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August 23, 2017

LETTER CONCERNING FIRST AMENDMENT RETALIATION AGAINST
BURLINGTON'S COMMUNITIES OF COLOR

AMERICAN CIVIL
LIBERTIES UNION
OF VERMONT

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Brandon del Pozo
Chief of Police
Burlington Police Department
One North Avenue
Burlington, VT 05401

Dear Chief del Pozo:

The ACLU Foundation of Vermont (“ACLU-VT”)¹ has determined – after several interviews, and a review of public records and bodycam videos – that Burlington Police Department officers have arrested and threatened multiple Burlingtonians, virtually all boys or men of color, in retaliation for their speech protected by the First Amendment to the United States Constitution and Article 13 of the Vermont Constitution.

For instance, on May 8, 2017, George Mnyonge, a local music artist, was being harassed on Main Street after leaving Nectar’s music club. After some heated discussion with police about their suspicions of him, officers asked Mr. Mnyonge and his friends to leave the area. As Mr. Mnyonge walked away, he turned and gave the officers “the finger” saying “fuck you.” As he walked further down the block, he said “I know my rights” and “You got nothing on me bitch.” He continued talking with friends as they walked down the block, asserting that police treat black people unfairly and that he believed the officers should have been helping him.

As captured by the officers’ body cameras, after the group walked away, one officer appears to tell another, “If he keeps going, I’ll fucking knock his ass out.” Shortly thereafter, the officers turned off their body cameras. Less than a minute later, the cameras were turned back on, and the officers walked a full

¹ Founded in 1967, the ACLU of Vermont is a nonpartisan, non-profit advocacy organization dedicated to defending the constitutional and civil rights of all Vermonters. With more than 7,500 members, ACLU-VT is the statewide affiliate of the national ACLU, which has a membership of over 1.6 million. The ACLU works to advance civil liberties through impact litigation, advocacy, and education.

block to pursue Mr. Mnyonge in order to arrest him.² As he was taken to the ground by multiple officers, he repeatedly yelled “What did I do?” Mr. Mnyonge was pepper sprayed and left with several lacerations on his hands, legs, and neck. An officer also injured his finger while holding Mr. Mnyonge.

The ACLU received a separate complaint regarding the June 17, 2017 arrest of a boy, thought to be between 11 and 13 years old, in Roosevelt Park. According to the complaint, after officers threatened to pepper spray a group of children and youth protesting their friend’s arrest and ordered them to back up, the boy walked backward with his hands up. Nonetheless, an officer pushed him away with both arms. The boy responded verbally with anger and frustration. After consulting amongst themselves for a few moments, the officers arrested the boy.

In a similar incident in Roosevelt Park, on June 11, 2017, Steven Tran was arrested for disorderly conduct after he “yelled obscenities” and “puffed up his chest and clinched his fist” at an officer. According to the officer’s affidavit, Mr. Tran gave him “the finger” and shouted “Fuck the Police.” It is unclear how long this interaction went on, but the officer alleges that later “Mr. Tran stated he was going to fight the police,” although an exact quote is not provided in the affidavit. Shortly thereafter, Mr. Tran ran away. The police chased him down and arrested him.

Additionally, in late 2016, after an officer-initiated physical interaction on Church Street, an African-American man repeatedly said “fuck you” to officers, calling one officer a “house nigger.” He was immediately arrested, despite presenting no threat.

The individuals discussed above, all people of color, were each charged with disorderly conduct. While they used crude or offensive language toward police, none of the accused used violence, force, or clear threats. Regardless of the appropriateness of their statements, they do not fit the definition of disorderly conduct.

More importantly, their speech was protected by the First Amendment. Among the freedoms this country provides is the right to criticize the government and public officials, including police officers. As the United States Supreme Court instructs, the First Amendment “protects a significant amount of verbal criticism and challenge directed at police officers.” *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). Courts have repeatedly noted that “citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.” *Flowers v. City of Minneapolis*, Civ. 05-2349, 2007 WL 2669460,

² During and after Mr. Mnyonge’s arrest, his friends used their cell phone cameras to record the police actions. At no point did they interfere with police actions. Nevertheless, one officer verbally encouraged other officers to arrest them for “hindering.” While other officers thankfully did not act on the encouragement, it is important to note that every federal circuit court to examine the issue has determined that recording the public actions of police officers is protected by the First Amendment. *Fields v. City of Philadelphia*, 862 F.3d 353, 354-57 (3d Cir. 2017) (citing *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995)).

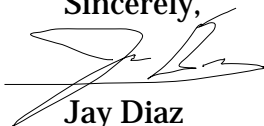
at *4 (D. Minn. Sept. 6, 2007) (quoting *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 774 (1994)). A person's language "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," but is nonetheless protected by the First Amendment. *Watts v. United States*, 394 U.S. 705, 708 (1969) (citation and internal quotation marks omitted).

Such speech receives even greater protection when directed at a police officer. *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987); *Provost v. City of Newburgh*, 262 F.3d 146, 160 (2d Cir. 2001); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990); see also *Flowers*, 2007 WL 2669460 (D. Minn. Sept. 6, 2007); *Long v. L'Esperance*, 166 Vt. 566, 572-74 (1997). "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." *Hill*, 482 U.S. at 462. Although "'fighting words' directed at police officers can be criminalized, . . . the 'fighting words' doctrine is probably 'narrower [in] application in cases involving words addressed to a police officer, because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen.'" *Posr v. Court Officer Shield #207*, 180 F.3d 409, 415 (2d Cir. 1999) (quoting *Hill*, 482 U.S. at 462).

The arrests in these cases demonstrate a troubling pattern of Burlington police unlawfully retaliating in violation of individuals' First Amendment rights. We bring these incidents to your attention to urge you to ensure that your officers understand the full scope of rights protected under the First Amendment and that they do not act in violation of those rights. As you are aware, such violations only serve to increase tensions between law enforcement and the communities they serve – particularly among traditionally over-policed communities of color. Officers have a range of options available to them to avoid such confrontations, including de-escalation tactics. Those options do not include violating First Amendment rights.

Please do not hesitate to contact me at jdiaz@acluvt.org or 802-223-6304 ext. 113.

Sincerely,



Jay Diaz
Staff Attorney
ACLU of Vermont

Cc: Sarah George, Chittenden County State's Attorney