judicial Conduct, Canon 3A(9) 13

Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations (April 15, 2005) 22

S. Judiciary Comm., *Statement to Assemb. Bill No. 2073*, at 1 (May 6, 2004) 34

Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey (N.J. Sup. Ct. Oct. 2003) 13

RULES

R. 3:17 22

CONSTITUTIONAL PROVISIONS

N.J. Const. art. I, ¶ 18 18

N.J. Const. art. I, ¶ 6 ..... passim

U.S. Const. amend. I. ..... passim

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of New Jersey ("ACLU-NJ") is a private, non-profit, non-partisan membership organization devoted exclusively to protecting the basic civil liberties of all New Jersey residents. Founded in 1960, the ACLU-NJ has approximately 15,000 members and supporters in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of over 500,000 members and supporters nationwide.

The ACLU-NJ, like the national ACLU, has a long history of defending First Amendment rights. *See, e.g.*, *State v. Mortimer*, 135 *N.J.* 517 (1994); *In re Lennox S. Hinds*, 90 *N.J.* 604 (1982); *Dendrite Int'l, Inc. v. Doe No. 3*, 342 *N.J. Super.* 134 (App. Div. 2001); *Fasching v. Kallinger*, 211 *N.J. Super.* 26 (App. Div. 1986). Indeed, the ACLU-NJ has previously advocated for the particular constitutional protection at stake in this case: the right of individuals to gather and disseminate information by filming or taking photographs in public. *See, e.g.*, *Tarus v. Borough of Pine Hill*, 189 *N.J.* 497 (2007). However, reports from members and the general public have alerted the ACLU-NJ to numerous circumstances in which police officers have suppressed citizens' right to videotape or to photograph in public places. For instance, on March 22, 2010, Khaliah Fitchette was riding a

bus in Newark when police officers boarded to assist a man who had slid off his seat and onto the floor. Ms. Fitchette, who was recording the incident on her cell phone camera, was handcuffed, arrested and taken to a detention facility when she refused the police's order that she shut the phone. *See* Complaint, *Phillips v. City of Newark*, No. ESX-L-3995-11 (Super. Ct. Law Div. filed Mar. 28, 2011).[1]

The ACLU-NJ also has a broader interest in ensuring that individuals have the ability effectively to vindicate their constitutional rights through the courts. *See, e.g.*, *Owens v. Feigin*, 194 *N.J.* 607 (2008); *State v. Novembrino*, 105 *N.J.* 95 (1987). The decision on appeal relied on the doctrine of qualified immunity to dismiss plaintiffs' claims. But that immunity has not previously been recognized as a defense against claims that state officials have violated the New Jersey Constitution or the New Jersey Civil Rights Act.

The ACLU-NJ accordingly files this *amicus* brief in support of the plaintiff-appellant in order to vindicate the specific free speech rights at stake in this case, and also to urge that the Court not create a new immunity for state officials, which would hamper New Jerseyans' ability to vindicate their constitutional rights, and would curtail the courts' authority

[1] ACLU-NJ is co-counsel for the plaintiff in that case along with the Seton Hall University School of Law, Center for Social Justice.

to enforce the State Constitution. For the reasons set forth below, the decision of the trial court granting summary judgment to the defendants on qualified immunity grounds should be reversed.

SUMMARY OF ARGUMENT

The defendants in this case repeatedly interfered with the plaintiff's ability to film a documentary on the public streets of Trenton. The complaint alleges that this conduct violated both the First Amendment to the U.S. Constitution and the cognate provision of the New Jersey Constitution, Article I, Paragraph 6. Plaintiff sought injunctive relief and damages for these violations pursuant to *N.J.S.A.* 10:6-2 (providing a state cause of action for violations of both the Federal and State Constitutions). *See* Compl. ¶¶ 32-43. The Law Division, however, dismissed all of these claims on summary judgment, on the ground that the police's conduct did not violate a "clearly established" right, therefore entitling the defendants to "qualified immunity." In so holding, the Superior Court committed two crucial errors of law, which this Court should redress.

First, the court below was mistaken as to the protection afforded by the First Amendment and Article I, Paragraph 6. The federal Constitution affords robust protection of the right to videotape in public, subject only to reasonable time, place or

manner restrictions that are content-neutral, narrowly tailored to meet a significant government objective, and leave open ample alternative channels of communication. The State Constitution provides even greater safeguards. The police's interference with plaintiff's documentary filmmaking ran afoul of these constitutional guarantees.

Second, the court erred by invoking qualified immunity to dismiss the case. Qualified immunity, a doctrine developed to insulate state officials from federal liability under 42 *U.S.C.* § 1983, is simply not a defense to claims brought directly under the New Jersey Constitution or pursuant to the New Jersey Civil Rights Act.[2] Moreover, qualified immunity has never constituted grounds to dismiss claims for injunctive relief, which were included among those asserted by the plaintiff.

For the reasons discussed below, the ACLU-NJ urges this Court to reaffirm that the State may not interfere with the individual right to gather information, document public activity, and otherwise amass the raw material of free expression on videotape, except in narrow circumstances not present here. Furthermore, consistent with the New Jersey courts' traditional hostility to doctrines that impair the courts' ability to adjudicate rights and to order appropriate

[2] While Plaintiff raised federal constitutional claims, he did so via the New Jersey Civil Rights Act, *N.J.S.A.* 10:6-2(c). *See* Compl. ¶¶ 32-43. Plaintiff did not raise any claims under 42 *U.S.C.* § 1983.

remedies, this Court should also decline to transplant the federal doctrine of qualified immunity into state constitutional jurisprudence.

ARGUMENT

I. THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS THE RIGHT TO VIDEOTAPE PUBLIC ACTIVITY

Video is a uniquely effective and powerful medium for gathering, receiving, and documenting information, and for providing it to others. Videotaping therefore falls squarely within the protection of the First Amendment, which does not simply guarantee the bare right to speak, but also protects the right to gather information — the raw material of speech. *First Nat'l Bank of Boston v. Bellotti*, 435 *U.S.* 765, 783 (1978). Moreover, the First Amendment's protections are at their peak in public forums, like the streets and sidewalks where the plaintiff did much of his filming. In such spaces, the State's power to interfere with filmmaking is at its weakest, and can be exercised only to impose time, place, and manner restrictions that are reasonable, content-neutral, and narrowly tailored to serve a significant governmental interest. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 *U.S.* 37, 45 (1983). The Constitution is therefore offended when the police order a filmmaker to stop because they simply prefer that he not film, because they themselves do not want to be captured on video

performing their public duties, or because they do not like the videographer's subject matter. The lower court erred by failing to apply this stringent standard of scrutiny to the police's conduct in this case.[3]

A. Filming and photographing is protected under the First Amendment

The U.S. Supreme Court has long recognized that "the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 *U.S.* 557, 564 (1969). The First Amendment thus protects "the freedom to hear as well as the freedom to speak" because "[t]he freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin." *Kleindienst v. Mandel*, 408 *U.S.* 753, 775 (1972) (Marshall, J., dissenting on other grounds). Accordingly, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank*, 435 *U.S.* at 783. This right is commonly asserted by news-gathering organizations, which have "an undoubted right to gather news from any source by means within the law." *Houchins v. KQED, Inc.*, 438 *U.S.* 1, 11

[3] This case was decided by the Law Division on defendants' motion for summary judgment. Accordingly, the facts were required to be "viewed in the light most favorable to the [plaintiff]" and summary judgment should have been denied if, on such a view of the record, "a rational factfinder [could have] resolve[d] the alleged disputed issue in favor of the [plaintiff]." *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 523 (1995).

(1978) (internal quotation omitted); *see also Branzburg v. Hayes*, 408 *U.S.* 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). But the First Amendment also protects the right of members of the general public — and certainly documentary filmmakers like the plaintiff — to gather information for subsequent expression. *See First Nat'l Bank*, 435 *U.S.* at 782 ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten."); *Branzburg*, 408 *U.S.* at 684 ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); *Glik v. Cunniffe*, 655 *F.*3d 78, 83 (1st Cir. 2011) ("[T]he public's right of access to information is coextensive with that of the press.").

Video, even more than photographs, written accounts, or unaided memory, has the capacity to record events in living detail. *See Tarus*, 189 *N.J.* at 512 ("[V]ideo cameras present distinct advantages over other recording devices."). To prohibit filming is therefore to deprive individuals of a uniquely vivid and reliable means of gathering, documenting and conveying information. The Supreme Court implicitly recognized the unique documentary capacities of video in *Scott v. Harris*, 550 *U.S.* 372 (2007), in which the Court considered whether the police violated the Fourth Amendment by attempting to end a

high-speed chase by ramming the fleeing motorist from behind. The entire chase was captured on the police cruiser's onboard camera. The Court discussed the videotape at length, relying on it to settle factual disputes and to inform the constitutional analysis. *See* 550 *U.S.* at 378 ("The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals."); *id.* at 390 (Stevens, J., dissenting) (discussing the videotape at length and concluding that "the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue"); *id.* at 387 (Breyer, J., concurring) ("[W]atching the video footage of the car chase made a difference to my own view of the case."). Indeed, the Court found the video evidence so instructive that it took the unprecedented step of posting the video to its website. *See id.* at 378 n.5.[4]

The First Amendment protects video not only because it is a means of gathering information and documenting events, but also because the films that result have unique expressive capacities. The Supreme Court long ago recognized that "motion pictures are a significant medium for the communication of ideas" and that "[t]hey may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes

[4] Video available at: http://www.supremecourt.gov/media/06/scott_v_harris.wmv

all artistic expression." *Joseph Burstyn Inc. v. Wilson*, 343 *U.S.* 495, 501 (1952). The subsequent history of video continues to prove the Supreme Court right. Thus, video footage has come to define momentous events and to shape public perceptions. For example, the brutal suppression of protest at Tiananmen Square in 1989 was crystallized by the now-famous video of a lone man standing in a white shirt in front of a column of tanks. Likewise, video has served to mobilize social movements: few can forget footage of the "Bloody Sunday" attack in Selma, Alabama in 1965, which "'touched a nerve deeper than anything that had come before'" and was "a turning point in the civil rights movement." *Demarest v. Athol/Orange Cmty. TV, Inc.*, 188 *F. Supp.* 2d 82, 96-97 (D. Mass. 2002) (quoting John Lewis & Michael D'Orso, *Walking with the Wind: A Memoir of the Movement*, 344 (1998)).

The emotional and expressive possibilities of video — like its documentary capacities — have also found their way into the courts. For instance, it is now common to introduce video victim impact evidence at the sentencing phase of capital trials. Justice Stevens, commenting on the admissibility of one such video, remarked that the "primary, if not sole, effect [of the video tributes at issue] was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendant." *Kelly v. California*, 555 *U.S.* 1020, 1025 (2008)

(Stevens, J., statement respecting denial of certiorari). As in *Scott v. Harris*, the Court posted a link to the video on its website.[5]

It is clear, then, that when the State interferes with individuals' ability to videotape, it interferes directly with their ability to gather and document information, and indirectly with their ability to express it to an audience. It is therefore no surprise that numerous federal courts have recognized that the First Amendment protects the specific right to gather information of public interest using videotape or photography. *See, e.g.*, *Glik*, 655 *F.*3d at 83 ("[T]he First Amendment protects the filming of government officials in public spaces"); *Smith v. City of Cumming*, 212 *F.*3d 1332, 1333 (11th Cir. 2000), *cert. denied*, 531 *U.S.* 978 ("The 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."); *Iacobucci v. Boulter*, 193 *F.*3d 14, 25 (1st Cir. 1999) (filming public officials having a conversation in a public area of a public building was "done in the exercise of [plaintiff's] First Amendment rights"); *Fordyce v. City of Seattle*, 55 *F.*3d 436, 439 (9th Cir. 1995) (recognizing "First Amendment right to film matters of public interest."); *Schnell v. City of Chicago*, 407 *F.*2d 1084, 1085-86

[5] http://www.supremecourt.gov/media/08/kelly_v_california.wmv

(7th Cir. 1969) (recognizing constitutional protection for photography of 1968 Democratic Convention and "attendant street activities"); *Pomykacz v. Borough of W. Wildwood*, 438 *F. Supp.* 2d 504, 512-13 (D.N.J. 2006) (holding that photographing a police officer in connection with political activism was protected by the First Amendment); *Robinson v. Fetterman*, 378 *F. Supp.* 2d 534, 541 (E.D. Pa. 2005) ("[T]here can be no doubt that the free speech clause of the Constitution protected [plaintiff] as he videotaped" state troopers conducting truck inspections on a state highway); *Demarest v. Athol/Orange Cmty. TV, Inc.*, 188 *F. Supp.* 2d at, 94 ("[P]laintiffs had a constitutionally protected right to record matters of public interest."); *Connell v. Town of Hudson*, 733 *F. Supp.* 465, 471-72 (D.N.H. 1990) (finding that police officer who prevented photographer from photographing a car accident violated clearly established First Amendment rights); *Channel 10, Inc. v. Gunnarson*, 337 *F. Supp.* 634, 638 (D. Minn. 1972) (holding that police interference with filming of crime scene violated First Amendment "right to be in public places and on public property to gather information, photographically or otherwise").

B. The right to videotape in public places is subject only to reasonable time, place and manner restrictions that are content-neutral and narrowly tailored.

Amicus recognizes that the right to film is not, of course, subject to absolute protection by the First Amendment. There

is, for instance, no right to videotape inside a private home without consent. *See Wilson v. Layne*, 526 *U.S.* 603 (1999) (TV crew accompanying police may not videotape inside home when police execute warrant). But in "traditional public spaces," like the streets and parks where the police interfered with the plaintiff's documentary filming, "the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'" *Glik*, 655 *F.*3d at 84 (quoting *Perry,* 460 *U.S.* at 45). In particular, content-based restrictions on videotaping, like content-based restrictions on any kind of speech, must satisfy the strictest level of judicial scrutiny: it must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry Educ. Ass'n*, 460 *U.S.* at 45; *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 *U.S.* 105, 115-16 (1991). But even content-neutral restrictions are closely regulated by the First Amendment. The "right to record matters of public concern . . . is subject to reasonable time, place and manner restrictions, as long as they are justified without reference to the content of the regulated speech, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information." *Kelly v. Borough of Carlisle*, 622 *F.*3d 248, 262 (3d Cir. 2010) (internal quotation and alteration omitted). In other words,

the police may not prohibit videotaping in public based on the film's subject matter except in the most extraordinary circumstances; even neutral restrictions on the time, place, and manner of filming face a substantial burden of justification.[6]

Application of these standards leads inexorably to the conclusion that the police do not have a general right to order an individual to stop filming in public spaces. *Smith*, 212 *F.*3d at 1333; *Iacobucci*, 193 *F.*3d at 25 (1st Cir. 1999); *Fordyce*, 55 *F.*3d at 439; *Schnell*, 407 F.2d at 1086. Nor does the preference of a police officer not to have his or her conduct recorded on tape amount to a reasonable time, place, or manner restriction "narrowly tailored to serve a significant government interest." *See Glik*, 655 *F.*3d at 84 ("The same restraint demanded of law enforcement officers in the face of 'provocative and challenging' speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.") (quoting *Terminiello v. Chicago*, 337 *U.S.* 1, 4 (1949)); *City of Houston v. Hill*, 482 *U.S.* 451,

[6] In non-public fora, the Courts have recognized that the right to videotape may be subject to greater restrictions. *See, e.g.*, *Wilson*, 526 *U.S.* 603 (television crew accompanying police may not tape inside a person's home when police execute a warrant); *Rice v. Kemper*, 374 *F.*3d 675, 678 (8th Cir. 2004) (no right to videotape execution); *United States v. Kerley*, 753 *F.*2d 617, 621 (7th Cir. 1985) (criminal trial); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 *F.*2d 16, 23 (2d Cir. 1984), *cert. denied sub nom. Cable News Network, Inc. v. U.S. Dist. Ct. for the S. Dist. of N.Y.*, 472 *U.S.* 1017 (1985) (civil trial). *But see N.J. Code of Judicial Conduct*, Canon 3A(9) (permitting cameras in N.J. courtrooms); *Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey* (N.J. Sup. Ct. Oct. 2003).

462-63 (1987) ("The freedom of individuals verbally to 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."). Rather, because the First Amendment jealously guards the "paramount public interest in a free flow of information to the people concerning public officials, their servants," the police have *less* power to demand not to be filmed than private citizens. *Garrison v. Louisiana*, 379 *U.S.* 64, 77 (1964); *see also Hustler Magazine v. Falwell*, 485 *U.S.* 46, 50 (1988) (emphasizing "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.").[7]

Nor do the police have the general power to stop individuals from filming them in the course of their public

[7] There may be circumstances in which the First Amendment right to videotape in public yields to the privacy interests of private citizens being videotaped. To be sure, most activities in public cannot be regarded as private. And any restrictions on videotaping would have to be narrowly tailored to serve any significant privacy interests that remain. *See Demarest v. Athol/Orange Cmty. TV, Inc.*, 188 *F. Supp.* 2d at 94 (finding that a policy requiring that broadcaster obtain a release form from every person captured on tape was not sufficiently tailored and remarking that "[i]t is doubtful whether, consistent with the First Amendment [defendant] may so entirely subordinate the plaintiffs' right of expression to citizens' privacy rights."). But the First Amendment might yield to narrowly-tailored laws prohibiting stalking, for example, or protecting individuals against pervasive, surreptitious surveillance. *See United States v. Maynard*, 615 *F.*3d 544 (D.C. Cir. 2010), *cert. granted sub nom. United States v. Jones*, 131 *S. Ct.* 3064 (2011) (finding, for Fourth Amendment purposes, that an individual retains a reasonable expectation of privacy in the "totality and pattern of his movements from place to place to place."). *But see Pomykacz*, 438 *F. Supp.* 2d at 513 n.14 (plaintiff, who was charged with "stalking" because she often photographed mayor and police officer, could proceed on her First Amendment retaliation claim because the First Amendment protected her right to photograph public officials in the performance of their duties).

duties. For instance, in *Glik v. Cunniffe*, the First Circuit held that the plaintiff had a constitutional right to film police officers executing an arrest on the Boston Common, holding that "peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." 655 *F.*3d at 84. Similarly, in *Robinson v. Fetterman*, 378 *F. Supp.* 2d at 542, the court held that the defendant officers violated the First Amendment when they arrested an individual for filming them as they conducted highway truck inspections from a distance of approximately 30 feet. *See also Pomykacz*, 438 *F. Supp.* 2d at 513 (holding that photographing police officer and mayor in connection with political activism protected by the First Amendment).

To be sure, the police have the power to prevent individuals from actually interfering with the exercise of their duties. The police, for example, can exercise their ordinary power to order individuals to keep their distance from an arrest in progress, and can prevent individuals from crossing the perimeter of a crime scene investigation. But in exercising these ordinary powers, police cannot target videographers and photographers, preventing them from recording that which members of the public would, if present, be permitted to see. *See Channel 10, Inc. v. Gunnarson*, 337 *F. Supp.* at 638 (recognizing

"the right of a newsman to be in an area where the general public is allowed"). Any such restrictions face a heightened burden of justification as to why preventing video cameras, in particular, is narrowly tailored to meet a significant government interest. *See, e.g.*, *id.* (suggesting that the police might prohibit a photographer from taking photographs at night where use of a flash or light would be necessary, if "such is interfering with or endangering them in their work"); *Kelly*, 622 *F.*3d at 262 (noting particular dangerousness of traffic stops and finding it an open question whether there is a First Amendment right to film such stops from the passenger seat).

The trial court in this case placed significant emphasis on the fact that the subject of plaintiff's documentary was gang activity in which the police had an investigatory interest. The court reasoned that because "gang activity is an activity of a violent nature . . . there was even more concern of the safety of both the police officer and the public with regard to that matter." Tr. at 10. The court, however, identified nothing in the record to suggest how plaintiff's filming actually interfered with the police officers' exercise of their duties, nor did it specify how the act of filming could have created a danger. Indeed, it is difficult to see how the mere presence of a video camera could have endangered the police or the public, so long as the camera was at an appropriate distance. The mere

fact that plaintiff was filming so-called "gang activity" does not supply a reasonable time, place or manner restriction narrowly tailored to serve a significant government interest.[8] Nor does the fact that the police were investigating the gang in question itself justify a prohibition, absent some explanation of how videotaping actually interfered with the investigation or how the restriction was otherwise "narrowly tailored." *See Connell v. Town of Hudson*, 733 *F. Supp.* at 471-72 (First Amendment right to photograph car accident); *Channel 10, Inc. v. Gunnarson*, 337 *F. Supp.* at 638 (First Amendment right to film crime scene).

In sum, the police had no authority to stop plaintiff from filming his gang documentary, so long as he was not actually interfering with the police's performance of its duties. Accordingly, the decision of the trial court dismissing this matter should be reversed.

II. ARTICLE I, PARAGRAPH 6 OF THE NEW JERSEY CONSTITUTION PROVIDES EVEN MORE ROBUST PROTECTION FOR THE RIGHT TO VIDEOTAPE

The New Jersey Constitution is an "alternative and independent source of individual rights." *State v. Schmid*, 84

[8] If the police were enforcing a blanket policy prohibiting filming gangs, they would be enforcing a content-based restriction, singling out a particular subject matter for disfavored treatment and therefore subject to an even higher burden of justification. *See Simon & Schuster, Inc.*, 502 *U.S.* at 116 (1991) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." (quoting *Regan v. Time, Inc.*, 468 *U.S.* 641, 648-49 (1984)).

N.J. 535, 555 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 *U.S.* 100 (1982). While New Jersey courts "rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution," *Karins v. City of Atlantic*, 152 *N.J.* 532, 547 (1998), the Supreme Court has recognized that Article I, Paragraphs 6 and 18 are "more sweeping in scope than the language of the First Amendment," *Schmid*, 84 *N.J.* at 557. Accordingly, the Supreme Court has held that "[p]recedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment." *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 *N.J.* 326, 353 (1994), *cert. denied sub nom. Short Hills Assocs. v. N.J. Coal. Against War in the Middle E.*, 516 U.S. 812 (1995). The First Amendment case law discussed above is therefore only a floor upon which the New Jersey Constitution builds greater protections.

In particular, the Supreme Court has recognized that the New Jersey Constitution is more hostile than is its federal counterpart to restrictions on speech relating to matters of public concern. *See Sisler v. Gannett Co., Inc.*, 104 *N.J.* 256, 271-72 (1986) ("[O]ur decisions, pronounced in the benevolent light of New Jersey's constitutional commitment to free speech,

have stressed the vigor with which New Jersey fosters and nurtures speech on matters of public concern.”). Thus, for example, the New Jersey Constitution imposes more stringent limits than does the First Amendment on defamation actions targeting speech on matters of public concern. *See id.* at 274-75.

This heightened protection extends to the constitutional protection afforded to videotaping matters of public importance. Almost thirty years ago, the Superior Court of New Jersey, Chancery Division held that the New Jersey Constitution protected the right to videotape public meetings, even if the First Amendment did not. *See Maurice River Twp. Bd. of Educ. v. Maurice River Twp. Teach. Ass’n & N.J. Educ. Ass’n*, 187 *N.J. Super.* 566, 568-70 (Ch. Div. 1982), *aff’d*, 193 *N.J. Super.* 488 (App. Div. 1984). The Supreme Court reaffirmed the right to videotape matters of public concern in *Tarus v. Borough of Pine Hill*, in which the Court reversed a decision of this Court that found no right under the common law or State Constitution to videotape a town meeting. 189 *N.J.* 497 (2007), *rev’g* 381 *N.J. Super.* 412 (App. Div. 2005)). While the *Tarus* Court found it unnecessary to reach the state constitutional question — ruling only on the existence of a common law right — its discussion of New Jersey legal precedent and history leave little doubt that

it would find a broad constitutional right to videotape matters of public concern.

Indeed, the *Tarus* Court held that the right to videotape had "wide and deep" roots in New Jersey law, stating that "'the law has embraced the undeniable fact that modern electronic devices are silent observers of history.'" *Id.* at 515 (quoting *Csorny v. Shoreham-Wading River Cent. Sch. Dist.*, 305 *A.D.*2d 83, 89, 759 *N.Y.S.*2d 513 (2003)). The Court recognized that the "[u]se of video cameras and our reliance on video to acquire information has expanded dramatically" and opined that the pervasive use of video cameras "evidences a societal acceptance of their use in public fora." 189 *N.J.* at 511-12 (citing *Maurice River*, 187 *N.J. Super.* at 570; *Maurice River*, 193 *N.J. Super.* at 492. The Court also recognized that "video cameras present distinct advantages over other recording devices, and, with improvements in technology, are no more disruptive than pen and paper or audio tape recorder." *Id.* at 512. Accordingly, the Court held that the law should "embrace additional means for documenting public proceedings—not fewer," and that the existence of alternative means of documenting an event should not count against the right to videotape. *Id.* at 509; *see also id*. at 508-09 ("[I]f a shorthand record of such a meeting is more accurate than long hand [sic] notes, then the use of shorthand is to be approved; and if the making of a tape record

is a still better method of memorializing the acts of a public body it should be encouraged." (internal quotation omitted)).

In addition to recognizing its technical advantages, the *Tarus* Court emphasized the importance of videotape as a means of holding public officials to account. *See* 189 N.J. at 508 ("[New Jersey's] long-standing appreciation of the importance of open government stems, in part, from the understanding that openness reduces public corruption."). Indeed, this is a theme of recent New Jersey Supreme Court jurisprudence. In *State v. Cook*, the Court considered whether custodial interrogations must be electronically recorded in order to be admissible into evidence. 179 *N.J.* 533 (2005). Among the benefits of such mandatory audio or video recording, the Court noted, was "that recording would protect police officers from false allegations and lend credibility to police work by demonstrating the fairness of the methods used and the legality of confessions obtained" *Id.* at 556 (citation omitted); *see also id.* at 552 (video recording "protect[s] the public's interest in honest and effective law enforcement, and protect the interests of police officers wrongfully accused of improper tactics" (citing *Stephan v. State*, 711 *P.*2d 1156, 1158 (Alaska 1985)). While the Supreme Court in *Cook* declined to find that audio or video recording was required as a matter of constitutional Due Process, it established a Special Committee to study the question, *id.* at

562; the Committee's exhaustive report ultimately recommended establishing a new court rule requiring that all custodial interrogations of individuals charged with serious crimes be electronically recorded, subject only to certain enumerated exceptions, *see Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations* (April 15, 2005). The Supreme Court adopted the recommendations in full. *See* Administrative Determination Re: Report of the Special Committee on the Recordation of Custodial Interrogation (N.J. Sup. Ct. Oct. 14, 2005); *R.* 3:17.

The Supreme Court has thus *required* that the police be recorded in the course of their some of their most sensitive duties — conducting interrogations of suspects. The same rationales that supported this requirement, including the reliability of electronic recording and its salutary effects on public administration, support the conclusion that the State Constitution provides heightened protection for the right to videotape matters of public concern generally, and to the film that plaintiff was making in particular.

The New Jersey Constitution may also extend greater protection than does the federal Constitution with regard to videotaping outside traditional public fora. When considering whether speech on private property is constitutionally protected, the New Jersey courts do not engage in the

formalistic "state action" analysis by which federal courts have constrained the First Amendment's reach, but instead seek "to achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property." *Schmid*, 84 *N.J.* at 562. Accordingly, a number of cases have extended state constitutional protection to speech on private property in circumstances where the First Amendment affords no protection at all. *Compare N.J. Coal. Against War in the Middle E.*, 138 *N.J.* 326 (holding that private shopping centers must afford right to leaflet of societal issues); *and Schmid*, 84 *N.J.* 535 (1980) (affording constitutional protection to the right to leaflet on campus of private university), *with Hudgens v. NLRB*, 424 *U.S.* 507 (1976) (holding that the First Amendment does not protect speech in a private shopping center); *and Grafton v. Brooklyn Law School*, 478 *F.*2d 1137, 1143 (2d Cir. 1973) (finding that private law school did not meet "state action" requirement such that the federal Constitution did not apply). It follows that the right to videotape in New Jersey may even extend to certain private spaces where the First Amendment simply does not apply.[9]

[9] It appears that in at least one instance, the police interfered with the plaintiff's ability to film in a public library, on the grounds that he was not a member. Even if the library was not a public forum — a point that the court below did not analyze, and which *amicus* does not concede — it would appear to be the kind of space that would benefit from the New Jersey Constitution's broader protection of First Amendment rights.

In any event, the right to videotape in New Jersey is robust. The First Amendment provides ample protection, supplemented by the New Jersey Constitution's heightened protection for speech on matters of public concern and its willingness to protect speech rights even in certain non-public forums.

III. THE LAW DIVISION ERRED BY DISMISSING PLAINTIFF'S CLAIMS ON THE BASIS OF QUALIFIED IMMUNITY

Qualified immunity is a doctrine created by the federal courts as a defense available to state officials who have been sued for damages under the federal civil rights statute, 42 *U.S.C.* § 1983. The doctrine was intended as a balance against the grant of access for plaintiffs to sue state actors in federal courts. *See Owen v. City of Independence*, 445 *U.S.* 622, 650-54 (1980) (describing history of immunities, including qualified immunity, under § 1983). The doctrine provides that defendant officials are immune from suit — not merely limited in their liability — so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 *U.S.* 800, 818 (1982). Accordingly, when an official invokes qualified immunity, a court must determine whether the rights at stake were "clearly established" at the time of the alleged violation. If the court finds that the law was not sufficiently

well-established, the defendant is entitled to immunity and the case is dismissed. Having determined that the law was unclear, the court is not required to clarify the law by adjudicating whether a constitutional violation in fact occurred. *See Pearson v. Callahan*, 555 *U.S.* 223, 236 (2009).

The Law Division applied this doctrine to dismiss plaintiff's lawsuit in its entirety. In particular, the following claims were dismissed:

(1) A claim for damages and injunctive relief directly under Article I, Paragraph 6 of the New Jersey Constitution.

(2) A claim for damages and injunctive relief under the New Jersey Civil Rights Act, *N.J.S.A.* 10:6-2(c), for violations of free speech rights secured both by the New Jersey Constitution and by the First Amendment to the U.S. Constitution.

Notably, the plaintiff did not state any claims at all under the federal civil rights statute, 42 *U.S.C.* § 1983. The Law Division nevertheless imported the § 1983 doctrine of qualified immunity into New Jersey law, without providing any analysis or rationale for doing so. Tr. at 7. The court then proceeded directly to the "clearly established" step of the analysis, determining that the rights in question were not clear enough to overcome qualified immunity. Tr. at 8-11. The court did not adjudicate whether plaintiff's rights had in fact been violated,

resting its decision solely on the defendant's entitlement to qualified immunity.[10]

In disposing of the case in this way, the Law Division committed two serious errors. First, the courts of this State have never recognized qualified immunity as a defense to claims brought directly under the New Jersey Constitution or pursuant to the New Jersey Civil Rights Act ("CRA"). Consistent with New Jersey law, policy and tradition, this Court should continue to reject qualified immunity in these contexts. Second, qualified immunity is simply not a bar to *any* claims for injunctive relief, even in the doctrine's home territory of § 1983

[10] *Kelly v. Borough of Carlisle*, upon which the lower court placed great reliance, dealt solely with claims raised pursuant to 42 *U.S.C.* § 1983, and invoked qualified immunity to dismiss those claims. 622 *F.*3d 248 (3d Cir. 2010) At issue was whether the First Amendment was violated when the plaintiff was arrested under a Pennsylvania wiretap law for videotaping a traffic stop in progress from the passenger seat. *Id.* at 251-52. The Court recognized the general principle that the First Amendment protects the "right to record matters of public concern," subject only to limited exceptions. But it nevertheless held that the existing cases were "insufficiently analogous to the facts of this case to have put [defendant] on notice of a clearly established right," and therefore dismissed the case on qualified immunity grounds, without actually determining whether the First Amendment had in fact been violated. *Id.* at 262-63. In order to find that the law was not sufficiently clearly established, the court relied on distinctions that are inapplicable here. For instance, it cited two cases suggesting that "videotaping without an expressive purpose may not be protected" – a consideration not relevant here, where plaintiff was making a documentary film. *Id.* at 262. It also relied on a Third Circuit case rejecting a broad right to videotape public meetings, a proposition that has been squarely rejected by the New Jersey courts. *Compare id.* (citing *Whiteland Woods, L.P. v. Twp. Of W. Whiteland*, 193 *F.*3d 177 (3d Cir. 1999), *with Tarus*, 187 *N.J.* 497. And it placed great emphasis on the "inherently dangerous" nature of traffic stops in particular, distinguishing the circumstances at stake there from prior cases in which the courts had found a First Amendment right to record police conducting investigations and other duties. *Kelly*, 193 *F.*3d at 262-63. As noted above, there is nothing in the record of this case to suggest that plaintiff's filming was interfering with the police in any way, much less that he was putting them in danger. *See supra*, at 16-17.

lawsuits. *See Morse v. Frederick*, 551 *U.S.* 393, 400 n.1 (2007); *Harris v. Pernsley*, 755 *F.*2d 338, 343 (3d Cir. 1985), *cert. denied*, 474 *U.S.* 965 ("The qualified immunity defense only applies, of course, to claims for money damages."). The Law Division was simply wrong to dismiss the injunctive portion of plaintiff's lawsuit on this basis.

A. This Court should not create a new immunity shielding state officials from judicial enforcement of the State Constitution

New Jersey courts have never before held that qualified immunity is a defense against claims directly under the New Jersey Constitution or under the New Jersey Civil Rights Act. *See Love v. N.J. Div. of Youth & Family Servs.*, No. 07-3661, 2010 *U.S. Dist. LEXIS* 73977, at *7 n.10 (D.N.J. July 22, 2010) (noting that there is "no caselaw addressing the question of whether persons subject to liability under the New Jersey Civil Rights Act have a qualified immunity defense."). This is for good reason: qualified immunity, which insulates state officials who may have violated the Constitution, cuts against a major thrust of this state's constitutional and civil rights jurisprudence, which emphasizes the judiciary's duty to enforce constitutional rights by adjudicating disputes and awarding effective and appropriate relief.

1. State employees do not enjoy qualified immunity from suit for violations of the New Jersey Constitution

New Jersey courts have long insisted on more robust judicial protection of state constitutional rights than the federal courts have with respect to the federal Constitution. For example, the New Jersey Supreme Court has held that "the State Constitution, as a wellspring of individual rights and liberties, may be directly enforceable, its protections not dependent even upon implementing legislation." *State v. Schmid*, 84 *N.J.* at 558 (citing *Peper v. Princeton Univ. Bd. of Trs.*, 77 *N.J.* 55, 77 (1978)). By contrast, the U.S. Supreme Court has been far more reluctant to consider lawsuits brought directly under the federal Constitution. *See, e.g.*, *Wilkie v. Robins*, 551 *U.S.* 537, 550 (2007) (finding no "automatic entitlement" to bring constitutional damages claims and noting that "in most instances we have found a[n implied cause of action] unjustified."); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009)) (en banc), *cert. denied* 130 *S. Ct.* 3409 (2010) (finding that existence of "special factors" prevented court from considering constitutional claim of individual sent by the United States to Syria for the purpose of interrogation under torture).

Similarly, the New Jersey courts have been hostile to judicial doctrines that limit the courts' authority to adjudicate and remediate individual rights. Thus, the Court

long ago abolished general state immunity from tort liability. *See Willis v. Dep't of Conservation & Econ. Dev.*, 55 *N.J.* 534 (1970) (abolishing general state immunity from tort liability). And the Supreme Court has affirmed the broad power of the courts to "to create, mold and apply remedies once jurisdiction is invoked." *State v. Abbati*, 99 *N.J.* 418, 428 (1985) ("[A]n unbroken conceptual thread running throughout our decisions applying [the judicial] article [of the New Jersey Constitution] is that the judicial power imports the power to fashion needed and appropriate remedies."). By contrast, the federal courts have retained the doctrine of federal sovereign immunity from suit and have acquiesced in legislation limiting their ability to remediate constitutional rights. *See, e.g.*, *Fed. Deposit Ins. Corp. v. Meyer*, 510 *U.S.* 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); *Miller v. French*, 530 *U.S.* 327 (2000) (upholding provision of the Prison Litigation Reform Act providing for an automatic stay of pre-existing constitutional injunctions upon motion by the government); *Imprisoned Citizens Union v. Ridge*, 169 *F.*3d 178 (3d Cir. 1999) (upholding provision of the Prison Litigation Reform Act limiting the scope of injunctive relief available to remedy constitutional violations).

The New Jersey Supreme Court has jealously guarded its authority to adjudicate and remediate constitutional violations even in the face of potential legislative encroachments. Thus, the Tort Claims Act ("TCA") contains a variety of immunities and procedural prerequisites that apply in tort litigation against state officials and entities, but the Supreme Court has repeatedly held that lawsuits alleging violations of constitutional rights do not come within these strictures. *Owens*, 194 *N.J.* at 613 (recognizing the "stark field of case law universally rejecting the importation of the [Tort Claims Act's] notice-of-claim requirement . . . for any constitutional claim."); *Velez v. City of Jersey City*, 180 *N.J.* 284, 296 (2004) (affirming *Greenway*, *infra*, and recognizing that "state or federal constitutional rights . . . supercede statutory limitations"); *Greenway Dev. Co. v. Borough of Paramus*, 163 *N.J.* 546, 557 (2000) (holding that constitutional violation was not an "injury" within the ambit of the Tort Claims Act, and that even if it were an "injury," "[a] public entity may not use a state statute, such as the TCA, to abrogate a claimant's constitutional rights.").

The doctrine of qualified immunity is inimical to these precedents, which affirm the robust protection that the New Jersey courts afford to constitutional rights. Qualified immunity would routinely prevent the court from granting a

remedy in cases where the constitution has been violated, but where the matter is one of first impression for the courts. Moreover, qualified immunity would permit the courts to dispose of cases on "clearly established" grounds, as the Law Division did here, without ever determining whether the New Jersey Constitution had been offended. As a consequence, the law will often remain undecided; plaintiffs will be denied even an adjudication of their constitutional rights, let alone a remedy; and state officials will remain free to again engage in conduct whose unconstitutionality has not yet been clearly established. The ultimate result is that the courts will have relinquished much of their authority to say what the New Jersey Constitution means and to enforce its guarantees.

There is no reason for this Court to impose this disability upon itself. Nothing in the Constitution signals the need to grant immunity to state officials. *See Lloyd v. Borough of Stone Harbor*, 179 *N.J. Super.* 496, 517 (Ch. Div. 1981) ("Our Constitution does not address immunities in civil rights actions."). There is no statute providing for such immunity against constitutional claims.[11] And the mere fact that the

[11] As already noted, the defenses found in the Tort Claims Act do not apply. *See supra* at 30. It is therefore of no moment that the "good faith" defense found in the Tort Claims Act has been interpreted to generally track the federal doctrine of qualified immunity. *See Fielder v. Stronack*, 141 *N.J.* 101, 131-32 (1995); *N.J.S.A.* 59:3-3. The Tort Claims Act, and the defenses it provides, simply do not apply to constitutional claims. *See, e.g.*, *Greenway*, 163 *N.J.* 546. For reasons described at length, *infra* at 33-36, the New Jersey Civil Rights Act also does not provide for any immunities.

federal courts have decided to grant state officials qualified immunity against federal § 1983 claims does not compel this Court to extend the same immunity to state officials for violating state law. *See Johnson v. Fankell*, 520 *U.S.* 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state. This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules." (internal citations omitted)).

Indeed, it would make little sense to transplant the doctrine into state law, because the rationale for qualified immunity against § 1983 claims is distinctively federal. Qualified immunity shields state officials from federal liability where they could not reasonably have known what the federal Constitution required of them. It does so because "the ultimate purpose of qualified immunity is to protect the state and its officials from *overenforcement of federal rights*." *Johnson*, 520 *U.S.* at 919 (emphasis added). This federalism concern simply does not exist when, as here, a *state* court is called upon to adjudicate whether a *state* official has violated a *state* constitutional right.

New Jersey courts have the power — and indeed the obligation — to hold the state's officials to a more stringent

constitutional standard. *State v. Schmid*, 84 *N.J.* at 559 ("[T]he State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights."); *King v. S. Jersey Nat'l Bank*, 66 *N.J.* 161, 177 (1974) ("[T]he judicial obligation to protect the fundamental rights of individuals is as old as this country."). This Court should therefore refuse to allow a broad new immunity that would insulate state officials from judicial scrutiny when they are alleged to have violated the State Constitution.

2. State employees do not enjoy qualified immunity against claims brought under the New Jersey Civil Rights Act of 2004

The New Jersey Civil Rights Act was enacted in 2004 "for the broad purpose of assuring a state law cause of action for violations of state and federal constitutional rights and to fill any gaps in state statutory anti-discrimination protection." *Owens*, 194 *N.J.* at 611. In particular, the CRA provides a private cause of action not only against direct deprivations of rights under the New Jersey Constitution and laws, but also against "interfer[ence]" or "attempt[s] to interfere with" rights by "threats, intimidation or coercion." *N.J.S.A.* 10:6-2(c). It provides a state cause of action for violations of federal rights, establishing a state basis for actions that previously could only be brought under 42 U.S.C.

§ 1983. *Id.*[12] The Act empowers the Attorney General to enforce violations of individuals' constitutional and statutory rights, and provides that any damages recovered in such an action will accrue to the injured party. *N.J.S.A.* 10:6-2(a)-(b). The Act provides for civil penalties in addition to damages, and it specifies that the prevailing party is entitled to its attorney's fees and costs. *N.J.S.A.* 10:6-2(e)-(f).

The objective of the CRA is apparent on its face: to expand the ability of aggrieved parties to vindicate their civil rights in court. The Senate Judiciary Committee made this explicit, explaining that the Act was intended "to protect and assure against deprivation of the free exercise of civil rights which are guaranteed and secured under the New Jersey Constitution and federal Constitution" and, to that end, "this bill provides a remedy when one person interferes with the civil rights of another." S. Judiciary Comm., *Statement to Assemb. Bill No. 2073*, at 1 (May 6, 2004). Nothing in the Act or its legislative history suggests that, by its enactment, the Legislature intended to create new immunities against civil rights suits. It would be ironic, then, if the CRA — enacted to "provide[] a remedy" — were interpreted to incorporate an immunity doctrine whose purpose and effect is to insulate state

[12] Plaintiff's First Amendment claim appears to have been brought pursuant to this provision of the New Jersey Civil Rights Act, not 42 *U.S.C.* § 1983. *See* Compl. ¶ 38, 42-43.

officials from suit thereby narrowing the remedies available to New Jerseyans.

Neither is there any basis in other statutes for a defense of qualified immunity against Civil Rights Act claims. The Tort Claims Act, which includes a defense of "good faith" immunity, does not apply to actions under the Civil Rights Act, just as it does not restrict actions directly under the Constitution. *See supra* at 30. Indeed, the Supreme Court recently made clear that "[i]n light of the broad remedial purpose of the CRA, and absent any legislative expression to the contrary, we are unconvinced that the Legislature chose to condition the rectifying of an infringement on an individual's vital constitutional rights, or of injurious discriminatory conduct, on satisfaction of the TCA's notice-of-claim requirement." *Owens*, 194 *N.J.* at 614. This holding followed from a number of prior cases holding that the TCA, including the immunities it provides, does not govern claims against public entities brought pursuant to statutes that provide private causes of action (as opposed to common-law tort claims). *See, e.g.*, *Fuchilla v. Layman*, 109 *N.J.* 319 (1988), *cert. denied sub nom. Univ. of Med. & Dentistry v. Fuchilla*, 488 *U.S.* 826 (notice requirement of TCA inapplicable to claims under the Law Against Discrimination); *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 *N.J.* 405 (1994) (punitive damages limit in TCA inapplicable to claims under the Conscientious Employee

Protection Act); *Brook v. April*, 294 *N.J. Super.* 90 (App. Div. 1996) (immunities in the TCA inapplicable to actions under the Workers' Compensation Law).

It is clear, then, that this Court is not required by statute to recognize a defense of qualified immunity in the CRA context. Moreover, there are compelling reasons why this Court should not exercise its common law power to create such a defense. As already discussed, qualified immunity permits state officials to evade liability for constitutional violations every time the right at stake is not sufficiently "clearly established." At the same time, the doctrine permits the courts to decline to adjudicate the constitutional issue before it, hence leaving numerous constitutional questions unresolved and unjustifiably ceding the judicial authority to adjudicate and enforce the law. In sum, allowing the invocation of qualified immunity in cases brought under the CRA is neither justified by the federalism-related policy reasons that underlie the federal doctrine, nor statutorily mandated by the New Jersey Legislature. *See supra*, at 30-33. The court below erred in rewriting New Jersey law and dismissing plaintiff's CRA claims on this basis.

B. The Law Division erred when it dismissed plaintiff's claims for injunctive relief on the basis of qualified immunity.

In addition to money damages, plaintiff seeks an injunction against any future police interference with his free speech rights. *See* Compl. at 12. The court below was simply mistaken when it dismissed this claim for prospective relief on the basis of qualified immunity, a doctrine that is not only, as set forth above, inapplicable here, but which, in any event, "only applies, of course, to claims for money damages." *Harris*, 755 *F.*2d at 343; *see also Morse*, 551 *U.S.* at 400 n.1 ("Qualified immunity shields public officials from money damages only."); *Wood v. Strickland*, 420 *U.S.* 308, 314 n.6 (1975) ("[I]mmunity from damages does not ordinarily bar equitable relief as well"). The judgment below should be reversed for this reason as well.

CONCLUSION

For the reasons set forth above, *amicus curiae* the American Civil Liberties Union of New Jersey respectfully urges the court to reverse the decision of the Law Division granting the defendants' motion for summary judgment.

Respectfully submitted,

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