

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2020-05949

DIV. F

SEC. 7

**B.W., a deceased minor, through representatives LATOYA CARNEY,
and BYRON WILSON, SR.**

V.

CITY OF NEW ORLEANS, et al

**NATIONAL POLICE ACCOUNTABILITY PROJECT'S MOTION FOR LEAVE TO
FILE AMICUS CURIAE BRIEF**

The National Police Accountability Project through its undersigned counsel and pursuant to La. Sup. Ct. R. VII § 12, submits this motion for leave of court to file an *amicus curiae* brief in support of Plaintiffs in the above-captioned matter.

Amicus, the National Police Accountability Project (NPAP), was founded in 1999 and is the largest organization of civil rights lawyers in the United States with more than 550 attorney members throughout the country. NPAP attorneys represent plaintiffs in civil actions alleging misconduct by law enforcement officers, including excessive force, wrongful conviction, and conditions of confinement cases. NPAP offers training and support to its attorney and legal worker members, educates the public about police misconduct and accountability, and provides resources for nonprofit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability and appears as *amicus curiae* in cases, such as this one, that present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions.

Transparency is an essential prerequisite to accountability, and NPAP attorneys who bring civil rights actions frequently rely on recordings from police body-worn cameras to develop their clients' cases. When these recordings are destroyed by police departments, NPAP's clients can be left with no ability to seek justice for the harms they have suffered. These recordings also empower members of the public to protect themselves against abusive police officers and advocate for reform.

NPAP is based in New Orleans but has a national presence. Accordingly, NPAP can offer the Court a unique perspective on this case. As NPAP understands due to its experience litigating civil rights cases throughout the country, the spoliation issue presented in this case is one of utmost national importance. Courts across the country are still in the process of determining the discovery repercussions of missing body-worn camera footage because the body-worn devices and the federal electronic discovery rules are still quite new. NPAP writes this brief to alert the Court of the legal developments on this issue in jurisdictions across the country, and to emphasize the absolute necessity of legal consequences for police officers who prevent individuals from accessing body-worn camera footage, which is foundational evidence in suits seeking accountability for official misconduct.

Pursuant to Rule VII § 12, in preparing the proposed amicus brief that accompanies this Motion as Exhibit A, amicus has reviewed the briefs of both parties in this case and has endeavored to offer a unique perspective on the issues raised by this case not addressed by either party.

National Police Accountability Project (NPAP) to request that Defendants appear to show cause why the Court should not grant NPAP's *Motion for Leave to File [Proposed] Brief of Amicus Curiae National Police Accountability Project* in the above-captioned case. The amicus curiae brief is attached as Exhibit A.

WHEREFORE, the National Police Accountability Project requests that its motion for leave to file *[Proposed] Brief of Amicus Curiae National Police Accountability Project* be granted. The National Police Accountability Project further requests that the Court set the hearing for this motion to take place over Zoom. Undersigned counsel lives out of state and would need to book costly air travel to attend the hearing should it be set for in-person attendance.

Dated: August 19, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August 2022, I served via electronic mail a true and correct copy of the forgoing Motion for Admission Pro Hac Vice on all parties.

/s/ Eliana Y. Machefsky
Eliana Y. Machefsky

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[PROPOSED] BRIEF OF *AMICUS CURIAE* NATIONAL POLICE ACCOUNTABILITY
PROJECT

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae is the National Police Accountability Project (NPAP), a non-profit organization. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock because it has no stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

The National Police Accountability Project (“NPAP”) was founded in 1999 and is the largest organization of civil rights lawyers in the United States with more than 550 attorney members throughout the country. NPAP attorneys represent plaintiffs in civil actions alleging misconduct by law enforcement officers, including excessive force, wrongful conviction, and conditions of confinement cases. NPAP offers training and support to its attorney and legal worker members, educates the public about police misconduct and accountability, and provides resources for nonprofit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability and appears as amicus curiae in cases, such as this one, that present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions. Transparency is an essential prerequisite to accountability and attorneys who bring civil rights actions frequently rely on recordings from police body-worn cameras to develop their clients’ cases. These recordings also empower members of the public to protect themselves against abusive police officers and advocate for reform.

¹ *Amicus curiae* conditionally files this brief with its motion for leave to file. *Amicus curiae* states that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund preparing or submitting this brief, and no person other than amicus curiae, their members, or their counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

When police officers fail to activate their body-worn cameras (BWCs) in defiance of departmental policy mandating activation, spoliation sanctions are warranted. The failure to activate a department-issued BWC manifests an intent to deprive civilian plaintiffs of the BWC footage and meets all the criteria under Federal Rule of Civil Procedure 37, which this Court considers when imposing spoliation sanctions. *See Jones v. LSU/EA Conway Medical Center*, 46 So. 3d 205, 210 (La. Ct. App. 2010) (“The Louisiana rule empowering a court to impose . . . sanctions is [substantively] identical to Federal Rule of Civil Procedure 37”). *See also Carter v. Hi Nabor Super Mkt., LLC*, 168 So. 3d 698, 704 (La. Ct. App. 2014) (citing Rule 37 when considering spoliation sanctions); *Day v. BNSF Railway Co.*, 319 So. 3d 416, 420 (La. Ct. App. 2021) (same); *Tomlinson v. Landmark Am. Ins. Co.*, 192 So. 3d 153, 160 (La. App. 2016) (“spoliation of evidence refers to the intentional destruction of the evidence for the purpose of depriving the opposing party of its use at trial.”).

Significant policy considerations also support granting spoliation sanctions against police officers who fail to activate their BWCs. First, sanctions are necessary to advance the Court’s commitment to truth in testimony and accuracy in judgment. BWCs provide civilians, police officers, and the courts with objective records of events in dispute. Several cases demonstrate that without video recordings, courts can be misled about the nature of police-civilian encounters. Second, sanctions will ensure that the costs to the public of BWCs do not outweigh their benefits. BWCs come at a substantial monetary cost to taxpayers, and the BWC’s capacity for constant surveillance can take a toll on civil liberties. The public benefit of the BWC—the camera’s function to document police officer conduct—is completely lost when police officers are effectively granted sole discretion over when to activate their BWCs. Finally, internal department discipline is not effective at ensuring compliance with department BWC policy because officers are unlikely to face meaningful consequences for violations of department policy. Five of the six NOPD officers involved in this very case had a history of BWC violations that went undetected and unpunished. *See Dept. of Police Interoffice Correspondence to Shaun Ferguson, Superintendent of Police, from Sergeant David Barnes, Public Integrity Bureau (May 31, 2019)*, at 31 – 36. An external check from the Court, in the form of the threat of spoliation sanctions, is necessary.

ARGUMENT

I. A Police Officer's Failure to Activate Their Body-Worn Camera Despite Department Policy Requiring Activation Amounts to Spoliation as a Matter of Law.

Under the rules of civil procedure, the trial court has the authority to sanction a party for the spoliation of electronically stored information (ESI) if the court finds: (1) the ESI in question once existed; (2) the party had a duty to preserve the ESI in anticipation of litigation; (3) the party failed to take reasonable steps to preserve the ESI; and (4) the ESI is irreparably lost. Fed. R. Civ. P. 37(e)(1). *See also Tomlinson*, 192 So. 32 at 160. Upon making an additional “finding that the party acted with the intent to deprive” the opposing party of the lost ESI, the court may “presume the lost information was unfavorable to the party,” “instruct the jury that it may or must presume the information was unfavorable to the party,” or even “dismiss the action or enter a default judgment.” Fed. R. Civ. P. 37(e)(2)(A)-(C).

Because BWCs are relatively new devices, and because the amendments to Federal Rule 37 are themselves relatively new, there are few cases discussing the discovery ramifications for the failure to activate the BWC. *See United States v. Garcia*, No. 1:19-cr-410-FB-1, 2021 U.S. Dist. LEXIS 150129, at *19 (E.D.N.Y. Aug. 10, 2021) (“Because of the relatively recent advent of police body cameras, there is a dearth of caselaw assessing the evidentiary consequences of a police officer's failure to comply with body camera mandates where the Fourth Amendment is implicated.”). But each element under Rule 37(e)(2) necessarily exists when a police officer contravenes department policy by failing to activate their BWC. Accordingly, an adverse spoliation inference is appropriate under this Court's standard.

A. Due to the Mechanics of the BWC, the Failure to Activate the BWC Amounts to the Destruction of Existing Evidence.

As a threshold matter, the party seeking spoliation sanctions must show that the evidence in question once existed and was later lost, destroyed, or altered. *See Crain v. City of Selma*, 952 F.3d 634, 639 (5th Cir. 2020) (holding district court did not abuse its discretion in denying spoliation sanctions upon finding “there was no evidence that video footage . . . ever existed—let alone that it was altered by the defendants.”) (emphasis in original); *Fernandez v. Centric*, No. 3:12-cv-00401-LRH-WGC, 2014 U.S. Dist. LEXIS 67888, at *25 - 26 (D. Nev. May 15, 2014) (“It is plaintiff's burden to make a prima facie showing that this evidence

existed. . . . [because o]ne of the elements of a spoliation claim is that . . . the evidence actually existed and was destroyed.”).

Almost all BWCs are manufactured so that they constantly create video footage, regardless of the police officer’s activation of the BWC. The leading supplier of BWCs in the United States, Axon,² which is also the supplier for Defendant New Orleans Police Department (NOPD),³ includes a “pre-event buffer” in its devices that keeps the BWC in a constant “standby mode in which the camera is powered on and rolling.” Harlan Yu, *The Details Beyond Body-Worn Camera Footage*, THE CHAMPION 28 (Jul. 2019).⁴ The default buffering mode for Axon BWCs lasts 30 seconds but BWCs can be configured to “capture up to 2 minutes before an event.”⁵ The BWCs used by NOPD have a buffer time of 60 seconds.⁶ New Orleans Police Department Operations Manual, Chapter: 41.3.10, *Body-Worn Camera (“BWC”)*, effective Apr. 5, 2015, at 9. When the officer taps the “Event” button on their BWC, the camera saves all the footage of the ensuing event *in addition to* the footage captured during the 30-second to 2-minute buffering time leading up to the event. Yu, *supra* at 28. If the officer never presses the “Event” button, however, the BWC remains in buffering mode and automatically records over the previous buffering footage. *Id.*

When a police officer does not activate their BWC they do not simply fail to document ensuing events but also actively delete the existing pre-event footage that has independent evidentiary value. *See id.* (“This [pre-event buffer] feature is designed to capture the moments leading up to an incident, which could provide crucial insight into why an officer began recording, especially for incidents that may have developed quickly or unexpectedly.”); David Garrick, *Report: SDPD body cameras reducing misconduct, aggressive use of force*, THE SAN DIEGO UNION-TRIBUNE (Feb. 9, 2017) (explaining that Taser Axon developed a 2-minute buffer in response to “requests from law enforcement agencies frustrated that the first

² Harlan Yu, *The Details Beyond Body-Worn Camera Footage*, THE CHAMPION 28 (Jul. 2019), available at https://www.nacdl.org/getattachment/1ab4f140-01e7-47a9-9d2c-1f67aced4615/28-30-40_harlan_yu_body_cameras_july_2019_champion_07172019_1213.pdf. Axon also claims that its model, the “Axon Body 2,” is “deployed by more major cities than any other police body camera.” Axon, *Axon Body 2*, available at: <https://www.axon.com/products/axon-body-2>.

³ New Orleans Police Department Operations Manual, Chapter: 41.3.10, *Body-Worn Camera (“BWC”)*, effective Apr. 5, 2015, at 2, available at <https://www.nola.gov/getattachment/NOPD/Policies/Chapter-41-3-10-BWC-EFFECTIVE-5-23-21.pdf/?lang=en-US>.

⁴ Available at https://www.nacdl.org/getattachment/1ab4f140-01e7-47a9-9d2c-1f67aced4615/28-30-40_harlan_yu_body_cameras_july_2019_champion_07172019_1213.pdf. All Axon models have this pre-event buffer. *See* Axon, *Axon Body 2*, *supra* note 2; Axon, *Axon Flex 2*, available at: <https://www.axon.com/products/axon-flex-2>; Axon, *Axon Body 3*, available at: <https://www.axon.com/products/axon-body-3>.

⁵ *Axon Body 2*, *supra* note 2; *Axon Flex 2*, *supra* note 4.

⁶ New Orleans Police Department Operations Manual, *supra* note 3 at 9.

generation of cameras only capture 30 seconds of footage”);⁷ Sidney Fussell, *The Always-On Police Camera*, THE ATLANTIC (Sep. 26, 2018) (discussing how on more than one occasion, pre-event buffering footage depicted police officers planting evidence moments before the BWC was activated).⁸ In other words, an officer’s failure to activate their BWC destroys existing evidence—the pre-event footage—by allowing the BWC’s pre-event loop to continue recording over itself. Spoliation sanctions are therefore wholly appropriate when an officer contravenes department policy by failing to press the BWC’s “Event” button.

B. Police Officers Have a Duty to Preserve BWC Footage by Activating Their BWCs When Department Policy So Mandates.

Rule 37(e) codifies the common law duty to preserve, *see* Advisory Committee Notes to Rule 37(e), 2015 Amendment, which is triggered when the party “has notice that the evidence is relevant to . . . or should have known that the evidence may be relevant” to pending or future litigation, *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015).

The very advent of BWCs and department policies requiring BWC activation are testament to law enforcement’s understanding that their interactions with the public may lead to litigation. Police departments regularly cite the BWC’s ability to exonerate officers from allegations of misconduct as one of the primary reasons for requiring its use. *See* Greg Hurley, *Body-Worn Cameras and the Courts*, NATIONAL CENTER FOR STATE COURTS 4 (2016) (“For some departments, the protection from liability is the paramount reason that they purchase BWC technology.”);⁹ *Body-Worn Cameras: Concepts and Issues Paper*, IACP NATIONAL LAW ENFORCEMENT POLICY CENTER 1 (Apr. 2014) (“In many instances police agencies have found the BWC useful for officers in the favorable resolution of both administrative and criminal complaints and as a defense resource in case of civil liability.”).¹⁰ Defendant NOPD has publicly acknowledged the role BWC footage plays in litigation. *See* New Orleans Police Department Operations Manual, Chap. 41.3.10, *supra*, at *PURPOSE* (a) and (d).

In addition to codifying the common law duty to preserve evidence, spoliation rules contemplate a duty to preserve stemming from “an independent requirement that the lost information be preserved,” such as requirements created by “statutes, administrative regulations, an order in another case, or a party’s own information-retention protocols.”

⁷ Available at <https://www.sandiegouniontribune.com/news/politics/sd-me-body-cameras-20170209-story.html>.

⁸ Available at <https://www.theatlantic.com/technology/archive/2018/09/body-camera-police-future/571402/>.

⁹ Available at https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0019/5617/final-bwc-report.pdf.

¹⁰ Available at <https://www.theiacp.org/sites/default/files/all/b/BodyWornCamerasPaper.pdf>.

Advisory Committee Notes to Rule 37(e), 2015 Amendment. Here, Defendant’s BWC policy functions as an independent requirement to preserve BWC footage that reinforces the common law duty to preserve in anticipation of litigation. The policy obligates officers to manually activate their BWCs when engaging with civilians in a vast array of contexts, including during vehicle pursuits.¹¹ Officers are only granted discretion to keep their BWCs off “during consensual contacts of a non-criminal nature.”¹² This policy reflects the department’s anticipation of future litigation and its understanding that BWC footage will be relevant to that litigation. The policy’s duty to preserve BWC footage thus buttresses the common law duty to preserve the footage.

C. When Officers Violate Department Policy by Failing to Activate Their BWCs They Necessarily Fail to Take Reasonable Steps to Preserve the BWC Footage.

Spoliation sanctions apply “if the information was lost because the party failed to take reasonable steps to preserve” it. Fed. R. Civ. P. 37(e). Courts consider the party’s “sophistication with regard to litigation” and the significance of the evidence relative to the financial burden of preservation when determining whether it took reasonable steps to preserve evidence. Advisory Committee Notes to Rule 37(e), 2015 Amendment; *Bistrrian v. Levi*, 448 F. Supp. 3d 454, 474 (E.D. Pa. 2020).

These factors support the inference that officers who do not activate their BWCs fail to take reasonable steps to preserve the BWC footage. First, police officers are sophisticated government actors embedded within the legal system and keenly aware of the importance of meticulous preservation of evidence. Officers also receive professional training on operating BWCs. Second, because BWC footage is highly relevant to litigation and there is no financial burden associated with activating the BWC, it is not unduly burdensome for officers to activate their BWCs when required by department policy to do so.

Defendant NOPD’s BWC policy offers additional evidence that an officer’s failure to activate their BWC amounts to the failure to take reasonable steps to preserve the footage. The policy reflects a reasonable “balance between the benefits of BWC devices[,] . . . civilians’ reasonable expectations of privacy,” and considerations of the constraints officers face on the ground. New Orleans Police Department Operations Manual, Chap. 41.3.10, *Required Activation of the BWC*. Moreover, courts regularly defer to department policies when

¹¹ New Orleans Police Department Operations Manual, Chap. 41.3.10, *supra* note 3 at 11(a) – (u).

¹² *Id.* at 14.

determining what can reasonably be expected of police officers in the field. *See Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241 (2021) (per curiam) (holding officer’s violation of department use of force policy was pertinent to determining the reasonableness of the officer’s actions); *Russell v. Wright*, 916 F. Supp. 2d 629, 644 (W.D. Va. 2013) (granting summary judgment to defendant sheriff on plaintiff’s state law claim of gross negligence in deploying of taser because the sheriff followed department taser policy); *United States v. Garcia*, No. 1:19-cr-410-FB-1, 2021 U.S. Dist. LEXIS 150129, at *18 (E.D.N.Y. Aug. 10, 2021) (noting that “the Second Circuit has effectively treated [the NYPD Patrol Guide] as binding when defining the official duties of police officers in civil cases.”). Because the officers here failed to follow their own department’s BWC policy, they failed to take reasonable steps to preserve the BWC footage.¹³

D. When Officers Fail to Activate Their BWCs, the Video Footage is Not Recoverable Through Other Means of Discovery.

The lost evidence must be irreplaceable for spoliation sanctions to apply. Fed. R. Civ. P. 37(e). “Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.”

Advisory Committee Notes to Rule 37(e), 2015 Amendment.

Lost BWC footage is not restorable or replaceable. When an officer fails to activate their BWC, the camera records over itself and the footage is lost forever. *See Harlan Yu, The Details Beyond Body-Worn Camera Footage, supra*, at 28. Moreover, the BWC of each officer at the scene captures unique footage reflecting the officer’s positioning and viewpoint. Footage from the officer furthest away from the civilian may offer critical context that the recording from the officer closest to the civilian lacks. *See Timothy Williams, James Thomas, Samuel Jacoby and Damien Cave, Police Body Cameras: What Do You See? THE NEW YORK TIMES* (Apr. 2016)¹⁴ (noting how footage of a police-civilian encounter recorded from a distance can add much-needed context to footage recorded by the BWC of the officer closest to the encounter). *See also* Phil Keren, *Hudson officers: Body cameras ‘awesome,’ a ‘great tool’*,

¹³ There are rare situations where the BWC malfunctions and fails to activate despite the officer’s best efforts. *See, e.g., Evans v. Lindley*, No. H-19-3627, 2020 U.S. Dist. LEXIS 206735, at *4 (S.D. Tex. Nov. 5, 2020) (denying spoliation sanctions where it was “undisputed that . . . [the officer] tried to activate his body camera [but] it did not record during the incident.”). But when, as here, the officers blatantly violate department policy and do not attempt to activate their BWCs, they necessarily fail to take reasonable steps to preserve relevant evidence.

¹⁴ Available at: https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html?_r=0.

AKRON BEACON JOURNAL (Mar. 2021)¹⁵ (“[I]f three different officers are handling a situation, the body camera worn by each officer will capture a slightly different viewpoint.”).

Accordingly, when any officer fails to activate their BWC, they destroy irreplaceable evidence.

E. The Violation of Department Policy Paired with the Selective Activation of the BWC Provides the Requisite Circumstantial Evidence of Bad Faith.

The Court may order an adverse inference under Rule 37(e) upon finding the spoliating party “acted with the intent to deprive another party of the information’s use in litigation.” Fed. R. Civ. P. 37(e)(2). Because “[i]ntent is rarely proved by direct evidence, . . . a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors.” *Rogers v. Averitt Express, Inc.*, 215 F. Supp. 3d 510, 517 (M.D. La. 2017) (quoting *Morris v. Union Pac. R.R.*, 373 F.3d 896, 901 (8th Cir. 2004)). Courts consider selective preservation of evidence circumstantial evidence of bad faith. *Bistrain*, 448 F. Supp. at 475-76. *See also E*Trade Secs. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 588 (D. Minn. 2005) (“a party’s decision to selectively preserve some evidence while failing to retain other [evidence] . . . may be used to demonstrate a party’s bad faith.”).

Here, the police officers’ selective activation of their BWCs suggests bad faith. Although BWCs serve important accountability functions, BWC footage also aids police officers by exonerating them from false allegations of misconduct. *See* ACLU of Massachusetts and University of California, Berkeley, School of Law’s Samuelson Law, Technology & Public Policy Clinic, *No Tape, No Testimony: How Courts Can Ensure the Responsible Use of Body Cameras* 5 (Nov. 29, 2016) (collecting cases where BWC footage exonerated officers). Police departments have also noted a decrease in allegations of misconduct since implementing BWC programs. Bureau of Justice Assistance, *Body-Worn Camera Toolkit: Body-Worn Camera Frequently Asked Questions*, U.S. DEPARTMENT OF JUSTICE 9 (describing reduction of complaints against officers in various cities that use BWCs).¹⁶ *See also* David Garrick, *supra* (describing decrease in allegations of misconduct against the San Diego Police Department). BWC footage also provides officers with valuable evidence to use when offering testimony against criminal defendants. Given the various benefits police can inure from BWC activation, their failure to activate is evidence of bad faith. *See* Tim Cushing, *ACLU Suggests Jury*

¹⁵ Available at: <https://www.beaconjournal.com/story/news/2021/03/27/udson-police-officers-using-body-cameras/4711558001/>.

¹⁶ Available at: https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BWC_FAQs.pdf.

Instructions Might Be A Fix for ‘Missing’ Police Body Camera Recordings, TECHDIRT (Dec. 2016) (“Body cameras are pretty much mainstream at this point, but when excessive force and/or misconduct are alleged, footage captured by police is often nonexistent. . . . Some [officers] repeatedly ‘forget’ to activate their cameras ahead of controversial arrests and interactions.”).¹⁷

II. Significant Policy Considerations Also Support the Imposition of Spoliation Sanctions When Police Officers Fail to Activate Their BWCs.

An adverse inference for the spoliation of BWC footage is not only rooted in caselaw but also warranted by sound policy considerations. First, an adverse inference is necessary to protect the Court’s interest in accuracy and truth. In the absence of spoliation sanctions, officers are free to avoid recording their interactions with civilians and later lie about the nature of the encounters under oath. As explained below, several cases bear out the prevalence of this type of misconduct, which can lead courts to reach inaccurate and unjust judgments. Second, an adverse inference will ensure that the costs to the public of BWCs—taxpayer money and increased surveillance—do not outweigh the benefit of BWCs as tools for holding officials accountable for misconduct. Finally, sanctions are necessary to ensure police officers follow department guidelines on BWC recording, because the internal sanctions currently in place are insufficient on their own to secure compliance.

A. An adverse inference for missing BWC footage serves the Court’s interest in accuracy and truth.

An adverse inference in the absence of BWC footage serves the Court’s interest in reaching just and accurate outcomes. Over the past several years, as video evidence has become increasingly commonplace, video footage has uncovered a startling amount of false police testimony. *See* Albert Samaha, *Blue Lies Matter: How Video Finally Proved That Cops Lie*, BUZZFEED NEWS (Jan. 2017) (collecting several cases).¹⁸ *See also United States v. Slager*, No. 2:16-cr-00378-DCN, 2018 U.S. Dist. LEXIS 6382, at *13 (D. S.C. Jan. 16, 2018) (testimony of former Charleston Police Officer Michael Slager, who claimed he fatally shot Michael Scott after Scott stole Slager’s taser, was proven false by a bystander’s video); *United States v. Simpson*, No. 16-cr-00005-CRB-1, 2021 U.S. Dist. LEXIS 94449, at *7-8 (N.D. Cal. May 18, 2021) (surveillance footage “was unequivocal in rebutting everything that the police officer

¹⁷ Available at: <https://www.techdirt.com/articles/20161130/11121036160/aclu-suggests-jury-instructions-might-be-fix-missing-police-body-camera-recordings.shtml>.

¹⁸ Available at: <https://www.buzzfeednews.com/article/albertsamaha/blue-lies-matter>.

testified to—at least as to all pertinent details.”); WCCO-TV Staff, *Original Police Statement Contradicts Video Footage in Chauvin Case*, CBS MINNESOTA (Apr. 2021) (bystander video contradicted the narrative initially released by the Minneapolis police after former officer Derek Chauvin murdered George Floyd). This phenomenon indicates that when police officers do not think there is video footage of a particular incident, or do not believe that video footage will be publicly released, they feel empowered to create self-serving narratives about the encounter. Applying an adverse inference when BWC footage is missing without adequate explanation removes any incentive for officers to avoid activating their BWCs to fabricate these narratives.

As these cases demonstrate, police officers can use the absence of BWC footage to their advantage, offering misleading and self-serving testimony. Spoliation sanctions would protect against such abuses by eliminating any incentive for officers to leave their BWCs deactivated. If the Court does not impose these sanctions, it will allow officers to continue flouting department policy and depriving the Court of the best evidence available without consequence.

B. Spoliation Sanctions Are Necessary to Ensure that the Costs to the Public of BWCs Do Not Outweigh Their Benefits.

BWC programs come at a great cost to the public, both in terms of the monetary expense to taxpayers and in terms of the potential threat BWC recordings pose to civil liberties. These costs are worthwhile if the public reaps the benefits of BWCs—transparency of police practices and accountability for unlawful police actions. But if officers unilaterally determine when to record police-civilian interactions, the costs of BWCs severely outweigh their benefits. With the ability to freely decide whether to activate their BWCs, police officers can manipulate BWCs so that they are no longer a mechanism for holding police officers accountable and only a law enforcement tool for gathering evidence and exonerating police officers.

The monetary cost of BWCs cannot be overstated. Between 2016 and 2020, the United States Congress allocated \$112.5 million to help local law enforcement agencies across the country purchase BWCs. Steve Zansberg, *Public Access to Police Body-Worn Camera Recordings (Status Report 2020)*, AMERICAN BAR ASSOCIATION (Jan. 2021).¹⁹ Defendant NOPD received \$237,000 from the United States Department of Justice in 2015. Bureau of Justice Assistance, *Body-Worn Camera Pilot Implementation Program Fact Sheet*, UNITED

¹⁹ Available at:

https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/fall2020/public-access-police-bodyworn-camera-recordings-status-report-2020/#ref20.

STATES DEPARTMENT OF JUSTICE 2 (2015).²⁰ This funding covered a mere fraction of the total cost of BWCs to NOPD. See Henrick Karoliszyn, *NOPD wearable cameras expected to cost \$1.2 million*, THE TIMES-PICAYUNE (Oct. 2013) (reporting the estimated costs of BWCs over a five-year period, including equipment and storage).²¹

BWC recordings also come at an expense to civil liberties. As BWCs become increasingly commonplace, civilians are subjected to consistent government surveillance. This is particularly so in densely-populated cities, like New Orleans, where officers in BWCs may encounter—and record—hundreds of civilians conducting “ordinary activities” on any given public street. Jay Stanley, *Police Body-Mounted Cameras: With Right Policies In Place, A Win For All*, ACLU (Mar. 2015).²² BWCs also regularly record sensitive moments and intimate places—investigations inside private homes, conversations with victims of alleged crimes. See *id.* This intrusive element of BWCs raises significant privacy concerns.

Despite these costs, BWCs can offer a major benefit to the public—a mechanism for holding police officers accountable for their misconduct. But this benefit remains illusory so long as officers have sole discretion over whether to activate BWCs. Reason suggests, and studies have confirmed, that the deterrent value of BWCs depends on whether “the camera is (i) actually worn by the officer, (ii) turned on, and (iii) used during the police-public encounter.” Barak Ariel, et. al., *Report: increases in police use of force in the presence of body-worn cameras are driven by officer discretion: a protocol-based subgroup analysis of ten randomized experiments*, 12 J. EXP. CRIM. 453, 456 (May 2016).²³ If the officer wearing the BWC has discretion over the decision to activate their BWC, the footage cannot reliably serve as an accountability measure. To the contrary, “when officers use[] their discretion to turn cameras on and off during their shifts,” researches have noted “an *increased* use of force.” *Id.* at 461. An adverse inference for missing BWC footage would finally take the discretion to activate away from police officers and ensure that BWCs act as the accountability tools they were intended to be.

²⁰ Available at: <https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/BWCPIP-Award-Fact-Sheet.pdf>.

²¹ Available at: https://www.nola.com/news/crime_police/article_37aea782-3e3f-5a65-9f5d-5a8d59138907.html.

²² Available at: <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>.

²³ Available at: <https://link.springer.com/content/pdf/10.1007/s11292-016-9261-3.pdf>.

C. Spoliation Sanctions Are Necessary to Hold Police Officers Accountable to Recording Because Department Policies Requiring Activation are Insufficient on Their Own to Ensure Compliance.

Consistent, non-discretionary activation of BWCs is critical to BWCs' proper function. Yet internal department disciplinary action is insufficient on its own to ensure officer compliance with BWC recording policies. An external accountability measure from the Court, in the form of an adverse inference for unjustifiably missing BWC footage, is needed to ensure officer compliance.

Accounts from several cities employing BWCs demonstrate the inability of department policies to secure officer compliance. For example, the Phoenix Police Department's BWC policy requires officers to activate their BWCs "during all investigative or enforcement contacts, . . . includ[ing] traffic stops," but a 2014 study found that only 6.5% of traffic stops were actually recorded. Charles M. Katz et. al., Ariz. Ctr. for Violence Prevention and Cmty. Safety, *Evaluating the Impact of Officer Worn Body Cameras in the Phoenix Police Department 22* (2014).²⁴ In Chicago, Illinois the city's Civilian Office of Police Accountability found "a pattern of disregard for BWC regulations which manifests itself in the practice of non-use and improper use of BWC equipment." Andrea Kersten, *Report on Non-Compliance with Body-Worn Camera Regulations*, CIVILIAN OFFICE OF POLICE ACCOUNTABILITY 2 (2021).²⁵ The Civilian Police Oversight Agency of Albuquerque, New Mexico "found that officers violated the department's body-worn camera recording rules more than they violated any other policy." *Street-Level Surveillance*, ELECTRONIC FRONTIER FOUNDATION (Oct. 2017).²⁶ The Agency alerted the police chief of these violations, but "the chief disagreed with the agency's conclusions and no disciplinary action was imposed." *Id.*

The widespread disregard for department policy calls for external action compelling police officers to reliably perform their BWC recording duties. Discovery sanctions for spoliated BWC footage are the proper external accountability mechanism.

²⁴ Available at: https://publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf.

²⁵ Available at: <https://www.chicagocopa.org/wp-content/uploads/2021/07/2021-07-26-BWC-Report-Package.pdf>.

²⁶ Available at: <https://www.eff.org/pages/body-worn-cameras>.

CONCLUSION

For the foregoing reasons, the Court should impose an adverse inference against defendant police officers who fail to activate their BWCs in violation of department policy.

CERTIFICATE OF COMPLIANCE

I am an attorney for amicus curiae. This brief contains 15 pages, excluding the items exempted by La. Sup. Ct. R. VII § 2. I certify that this brief complies with the requirements set forth in La. Sup. Ct. R. VII.

Dated: August 19, 2022

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