No. _____

In the Supreme Court of the United States

JOHN BORG, *et al.*,
Petitioners,

v.

TOWN OF WESTPORT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether eleven weeks of continuous, covert video surveillance of the Petitioners' home, which included surveillance of the curtilage and areas inside the home, by the Police Department of the Town of Westport, Connecticut, constituted a Fourth Amendment search that required a warrant?

PARTIES TO THE PROCEEDINGS

Petitioners, husband and wife John Borg and Alison Borg, and John Borg, *per proxima amici,* Robin Borg, were the Plaintiffs-Appellants below. The Respondents, the Town of Westport, Westport Chief of Police Dale E. Call, and Westport Police Department Detectives John Rocke, George Taylor, Anthony Prezioso, and Westport Police Officers John Lachioma and Daniel Paz, were the Defendants-Appellees.

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JURISDICTION

On March 29, 2017, the United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court for the District of Connecticut, which dismissed, pursuant to Fed. R. Civ. P. 12(b)(6), claims brought by Petitioners pursuant to 42 U.S.C. § 1983. App. A at 1. On May 22, 2017, the Second Circuit denied Petitioners' Petition for Rehearing or Rehearing En Banc. App. D at 39. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution guarantees, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

Section 1983 of Title 42 of the United States Code provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. section 1983.

STATEMENT OF THE CASE

A. Facts Material to the Question Presented

Petitioners are husband and wife John Borg and Alison Borg, and John Borg, p.p.a. on behalf of their minor child, Robin Borg. Petitioners brought this action pursuant to 42 U.S.C. § 1983, against the Town of Westport, Chief of Police Dale E. Call, Westport Police Department Detectives John Rocke, George Taylor, Anthony Prezioso, and Officers John Lachioma and Daniel Paz. App. E at 41. Petitioners alleged that over the course of eleven weeks, members of the Westport Police Department engaged in continuous, covert video surveillance of their home without a warrant. App. E at 44-46, ¶¶ 15-21. Petitioners asserted that the prolonged period of continuous, covert, warrantless video surveillance amounted to an illegal search in violation of the Fourth Amendment. The *Amended Complaint* alleges the following:

On January 30, 2015, Westport Police Detectives Lachioma and Paz requested and received permission from the Petitioners' neighbors to install covert video cameras on their property to surveil the Petitioners' home. App. E at 44-46, ¶¶ 15-27. From that date until April 20, 2015, the Defendants conducted around-the-clock covert video surveillance of the Borg's home in an effort to collect evidence of criminal activity against John Borg. *Id*. John and Alison Borg are licensed psychotherapists, who regularly treat patients in their home office. The area surveilled included the curtilage as well as inside the Borg's home, and captured details of John and Alison Borg's professional life and those of the patients who visited, all of whom reasonably expected to enjoy the confidentiality of the therapist-patient relationship. The police did not obtain a warrant prior to conducting the surveillance, or at any time thereafter. App. E at 44-46, ¶¶ 20-22.

B. Basis for Jurisdiction

On September 17, 2015 the Petitioners filed a § 1983 action in the United States District Court for the District of Connecticut. On August 18, 2016, the district court (*Thompson, J.*) granted the Respondents motion to dismiss the Petitioners action in its entirety. The Court concluded that the use of the video cameras did not render the defendants' surveillance a "search" for purposes of the Fourth Amendment. App. at 8. Final judgment dismissing the action entered on September 15, 2016. App. at 6. Petitioners filed a timely notice of appeal on September 8, 2016. The Court of Appeals for the Second Circuit affirmed the dismissal on March 29, 2017. App. at 1. The court

denied the Petition for Rehearing or Rehearing En Banc on May 22, 2017. App. at 39.

Jurisdiction was proper in the District of Connecticut under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1367(a), (supplemental jurisdiction over state law claims). The Court of Appeals for the Second Circuit had jurisdiction over the final decision of the district court pursuant to 28 U.S.C. § 1291. The United States Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE PETITION

I. The Court should grant the Petition for Writ of *Certiorari* to resolve the conflict in the lower courts on the issue whether extended covert video surveillance of a residence constitutes a "search" within the meaning of the Fourth Amendment and *Katz v. United States*, 389 U.S. 347 (1967).

This Court has left open the issue whether warrantless, "twenty-four hour surveillance of any citizen of this country" violates the Fourth Amendment. *United States v. Knotts*, 460 U.S. 276, 283-84 (1983). Supreme Court review is necessary to resolve conflicts in the lower courts as to whether, and to what extent, law enforcement may conduct prolonged, covert video surveillance of a home without a warrant or judicial oversight. Petitioners believe the answer is clear. Covert electronic surveillance represents an Orwellian invasion into personal privacy, especially when the target of the surveillance is the home. "[T]he Court since the enactment of the Fourth Amendment has stressed 'the overriding

respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,' for it is the home that, more than any other location, 'provide[s] the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance.'" *Oliver v. United States*, 466 U.S. 170, 178-79 (1984) (*quoting Payton v. New York*, 445 U.S. 573, 601 (1980).

A. Decisions from the Fifth, Seventh, Eighth, Ninth and Tenth Circuits have recognized that extended, warrantless, covert video surveillance violates a reasonable expectation of privacy.

The Fifth, Seventh, Eighth, Ninth and Tenth Circuits have concluded, without any extension or modification of the test set forth in *Katz v. United States*, 389 U.S. 347, 360 (*Harlan, J., concurring*),[1] that covert video surveillance results in a serious intrusion into personal privacy, implicating the Fourth Amendment. *See, e.g., United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) ("This type of surveillance [of a defendant's home] provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian

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[1] The touchstone of Fourth Amendment analysis to determine whether a search occurs is whether a person has a "'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (*quoting Katz v. United States*, 389 U.S. 347, 360 (*Harlan, J., concurring*)). "The inquiry has two-parts: first, whether the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *Ciraolo*, 476 U.S. at 211.

state"); *United States v. Torres*, 751 F.2d 875, 882 (7th Cir.1984) (*Posner, J.*) ("We think it also unarguable that television surveillance is exceedingly intrusive . . . and inherently indiscriminate, and that it could be grossly abused--to eliminate personal privacy as understood in modern Western nations."); *United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994) ("It is clear that silent video surveillance results . . . in a very serious, some say Orwellian, invasion of privacy"); *United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir. 1992) (*Kozinski, J.*, *concurring*)("[V]ideo surveillance can result in extraordinarily serious intrusions into personal privacy."); *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991) (finding warrantless video surveillance of office violated the Fourth Amendment rights of those who were recorded, including a person recorded in an office that was not his); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1443 (10th Cir. 1990) (holding Fed.R.Crim.P. 41(b) grants authority to district court to authorize video surveillance in commercial building); *Shafer v. City of Boulder*, 896 F.Supp.2d 915 (D. Nev. 2012) (ruling extended warrantless covert video surveillance of home constituted Fourth Amendment search); *Richards v. County of Los Angeles*, 775 F.Supp.2d 1176 (C.D.Cal. 2011) ("Outside of a strip search or a body cavity search, a covert video search is the most intrusive method of investigation a government employer could select.").[2]

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[2] In *United States v. Garcia-Gonzalez*, United States District Court, D. Mass., Criminal Action No. 14-10296 (September 1, 2015, *Sorokin, J.*) expressed similar constitutional concerns over the use of electronic surveillance. "Long-term around-the-clock monitoring of a residence chronicles and informs the 'who, what, when, why,

The Court's concerns over the use of GPS technology on the right to privacy, as set forth in *United States v. Jones*, 132 S. Ct. 945 (2012), applies with equal force to the covert video surveillance at issue in this matter. "Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring-by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track-may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.* at 955-56 (*Sotomayor, concurring*), (*quoting United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (*Flaum, J., concurring*). However, the Court has not addressed whether its reasoning in *Jones* applies to the use of covert video surveillance. Accordingly, Supreme Court review is necessary to resolve the conflict with the lower courts, as discussed below, that have found there are no Fourth Amendment issues regarding the use of this technology.

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where from, and how long' of a person's activities and associations unfolding at the threshold adjoining one's private and public lives. … Nonetheless, I must deny defendant's Motion under First Circuit precedent." *Id., citing United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009).

B. Decisions from the First, Second, Fourth and Sixth Circuits have found that extended covert video surveillance does not implicate the Fourth Amendment.

The First, Second, Fourth and Sixth Circuits have upheld the use of extended covert video surveillance, finding there was no Fourth Amendment violation because what the government had engaged in was a visual search only. *United States v. Bucci* , 582 F.3d 108, 116-17 (1st Cir. 2009) (holding eight (8) month warrantless video surveillance of defendant's driveway and garage door did not violate defendant's Fourth Amendment rights because defendant's activities were conducted in unobstructed plain view); *United States v. Davis*, 326 F.3d 361, 365 (2d Cir. 2003) ("what a person knowingly exposes to the public through an open door or window does not receive Fourth Amendment protection"); *United States v. Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009) ("[the government] could have stationed agents to surveil Vankesteren's property twenty-four hours a day . . . That the agents chose to use a more resource-efficient surveillance method does not change our Fourth Amendment analysis"); *United States v. Houston*, 813 F.3d 282, 289 (6th Cir. 2016) (*en banc*) ("the long length of time of the surveillance does not render the video recordings unconstitutionally unreasonable, because it was possible for law enforcement to have engaged in live surveillance of the farm for ten weeks."). The decision below, and those by the First Fourth and Sixth Circuits are not faithful to *Katz* and its progeny, but are based on the false equivalency that extended covert electronic surveillance is no more intrusive than visual observation.

Additionally these decisions bely the decision by this Court in *United States v. Jones*, 132 S. Ct. 945 (2012). For the reasons that follow, these decisions fail to acknowledge fundamental differences that distinguish simple visual observation from the invasion of privacy that covert electronic surveillance represents.

C. Decisions upholding extended, covert surveillance are based on the false equivalency that extended covert electronic surveillance is no more intrusive than visual observation.

The decision below by the Court of the Appeals for the Second Circuit affirmed the District Court's dismissal of the Petitioners' § 1983 action pursuant to Fed.R.Civ.P. 12(b)(6) in that the Petitioners had failed to state a claim for an illegal search. "We agree with the District Court that Plaintiffs' Fourth Amendment claim fails. Our precedent clearly states that 'what a person knowingly exposes to the public through an open door or window does not receive Fourth Amendment protection.'" App. at 3-4, *citing United States v. Davis*, 326 F.3d 361, 365 (2d Cir. 2003). The decision below, and those by the First Fourth and Sixth Circuits are not faithful to *Katz* and its progeny.

The Second Circuit, along with the other courts that have found that covert video surveillance does not implicate the Fourth Amendment, rely on *obitur dictum* from *Katz* ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967)) and the false analogy to the visual observations at issue in *Dow*

Chem. Co. v. United States, 476 U.S. 227 (1986) and *California v. Ciraolo*, 476 U.S. 20 (1986).

These courts have extended this *dictum* and the analogy to *Dow Chemical and Ciraolo* far beyond what logic and experience must allow. Both *Dow Chemical* and *Ciraolo* acknowledged that the Fourth Amendment analysis changes when the surveillance is done electronically and covertly, and when the home is the target of the government's investigation. "This is not an area immediately adjacent to a private home where privacy expectations are most heightened." *Dow Chem. Co.*, 476 U.S. at 237, n. 3. "[W]e should remember that [the history of the Fourth Amendment] reflects a choice that our society should be one in which citizens 'dwell in reasonable security and freedom from surveillance.'" *Ciraolo* at 217, *quoting Johnson v. United States*, 333 U.S. 10, 14 (1948).

Although a person may expose small details of their public movements and may have no reasonable expectation of privacy in those movements, aggregating those movements through technologies that can reveal much more than discrete pieces of information raises different Fourth Amendment concerns. "Technology advances that make 'available at a relatively low cost such a substantial quantum of intimate information about any person'" to the Government "may alter the relationship between citizen and government in a way that is inimical to democratic society." *Jones*, 132 S. Ct. at 956 (*Sotomayor, J., concurring*). Consequently, although society might be willing to accept the presence of a "nosy neighbor," or the presence of a police officer on the street, it does not logically follow that society is willing to accept as reasonable being

secretly videotaped for an extended period. *See United States v. Anderson-Bagshaw*, 509 Fed. Appx. 396, 421 (6th Cir. 2012).

Equating "visual observation," with the omnipresent eye of a covert video camera is pure "sophistry," as the Fifth Circuit recognized in *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987). In *Cuevas-Sanchez*, the government conducted video surveillance of a defendant's backyard, which was visible from the street. The court rejected the government's comparison to *California v. Ciraolo*, 476 U.S. 207 (1986), and its holding that "the Fourth Amendment simply does not require the police traveling in the public airways at [1,000 feet] to obtain a warrant in order to observe what is visible to the naked eye." The court found that the government had invaded the defendant's reasonable expectation of privacy in not being videotaped:

> Close inspection, however, discloses the sophistry underlying the government's argument.... Here, unlike in *Ciraolo*, the government's intrusion is not minimal. It is not a one-time overhead flight or a glance over the fence by a passer-by. Here the government placed a video camera that allowed them to record all activity in Cuevas's backyard. It does not follow that *Ciraolo* authorizes any type of surveillance whatever just because one type of minimally-intrusive aerial observation is possible.

Cuevas-Sanchez at 251.

The fundamental difference between "human" surveillance and covert electronic surveillance is that the latter allows the State to collect, and preserve, private information, details about one's "familial, political, professional, religious, and sexual associations," which simple human surveillance cannot. *Jones*, 132 S. Ct. at 955 (*Sotomayor, J., concurring*). It is therefore a far greater invasion of privacy than simple visual observation, warranting the protection of the Fourth Amendment.

II. The Court should grant the Petition for Writ of *Certiorari* because of the fundamental importance of the privacy interest at issue.

It is not possible to reconcile the freedoms of association, speech, and press, guaranteed by the United States Constitution with a government that can conduct unrestricted covert electronic surveillance of its citizenry. It is not hyperbole to declare, as Judge Posner did as early as 1984, that covert video surveillance "could be grossly abused--to eliminate personal privacy as understood in modern Western nations." *United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1984) (*Posner, J.*) Justice Sotomayor's warnings about the dangers of the use of GPS monitoring apply with equal force here. "I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance.'" *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (*Sotomayor, J.,*

concurring), *quoting United States v. Di Re,* 332 U.S. 581, 595 (1948).

Turning to the facts in the instant matter, detectives from the Westport Connecticut Police Department conducted video surveillance of the Petitioners' home without any judicial oversight. App. E at 45, ¶ 25. The Second Circuit was willing to conclude that this was merely a visual observation that did not implicate the Fourth Amendment, but failed to address fundamental questions about the privacy interests that were violated, the interior of their home as well as the curtilage. The Petitioners alleged that the surveillance was able to capture intimate details about the Borg's family, personal relations between husband and wife, their relationship with their young child, and their professional life over an eleven week period, in a way that human surveillance could not. App. E at 44-45, ¶¶ 20-24. Petitioners' § 1983 claim for the illegal search raises these and other privacy concerns—how long police can conduct warrantless surveillance, whether, as in the instant matter, police are allowed to enlist cooperation from the neighbors to gain vantage points not viewable from the public, and whether privacy concerns are raised when the interior of the home is target of the surveillance.

The fact that a police officer is able to glimpse through a window when passing by a private home does not give rise to a corresponding right to conduct warrantless, round-the-clock video recording, which allows collection of an aggregate of information that a visual observer could not. Such conduct is antithetical to the Fourth Amendment, and "so reminiscent of the 'telescreens' by which 'Big Brother' in George Orwell's

1984 maintained visual surveillance of the entire population of 'Oceania,' the miserable country depicted in that anti-utopian novel--that it can in no circumstances be authorized." *United States v. Torres*, 751 F.2d 875, 877 (7th Cir. 1984). Accordingly, the Court should grant the Petition for Writ of Certiorari to address these fundamental questions about the use of technological surveillance and its impact on the Fourth Amendment.

CONCLUSION

For the aforementioned reasons, the petition for writ of *certiorari* should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

16-3118-cv

[Filed March 29, 2017]

JOHN BORG, ALISON BORG, AND JOHN BORG P.P.A. ROBIN BORG, *Plaintiffs-Appellants,*	)
v.	)
TOWN OF WESPORT, DALE E. CALL, CHIEF OF POLICE, JOHN ROCKE, DETECTIVE, GEORGE TAYLOR, DETECTIVE, ANTHONY PREZIOSO, DETECTIVE, JOHN LACHIOMA, OFFICER, AND DANIEL PAZ, OFFICER, *Defendants-Appellees*.	)

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party

citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of March, two thousand seventeen.

PRESENT: JOSÉ A. CABRANES,
RICHARD C. WESLEY,
Circuit Judges.
WILLIAM K. SESSIONS III,*
District Judge.

FOR PLAINTIFFS-APPELLANTS:

A. PAUL SPINELLA, Spinella & Associates, Hartford, CT.

FOR DEFENDANTS-APPELLEES:

JONATHAN C. ZELLNER, Ryan Ryan Deluca, LLP, Stamford, CT.

Appeal from an order of the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court be and hereby is **AFFIRMED**.

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* Judge William K. Sessions III, of the United States District Court for the District of Vermont, sitting by designation.

Plaintiffs-Appellants brought claims against the Town of Westport and various state police officials, alleging violations of their rights under the Fourth Amendment to the U.S. Constitution and Connecticut tort law. The District Court granted Defendants' motion pursuant to Federal Rule of Civil Procedure 12(b)(6) and dismissed the case. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a district court's grant of a motion to dismiss *de novo*. *In re Actos End–Payor Antitrust Litig.*, 848 F.3d 89, 97 (2d Cir. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In their amended complaint, Plaintiffs alleged that Defendants installed video cameras on two neighboring properties, with those neighbors' knowledge (and apparent consent), "in an effort to obtain evidence of criminal activity." J.A. 10-20 ("Am. Compl.") ¶ 15; *see id.* ¶¶ 15-17. For almost three months,[1] Defendants "conducted continuing, around-the-clock covert surveillance of the interior of the Plaintiffs' home and the curtilage area." *Id.* ¶ 20.

We agree with the District Court that Plaintiffs' Fourth Amendment claim fails. Our precedent clearly states that "what a person knowingly exposes to the

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[1] Plaintiffs allege that the surveillance began on January 30, 2015, and that the footage was reviewed on April 5, 2015, but then allege that the surveillance lasted "until at least April 20, 3015 [sic]." *See* Am. Compl. ¶¶ 19-20.

public through an open door or window does not receive Fourth Amendment protection." *United States v. Davis*, 326 F.3d 361, 365 (2d Cir. 2003); *see also Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997) ("Although society generally respects a person's expectations of privacy in a dwelling, what a person chooses voluntarily to expose to public view thereby loses its Fourth Amendment protection."). Nor does the use of video cameras call for a different result, because such technology cannot be used "to explore details of the home that would previously have been unknowable without physical intrusion." *Kyllo v. United States*, 533 U.S. 27, 40 (2001); *see also Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) ("[S]urveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."). And to the extent that the law governing *extended* video surveillance is uncertain, Defendants would nonetheless be entitled to qualified immunity.[2]

We agree with the District Court that Plaintiffs' state law claims likewise fail. To state a claim under Connecticut law for intentional infliction of emotional distress, Plaintiffs must allege, among other things, that "the actor intended to inflict emotional distress or

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[2] Further, without an underlying constitutional violation, Plaintiffs' claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), cannot stand. *See Segal v. City of N.Y.*, 459 F.3d 207, 219 (2d Cir. 2006).

that he knew or should have known that emotional distress was the likely result of his conduct" and that "the conduct was extreme and outrageous." *Watts v. Chittenden*, 301 Conn. 575, 586 (2011). Plaintiffs' allegations do not satisfy those elements; indeed, Plaintiffs allege benignly that the video cameras were set up "in an effort to obtain evidence of criminal activity." Am. Compl. ¶ 15. With respect to Plaintiffs' other tort claims, Connecticut law provides immunity against the imposition of liability for unintentional (that is, negligent) conduct, *see Doe v. Petersen*, 279 Conn. 607, 614 (2006), and the exception to that rule upon which Plaintiffs rely is inapposite here, *see Haynes v. City of Middletown*, 314 Conn. 303, 312-13 (2014).[3]

CONCLUSION

We have reviewed all of the arguments raised by Plaintiffs on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
[SEAL]

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[3] We further agree with the District Court that Plaintiffs have no claim for indemnity under Connecticut law.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CASE NO. 3:15-CV-1380 (AWT)

[Filed September 15, 2016]

JOHN BORG; ALISON BORG;
JOHN BORG, PPA, ROBIN BORG,
Plaintiffs,

v.

TOWN OF WESPORT; DALE E. CALL,
CHIEF OF POLICE; DETECTIVE JOHN
ROCKE; DETECTIVE GEORGE TAYLOR;
DETECTIVE ANTHONY P. PREZIOSO;
OFFICER JOHN LACHIOMA;
OFFICER DANIEL PAZ,
Defendants.

JUDGMENT

This action having come on for consideration of the defendants' motion to dismiss the plaintiffs' amended complaint, before the Honorable Alvin W. Thompson, United States District Judge.

The Court having considered the full record of the case including applicable principles of law, granted the defendants' motion to dismiss. It is therefore;

ORDERED, ADJUDGED AND DECREED that judgment is hereby entered dismissing the case and the case is closed.

Dated at Hartford, Connecticut, this 15th day of September, 2016.

ROBIN D. TABORA, Clerk

By /s/ Linda S. Ferguson
Linda S. Ferguson
Deputy Clerk

EOD: 9/15/16

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:15-cv-1380 (AWT)

[Filed August 18, 2016]

JOHN BORG; ALISON BORG; and JOHN BORG, PPA, ROBIN BORG,
Plaintiffs,

v.

TOWN OF WESPORT; DALE E. CALL, CHIEF OF POLICE; DETECTIVE JOHN ROCKE; DETECTIVE GEORGE TAYLOR; DETECTIVE ANTHONY P. PREZIOSO; OFFICER JOHN LACHIOMA; OFFICER DANIEL PAZ,
Defendants.

RULING ON MOTION TO DISMISS

The Amended Complaint in this case contains seven counts: unreasonable warrantless search in violation of Fourth and Fourteenth Amendments of the United States Constitution (First Count); a Monell claim (Second Count); intentional infliction of emotional distress by the defendant officers (Third Count); negligent infliction of emotional distress by the defendant officers (Fourth Count); negligence by the

defendant officers (Fifth Count); indemnification claim against the Town of Westport pursuant to Conn. Gen. Stat. § 52-557n (Sixth Count); and indemnification claim against the Town of Westport pursuant to Conn. Gen. Stat. § 7-465 (Seventh Count).

The defendants, Town of Westport ("Westport"), Dale E. Call, Chief of Police ("Chief Call"), Detective John Rocke ("Rocke"), Detective George Taylor ("Taylor"), Detective Anthony P. Prezioso ("Prezioso"), Officer John Lachioma; and Officer Daniel Paz move to dismiss the Amended Complaint[1] in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The motion is being granted.

I. FACTUAL ALLEGATIONS

"The complaint, which [the court] must accept as true for purposes of testing its sufficiency, alleges the following circumstances." Monsky v. Moraghan, 127 F.3d 243, 244 (2d Cir. 1997).

The plaintiffs allege that "[o]n or about January 15, 2015 the Defendant police officers requested from one of the Plaintiffs' immediate neighbors that the

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[1] The defendants filed their motion to dismiss the original complaint. The plaintiffs thereafter filed a Motion to Amend Complaint (Doc. No. 18), which the court granted. (See Doc. No. 25). The defendants objected to the plaintiff's motion, but nonetheless stated, "[T]he Defendants stand by and reiterate the arguments raised in their Motion to Dismiss the original Complaint (#10), as those arguments are equally applicable to the Proposed Amended Complaint." (Doc. No. 19). Accordingly, the court considers the defendants' Motion to Dismiss as directed to the Amended Complaint (Doc. No. 26).

Westport Police Department be allowed to install video cameras to conduct surveillance of the Plaintiffs' Westport home, in an effort to obtain evidence of criminal activity." (Amended Complaint (Doc. No. 26) ("Am. Compl.") ¶ 15.) The plaintiffs allege that on or about January 30, 2015, Rocke and Prezioso installed the video surveillance equipment and began filming their home. "The areas under surveillance included the interior of the Plaintiffs' home as well as the curtilage." (Id. ¶ 16.) On February 12, 2015, Rocke and Taylor installed video cameras at a second neighbor's residence, again in order to surveil the plaintiffs' home. The plaintiffs allege that the "covert surveillance" took place "around-the-clock" from January 30, 2015 to at least April 20, 2015. (Id. ¶ 20.) The surveillance was conducted without a search warrant.

The plaintiffs allege that "[t]he Defendants' prolonged and pervasive video surveillance of the Plaintiffs' residence recorded intimate details connected [to] the Plaintiffs' home and family." (Id. ¶ 21.) The plaintiffs further allege that John and Alison Borg are both psychologists who see patients in their home and that the video surveillance "captured details of John and Alison Borg's working life and those of the patients who visited, all of whom reasonably expected to enjoy the confidentiality of the therapist-patient relationship." (Id. ¶ 22.)

In the First Count, the plaintiffs allege that the defendants acted under color of law to deprive them of their Fourth and Fourteenth Amendment rights to be free from unreasonable searches. They allege that, as a "direct and proximate result" of the surveillance, they have suffered general and special damages and are

entitled to relief under 42 U.S.C. § 1983. They further allege that "John and Alison Borg have suffered and continue to suffer mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of their family life over a period of twelve weeks" and that "[t]he minor Plaintiff, Robin Borg, has suffered and continues the suffer from a heightened level of anxiety, fear of police, feeling unsafe in her own home, mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of her life over a period of twelve weeks." (Id. I,[2] ¶¶ 28-29.)

In the Second Count, the plaintiffs allege, upon information and belief, that "the Town of Westport, by and through its Police Department, regularly conducts warrantless, covert video surveillance of its residents" and that Westport, by and through Chief Call, "had knowledge of the practice of warrantless covert video surveillance, or had they diligently exercised its duties to instruct, supervise, control, and discipline the Westport Police Department on a continuing basis, should have had knowledge of the wrongs that had been committed . . . [or] were about to be committed." (Id. II, ¶¶ 31, 33.) Additionally, they allege that Chief Call and Westport "implicitly or explicitly adopted and implemented careless and reckless policies, customs, or practices" of conducting warrantless searches in violation of constitutional rights. (Id. II, ¶ 34.) They also allege that Chief Call and Westport "failed to train the Westport Police Department in the law of search

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[2] Because the numbering of paragraphs is not continuous, the court uses roman numerals to denote from which count the court is citing.

and seizure" and that such failure allowed officers to conduct unconstitutional warrantless video surveillance of homes and property. (Id. II, ¶ 36.) The plaintiffs allege that Chief Call and Westport were in a position to prevent these alleged unconstitutional warrantless searches and "could have done so by reasonable diligence, but intentionally, knowingly, or recklessly failed or refused to do so." (Id. II, ¶ 35.) As a direct and proximate result, the plaintiffs allege that they have suffered damages.

In the Third Count, brought against the defendant officers, the plaintiffs allege that the "actions by the defendant officers were intentional, willful and deliberate, and caused the Plaintiffs to suffer from severe emotional distress, which the defendant officers knew or should have known would have resulted from their actions." (Id. III, ¶ 32.) They allege that the officers' conduct was "extreme and outrageous," that it was the "sole cause of the Plaintiffs' distress," that their distress was "severe," and that they "suffered damages." (Id. III, ¶¶ 32-35.)

In the Fourth Count, brought against the defendant officers, the plaintiffs allege that "[t]he defendant officers were negligent in causing the Plaintiff to suffer emotional distress in that the defendants should have realized that their conduct involved an unreasonable risk of causing emotional distress, and that distress might result in illness or bodily harm, and did cause the plaintiff[s] bodily harm." (Id. IV, ¶ 31.) They allege that as a result of the defendants' negligence, they have suffered damages.

In the Fifth Count, brought against the defendant officers, the plaintiffs allege that "[a]s . . . police officers

for the Town of Westport, the defendant officers owed the Plaintiffs a duty of care," that they breached this duty by conducting the warrantless search and that, as a result, the plaintiffs have suffered damages. (Id. V, ¶¶ 31-33.)

In the Sixth Count, the plaintiffs allege that "[p]ursuant to Gen. Stat. § 52-557n, the Town of Westport is liable for the injuries and losses complained of caused by the negligent acts or omissions of any officer or agent thereof acting within the scope of his employment or official duties[.]" (Id. VI, ¶ 3.)

In the Seventh Count, the plaintiffs allege that pursuant to Conn. Gen. Stat. § 7-465, Westport is liable to indemnify the officers for any damages awarded for physical damage to the plaintiffs or their property as a result of the defendant officers' video surveillance.

II. LEGAL STANDARD

When deciding a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6), the court must accept as true all factual allegations in the complaint and must draw inferences in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 550, 555 (2007) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)(on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation")). "Nor does a complaint suffice if it tenders naked assertions devoid

of further factual enhancement. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact)." Id. (citations omitted). However, the plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Id. at 1974. "The function of a motion to dismiss is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Mytych v. May Dept. Store Co., 34 F. Supp. 2d 130, 131 (D. Conn. 1999) (quoting Ryder Energy Distrib. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984)). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims." United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232).

In its review of a motion to dismiss for failure to state a claim, the court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

III. DISCUSSION

The defendants move to dismiss all counts pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that the plaintiffs have failed to state a claim upon which relief can be granted.

A. Count One -- Violation of the Fourth Amendment

The plaintiffs allege that the defendants acted under color of state law to violate their Fourth and Fourteenth Amendment rights.

> The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

The defendants argue that the plaintiffs have failed to allege that they conducted a "search" of the plaintiffs' home within the meaning of the Fourth Amendment. "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." Kyllo, 533 U.S. at 33 (citing Katz v. United States, 389 U.S. 347 (1967)). In general, "visual observation is no 'search' at all" for purposes of the Fourth Amendment. Id. at 32 (citing Dow Chemical Co. v. United States, 476 U.S. 227, 234–235 (1986)). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Florida v. Riley, 488 U.S. 445, 449 (1989) (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)). Accordingly, "what a person knowingly exposes to the public through an open door or window does not

receive Fourth Amendment protection." United States v. Davis, 326 F.3d 361, 365 (2d Cir. 2003). "Generally, the police are free to observe whatever may be seen from a place where they are entitled to be." United States v. Fields, 113 F.3d 313, 321 (2d Cir. 1997) (citing Riley, 488 U.S. at 449).

In this case, the plaintiffs do not allege that the defendant officers physically entered their property or home. In addition, the plaintiffs have not alleged that the defendant officers observed anything other than that which could be seen from a place where they were entitled to be, see Fields, 113 F.3d at 321, or that they observed anything other than what the plaintiffs voluntarily chose to expose to public view, see id. ("Although society generally respects a person's expectations of privacy in a dwelling, what a person chooses voluntarily to expose to public view thereby loses its Fourth Amendment protection." (citing Ciraolo, 476 U.S. at 213)).

Although the officers used video equipment to surveil the house, as opposed to naked-eye observation, the use of technology to conduct visual surveillance does not inherently raise constitutional concerns. See Dow Chemical Co., 476 U.S. at 238 ("the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give . . . more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems."). In Kyllo, the Supreme Court considered "how much technological enhancement of ordinary perception from

such a vantage point, if any, is too much" and "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." Kyllo, 533 U.S. at 33-34. The Court concluded that "[w]here . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." Id. at 40. In Kyllo, the Court held that use of thermal-imaging technology constituted a search of a person's home because such technology was not in general public use at the time and the information obtained would previously have been unknowable without physical intrusion. In this case, the plaintiffs do not allege facts that support an inference that the police used a device that was not in general public use at the time or that the police explored any details of the home that would previously have been unknowable without physical intrusion. Thus, they have failed to allege facts sufficient to suggest that the defendants conducted a Fourth Amendment search of their home or property.

The plaintiffs argue that Shafer v. City of Boulder, 896 F. Supp. 2d 915 (D. Nev. 2012) "foreclose[s] any argument that the Plaintiff's § 1983 claim is not legally feasible and fails to state a cause of action." (Mem. of Law in Supp. of Opp. to the Mot. to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) (Doc. No. 22-1) ("Opp.") at 5.) In Shafer, the court denied the defendants' motion for summary judgment where the government installed "four infrared, long-range, weatherproof, silent video surveillance cameras" that had been provided by the Department of Homeland Security and surveilled the

plaintiff's backyard and bathroom window around the clock for 56 days. Shafer, 896 F. Supp. 2d at 924. The court concluded that the government had violated the plaintiff's reasonable subjective and objective expectations of privacy. In concluding that the surveillance violated the plaintiff's objective expectation of privacy, the court stated:

> Importantly, it was not only [the] omnipresence and lengthy duration of the surveillance that intruded upon Shafer's expectation of privacy in his home, but also the intensity of the surveillance. The DHS cameras provided to Fenyves were long-range, infrared, heavy-duty, waterproof, daytime/nighttime cameras, purchased as part of a $50,000 Department of Homeland Security grant to combat terrorism and similar criminal activity. The DHS cameras undoubtedly contained superior video-recording capabilities than a video camera purchased from a department store. As such, this case presents similar facts to cases where "the Government uses a device that is not in general public use[] to explore details of a home that would previously have been unknowable without physical intrusion." See Kyllo, 533 U.S. at 40[.]

Shafer, 896 F. Supp. 2d at 932. Here the facts alleged do not suggest that the surveillance was comparable in terms of "intensity" to the conduct in Shafer, and that fact distinguishes this case from Shafer along the lines discussed in Kyllo.

Accordingly, the court concludes that here the use of the video cameras did not render the defendants'

surveillance a "search" for purposes of the Fourth Amendment, and the First Count is being dismissed.

B. Count Two -- Monell Violation

"A municipality or other local government may be liable under [42 U.S.C. § 1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." Connick v. Thompson, 563 U.S. 51, 60 (2011) (citing Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 692 (1978)).

> Plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.

Id. at 60-61 (citations omitted) (quoting Monell, 436 U.S. at 691).

The plaintiffs allege that Westport is liable under Monell on the grounds that Westport had the authority to make a policy to conduct covert video surveillance; that Westport had "knowledge of the practice of warrantless covert video surveillance" or should have known of the practice; that Westport "implicitly or explicitly adopted and implemented careless and reckless policies, customs, or practices" that included unconstitutional searches; that Westport had the power to prevent unconstitutional searches and refused to do so; that Westport failed to adequately train officers on the law of search and seizure; and that, as a result, the

plaintiffs suffered "general and special damages in connection with the deprivation of their constitutional rights guaranteed by the [F]ourth and [Fourteenth] [A]mendments[.]" (Am. Compl. II, ¶¶ 31-37.)

Because, as discussed above, the defendant officers did not conduct an unconstitutional search of the plaintiffs' property, the plaintiffs fail to allege a Monell claim. See Johnson v. City of New York, 551 F. App'x 14, 15 (2d Cir. 2014) ("Because he has not alleged a valid underlying constitutional deprivation, his claim against New York City pursuant to Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), must also fail. See City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986) (stating that Monell liability does not lie where municipality's officer does not inflict constitutional harm)."); Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006) ("Monell does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." (emphasis in original)).

Accordingly, the Second Count is being dismissed.[3]

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[3] To the extent the plaintiffs allege that the defendant officers' actions violated their patients' reasonable expectation of privacy (see Am. Compl. ¶ 23 ("John and Alison Borg are both psychologists, and see patients from their home. The covert surveillance further captured details of John and Alison Borg's working life and those patients who visited, all of whom reasonably expected to enjoy the confidentiality of the therapist-patient relationship.")), they do not have standing to raise a Fourth Amendment claim on behalf of their patients.

C. Count Three -- Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress under Connecticut law, a plaintiff must allege:

> (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe.

Watts v. Chittenden, 301 Conn. 575, 586 (2011) (quoting Appleton v. Bd. of Educ., 254 Conn. 205, 210 (2000)).

In this case, the plaintiffs have failed to allege facts to support the first, second and fourth requirements. As to the first requirement, the plaintiffs have failed to adequately allege that the defendant officers intended to inflict emotional distress on the plaintiffs or that they should have known that emotional distress was the likely result of their conduct. They allege that the defendant officers' actions "were intentional, willful and deliberate, and caused the Plaintiffs to suffer from severe emotional distress, which the defendant officers knew or should have known would have resulted from their actions." (Am. Compl. III, ¶ 32.) However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a). Iqbal, 556 U.S. at

678. The plaintiffs do not elsewhere make any factual allegations that could support the inference that the defendant officers intended to cause the plaintiffs emotional distress or should have known that their actions would cause such distress. To the extent the plaintiffs base their claim on the fact that the police intended to surveil the house and that the surveillance was distressing, the plaintiffs' claim also fails. See Abdella v. O'Toole, 343 F. Supp. 2d 129, 140 (D. Conn. 2004) ("A police search, legal or not, is likely to unnerve or distress most people, but an intentional infliction of emotional distress claim requires some showing of an intent to cause emotional harm."). Therefore, the court concludes that the plaintiffs have failed to allege facts sufficient to satisfy the first requirement for a claim for intentional infliction of emotional distress.

To satisfy the second requirement of a claim for intentional infliction of emotional distress, the conduct complained of must be "extreme and outrageous." "Liability for intentional infliction of emotional distress requires conduct that exceeds 'all bounds usually tolerated by decent society. . . .'" Appleton, 254 Conn. at 210 (quoting Petyan v. Ellis, 200 Conn. 243, 254 n. 5 (1986) (quoting W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 12, p. 60)).

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment

> against the actor, and lead him to exclaim, "Outrageous!"

Id. at 211 (quoting Restatement (Second), Torts § 46, comment (d), p. 73 (1965)). The plaintiffs have not alleged facts to suggest that the installation of video surveillance cameras on neighboring property exceeds "all bounds usually tolerated by decent society." First, as discussed above, the court has concluded that the plaintiffs have failed to allege that the defendant officers conducted an unlawful search. Additionally, they have failed to allege other facts that could provide a basis for their contention that the defendant officers' conduct was extreme and outrageous. For example, there is no allegation that the defendant officers observed anything that was not ordinarily visible to the plaintiffs' neighbors.

Also, while the plaintiffs allege that the defendant officers may have been able to observe patients who sought mental health treatment from the plaintiffs, they have not alleged that their neighbors or anyone passing by on the street could not have observed the same. Thus, this fact does not change the court's analysis, and the court concludes that the plaintiffs have failed to allege any facts to suggest that the defendant officers engaged in conduct that might be considered "extreme and outrageous."

In order to satisfy the fourth requirement the "distress must be 'so severe that no reasonable person could be expected to endure it.'" Craig v. Yale Univ. Sch. of Med., 838 F. Supp. 2d 4, 12 (D. Conn. 2011) (quoting Tomby v. Comty. Renewal Team, Inc., 2010 WL 5174404, at *7 (D. Conn. Dec. 15, 2010)). Comment j of Section 46 of the Restatement (Third) or Torts:

Liability for Physical and Emotional Harm states that this requirement is satisfied

> when the person seeking recovery has suffered *severe* emotional harm. Complete emotional tranquility is seldom attainable in this world, and some degree of emotional harm, even significant harm, is part of the price of living in a complex and interactive society. Requiring proof that the emotional harm is severe (and the result of extreme and outrageous conduct) provides some assurance that the harm is genuine. Thus, the law intervenes only when the plaintiff's emotional harm is severe and when a person of ordinary sensitivities in the same circumstances would suffer severe harm. . . . Severe harm must be proved, but in many cases the extreme and outrageous character of the defendant's conduct is itself important evidence bearing on whether the requisite degree of harm resulted[.]

Restatement (Third) of Torts: Phys. & Emot. Harm § 46 cmt. j (Am. Law. Inst. 2012).

The plaintiffs allege that John and Alison Borg "have suffered and continue to suffer mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of their family life over a period of twelve weeks" and that "[t]he minor Plaintiff, Robin Borg, has suffered and continues to suffer from a heightened level of anxiety, fear of police, feeling unsafe in [her] own home, mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of her life over a period of twelve weeks." (Am.

Compl. I, ¶¶ 28-29.) Although the plaintiffs are upset and distressed, they have not alleged facts sufficient to suggest that their distress was "so severe that no reasonable person could be expected to endure it." "Absent some evidence that plaintiff suffered these symptoms to an extraordinary degree, the facts alleged in his pleadings and opposition papers, taken in the light most favorable to plaintiff, do not support his claim of severe emotional distress." Almonte v. Coca-Cola Bottling Co. of N.Y., Inc., 959 F. Supp. 569, 576 (D. Conn. 1997); see also Lachira v. Sutton, No. 3:05-cv-1585, 2007 WL 1346913, at *23 (D. Conn. May 7, 2007) (no evidence was provided to support a finding "that any emotional distress suffered was 'severe,' at a level which 'no reasonable person could be expected to endure,' or that she experienced her symptoms 'to an extraordinary degree'"); Colon v. Tucciarone, No. CIV 3:02CV00891PCD, 2003 WL 22455005, at *4 (D. Conn. July 21, 2003) ("Agitation, disturbance, fear, nervousness, embarrassment, pain, and loss of faith in the law following a traffic stop, arrest, and court appearance are by no means distress that no reasonable person can be expected to endure."). Compare Mellaly v. Eastman Kodak Co., 597 A.2d 846, 848 (Conn. Super. Ct. 1991) (severe emotional distress sufficiently alleged where plaintiff alleged he "became depressed, lost sleep, suffered from anxiety attacks, stress and felt physical pain, including high blood pressure, and suffered from rashes, skin problems and a swollen face resulting from anxiety."). So, although the plaintiffs allege that "[t]he emotional distress sustained by [them] was severe[,]" (Am. Compl. III, ¶ 34), this allegation is no more than a "[t]hreadbare recital[] of the elements of a cause of action" and does

not satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a). Iqbal, 556 U.S. at 678.

Because the plaintiffs have failed to allege facts to support the first, second and fourth elements of a claim for intentional infliction of emotional distress, the Third Count is being dismissed.

D. Fourth and Fifth Counts: Negligent Infliction of Emotional Distress and Negligence

1. Governmental Immunity

The defendants argue that the Fourth and Fifth Counts, brought against the defendant officers, are barred by the doctrine of governmental immunity. Although governmental immunity is generally raised as an affirmative defense, "[a]n affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6), without resort to summary judgment procedure, if the defense appears on the face of the complaint." McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004) (quoting Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67 (2d Cir. 1998)).

Under Connecticut law, "[m]unicipal officials are immune from liability for negligence arising out of their discretionary acts[.]" Doe v. Petersen, 279 Conn. 607, 614 (2006). "The hallmark of a discretionary act is that it requires the exercise of judgment.... In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." Violano v. Fernandez, 280 Conn. 310, 318 (2006) (alterations in original) (quoting Martel v. Metro. Dist. Comm'n, 275 Conn. 38, 48–49 (2005)). It is undisputed that the defendant officers'

acts were discretionary. (See Mem. of Law in Supp. of Mot. to Dismiss (Doc. No. 10-1) at 14-16 (arguing that the defendant officers' acts were discretionary); Opp. at 16 (arguing that imminent harm exception applies)).

There are three recognized exceptions to discretionary act immunity:

> First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure. E.g., Mulligan v. Rioux, 229 Conn. 716, 728, 732, 643 A.2d 1226 (1994). Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws. See, e.g., Sestito v. Groton, 178 Conn. 520, 525–28, 423 A.2d 165 (1979). Third, liability may be imposed when "the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm...." Evon v. Andrews, supra, 211 Conn. at 505, 559 A.2d 1131.

Petersen, 279 Conn. at 615-16 (footnote omitted). The plaintiffs argue that the imminent harm exception applies. They argue that the danger to the plaintiffs "was limited in duration--the search was continuous over a twelve week period, and limited in geographical scope to the Borg's residence, thereby meeting the imminent requirement. Equally apparent was that their conduct subjected the Borg's to harm, as alleged in the Complaint." (Opp. at 17.)

As a threshold matter, the court notes that in Haynes v. City of Middletown, the Connecticut Supreme Court articulated the imminent harm to identifiable persons exception to government immunity as follows:

> "This court has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm.... This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.... All three must be proven in order for the exception to apply."

313 Conn. 303, 312-13 (2014) (quoting Edgerton v. Clinton, 311 Conn. 217, 230-31 (2014)). Thus, while there is a reference in the third requirement to the public official's "conduct," it appears from the context that the only conduct being referenced is conduct that constitutes a "failure to act."

The plaintiffs find support in Brooks v. Powers, 165 Conn. App. 44 (2016), for their argument that the defendants are liable here because "their conduct subjected the Borg's to harm." There the court stated that the Connecticut Supreme Court had "stated [the] exception in two different ways" and described the first when a public official's failure to act would be likely to subject an identifiable person to imminent harm and the second as when the three requirements set forth in

Haynes are satisfied.[4] The discussion in Brooks,

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[4] As a threshold matter, we must determine the general contours of the imminent harm, identifiable victim exception. Our Supreme Court has stated that exception in two different ways.

First, the court has said that the exception applies if "the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm...."(Emphasis added; internal quotation marks omitted.) Haynes v. Middletown, supra, 314 Conn. at 312, 101 A.3d 249. Read literally, this would mean that if it is clear before the officer acts that doing nothing likely would result in harm to the victim, then the exception applies, immunity is turned off, and whatever response or nonresponse the officer makes must be reasonable; a negligent response would subject the officer to liability. On this reading, the exception would operate as an off switch for immunity in a subset of high stakes situations, requiring officers to act reasonably when someone's life was on the line.

Second, the court has said that the exception applies if the plaintiff can show "(1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm." (Emphasis added; internal quotation marks omitted.) Id., at 313, 101 A.3d 249. Read literally, this would mean that an officer who has identified a victim as threatened by imminent harm is still free to respond unreasonably, so long as it is not apparent that the officer's particular response will likely result in harm to the victim. On this reading, the exception would generally permit officers to act unreasonably, even in high stakes situations, but would peel back that immunity if an officer showed a particularly egregious disregard for life.

We conclude that our Supreme Court's immunity jurisprudence supports the second reading of the exception. A plaintiff must therefore prove not only that it was apparent that a victim was at risk of imminent harm, but also that it was

however, is based entirely on a reading of Haynes and the language in Haynes clearly states the principle that the exception exists in the context of a failure to act.

Thus, the court concludes that one of the requirements for pleading the imminent harm to identifiable persons exception here is pleading facts that could show that the circumstances made it apparent to the defendant officers that their failure to act would be likely to subject the plaintiffs to imminent harm. Here, however, the plaintiffs have alleged that the defendant officers acted in a certain way, not that they failed to act and thus subjected the plaintiffs to imminent harm. Accordingly, the plaintiffs have not satisfied this requirement for pleading the imminent harm to identifiable persons exception.

In addition, the plaintiffs have failed to allege facts that satisfy the imminent harm requirement. To the extent the plaintiffs argue that the defendant officers' actions exposed them to imminent harm, they do not identify that imminent harm specifically in either the Fourth or Fifth Counts or in their opposition. (See Opp. at 17 ("[e]qually apparent was that their conduct subjected the Borg's to harm, as alleged in the Complaint").) To the extent the "imminent harm" is violation of the plaintiffs' Fourth and Fourteenth Amendment rights, that claim is unavailing because the court has concluded that the plaintiffs have not adequately alleged such a violation. To the extent the "imminent harm" is emotional distress experienced by

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apparent that the defendants' chosen response or nonresponse to the imminent danger would likely subject the victim to that harm.

Brooks v. Powers, 165 Conn. App. 44, 60–61 (2016).

the plaintiffs, such harm is not the type of "dangerous condition" that rises to a level so as to invoke the imminent harm to identifiable victim exception. See Bento v. City of Milford, No. 3:13CV1385, 2014 WL 1690390, at *6 (D. Conn. Apr. 29, 2014) ("courts in this state have also held that the imminent harm complained of must be physical in nature in order for the exception to apply"); Pane v. City of Danbury, No. CV97347235S, 2002 WL 31466332, at *9 (Conn. Super. Ct. Oct. 18, 2002), aff'd, 267 Conn. 669 (2004)[5] ("Cases where plaintiffs allege "imminent harm" typically involve physical harm rather than emotional distress."[6]).

Therefore, the defendant officers are entitled to governmental immunity with respect to the Fourth and Fifth Counts, and these counts are being dismissed.

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[5] Pane, 267 Conn. 669 (2004) was overruled by Grady v. Town of Somers, 984 A.2d 684 (2009). However, claims against the individual employee were withdrawn from the case before after the Superior Court decision in Pane, 2002 WL 31466332.

[6] See Elliott v. City of Waterbury, 245 Conn. 385, 715 A.2d 27 (1998) (decedent killed by hunter while on city-owned property); Purzycki v. Fairfield, 244 Conn. 101, 708 A.2d 937 (1998) (student injured in unsupervised school hallway); Fraser v. United States, 236 Conn. 625, 674 A.2d 811 (1996) (decedent stabbed at federal medical center); Burns v. Board of Education, 228 Conn. 640, 638 A.2d 1 (1994) (student injured by fall in school courtyard); Evon v. Andrews, 211 Conn. 501, 559 A.2d 1131 (1989); Gordon v. Bridgeport Housing Authority, supra, 208 Conn. 161, 544 A.2d 1185 (decedent attacked at city housing authority project); Shore v. Stonington, 187 Conn. 147, 444 A.2d 1379 (1982) (decedent killed by vehicle driven by intoxicated driver).

2. Fourth Count: Negligent Infliction of Emotional Distress

Even if the defendant officers were not entitled to governmental immunity with respect to the claim for negligent infliction of emotional distress, it should be dismissed because the plaintiffs have failed to state a claim upon which relief can be granted.

To state a claim for negligent infliction of emotional distress, a plaintiff must allege that "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." See Hall v. Bergman, 296 Conn. 169, 182 n.8 (2010) (quoting Carrol v. Allstate Ins. Co., 262 Conn. 433, 444 (2003)).

The plaintiffs allege that "[t]he defendant officers were negligent in causing the Plaintiff[s] to suffer emotional distress in that the defendants should have realized that their conduct involved an unreasonable risk of causing emotional distress, and that distress might result in illness or bodily harm, and did cause the plaintiff bodily harm." (Am. Compl. IV, ¶ 31.) As an initial matter, this is a threadbare recital of the elements of a cause of action and does not satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a).

However, even if the court were to accept this conclusory allegation as sufficient to satisfy the requirements of Rule 8(a), the plaintiffs have nonetheless failed to state a claim upon which relief

can be granted. The plaintiffs allege that the defendant officers' conduct caused them to suffer "mental anguish, shock, fright, and embarrassment" as well as "anxiety, fear of police, feeling unsafe in own home, mental anguish, shock, fright, and embarrassment[.]" (Id. I, ¶¶ 28-29.)

Assuming arguendo that this harm is sufficiently severe for purposes of a claim for negligent infliction of emotional distress, but see Abdella, 343 F. Supp. 2d at 140-41, the plaintiffs have failed to allege facts sufficient to suggest that such harm was foreseeable to the defendants.

> The foreseeability requirement in a negligent infliction of emotional distress claim is more specific than the standard negligence requirement that an actor should have foreseen that his tortious conduct was likely to cause harm. Scanlon v. Connecticut Light & Power Co., 258 Conn. 436, 446-47, 782 A.2d 87 (2001). In order to state a claim for negligent infliction of emotional distress, the plaintiff must plead that the actor should have foreseen that her behavior would likely cause harm of a specific nature, i.e., emotional distress likely to lead to illness or bodily harm. Id.

Olson v. Bristol-Burlington Health Dist., 87 Conn. App. 1, 5, (2005). The plaintiffs have not alleged facts sufficient to suggest that the defendant officers should have foreseen that their behavior would likely cause emotional distress so severe as to be likely to lead to illness or bodily harm. First, as discussed above, they have not alleged facts to show that the defendants' search was unlawful. Second, they have not alleged

facts sufficient to suggest that the manner in which the defendant officers surveilled the plaintiffs would foreseeably create an unreasonable risk of emotional distress. Cf. Olson, 87 Conn. App. at 5 ("to prevail on a claim of negligent infliction of emotional distress arising in the employment setting, a plaintiff need not plead or prove that the discharge, itself, was wrongful, but only that the defendant's conduct in the termination process created an unreasonable risk of emotional distress"). Although it is reasonably foreseeable that a covert surveillance operation would be upsetting to the person being surveilled, it is not reasonably foreseeable that a covert surveillance operation in and of itself creates an unreasonable risk of causing emotional distress so severe that it might result in illness or bodily harm. See Abdella, 343 F. Supp. 2d at 141 ("Plaintiffs allege that they are worried, depressed, unhappy in their community and that they have lost trust in the police. Any police activity may reasonably result in exactly the type of response described by the plaintiffs, regardless of its legality. As unfortunate as these experiences are, the court cannot conclude that a police search involves an unreasonable risk of such distress, or that the distress alleged by plaintiffs is so severe as to cause illness or bodily harm without some proof of such harm, and the record is devoid of sufficient proof on this point.")

Because, as alleged here, neither the fact that the defendant officers conducted video surveillance of the property nor the manner in which they conducted the surveillance could create an unreasonable risk of causing the plaintiff foreseeable emotional distress that would be severe enough that it might result in illness

or bodily harm, the plaintiffs have failed to state a claim for negligent infliction of emotional distress.

3. Fifth Count: Negligence

Even if the defendant officers were not entitled to governmental immunity with respect to the claim of negligence, it should be dismissed because the plaintiffs have failed to state a claim upon which relief can be granted.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." RK Constructors, Inc. v. Fusco Corp., 231 Conn. 381, 384 (1994). The plaintiffs allege that "[a]s . . . police officers for the Town of Westport, the defendant officers owed the Plaintiffs a duty of care." (Am. Compl. V, ¶ 31.) However, they do not allege the basis, the nature, or the scope of the police officers' alleged duty to the plaintiffs. They allege that the supposed duty was breached "by the aforementioned search, which had no justification or excuse in law, and [was] instead illegal, improper and unrelated to any activity in which law enforcement officers may rightfully engage in the course of protecting persons or property or ensuring civil order." (Id. V, ¶ 32.) It seems, then, that the alleged duty the plaintiffs claim was owed by the defendant officers is one to follow the law with respect to searches. As discussed above, however, the plaintiffs have not adequately alleged that the defendant officers have failed to do so. Accordingly, the plaintiffs have failed to state a claim for negligence upon which relief can be granted.

E. Sixth Count: Indemnity Pursuant to Conn. Gen. Stat. § 52-557n

Connecticut General Statutes Section 52-557n(a)(1) provides in pertinent part

> (a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . .

Conn. Gen. Stat. § 52-557n(a)(1). Section 52-557n(a)(2) provides an exception for discretionary acts:

> (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.

Conn. Gen. Stat. § 52-557n(a)(2). The defendant officers' conduct in this case was discretionary and none of the three exceptions to governmental immunity apply. Thus, the plaintiffs have failed to state a claim for indemnity under Conn. Gen. Stat. § 52-557n. See Violano, 280 Conn. at 335 ("[T]he municipality and its official or employee will be immune from liability for their negligence if the act complained of was discretionary in nature and does not fall within the three exceptions to discretionary act immunity.").

Therefore, the Sixth Count is being dismissed.

F. Seventh Count: Indemnity Pursuant to Conn. Gen. Stat. § 7-465

Connecticut General Statutes Sections 7-465 provides, in pertinent part:

> Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as set forth in this section, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any wilful or wanton act of such employee in the discharge of such duty.

Conn. Gen. Stat. § 7-465. The court has concluded that the plaintiffs have failed to state a claim against the defendant officers. Therefore, the plaintiffs also have failed to state a claim for indemnification pursuant to Conn. Gen. Stat. § 7-465, and the Seventh Count is being dismissed. See Myers v. City of Hartford, 84 Conn. App. 395, 401 (2004) ("Under § 7–465, the municipality's duty to indemnify attaches only when the employee is found to be liable and the employee's actions do not fall within the exception for wilful and wanton acts."); Singhaviroj v. Bd. of Educ. of Town of Fairfield, 301 Conn. 1, 5 n.4 (2011) (noting that an

indemnification claim brought under Conn. Gen. Stat. § 7-465 is "derivative of the plaintiff's claim under 42 U.S.C. § 1983 because the plaintiff cannot prevail under § 7–465 unless he prevails under § 1983").

IV. CONCLUSION

For the reasons set forth above, the Motion to Dismiss (Doc. No. 10) is hereby GRANTED.

The Clerk shall close this case.

It is so ordered.

Signed this 18th day of August 2016, at Hartford, Connecticut.

/s/
Alvin W. Thompson
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 16-3118

[Filed May 22, 2017]

John Borg, Alison Borg,	)
John Borg, ppa Robin Borg,	)
Plaintiffs - Appellants,	)
	)
v.	)
	)
Town of Westport, Dale E. Call, Chief of Police, John Rocke, Detective, George Taylor, Detective, Anthony P. Prezioso, Detective, John Lachioma, Officer, Daniel Paz, Officer,	)
Defendants – Appellees.	)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of May, two thousand seventeen.

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for

panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
[SEAL]

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL ACTION NO. 3:15-cv-01380 (AWT)

[Filed May 13, 2016]

JOHN BORG; ALISON BORG	)
JOHN BORG, PPA, ROBIN BORG	)
Plaintiffs	)
	)
v.	)
	)
TOWN OF WESTPORT; DALE E. CALL,	)
CHIEF OF POLICE DETECTIVE JOHN	)
ROCKE; DETECTIVE GEORGE TAYLOR	)
DETECTIVE ANTHONY P. PREZIOSO;	)
OFFICER JOHN LACHIOMA;	)
OFFICER DANIEL PAZ	)
Defendants	)

AMENDED COMPLAINT

Come now the Plaintiffs, John Borg, Alison Borg, and Robin Borg, and for their causes of action complain and allege as follows:

INTRODUCTION

1. This action arises under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution; under federal law, 42 U.S.C. §§ 1983 and

1988; under the common law of the State of Connecticut for intentional and/or negligent infliction of emotional distress, civil conspiracy, and negligence.

JURISDICTION

2. Jurisdiction is proper pursuant to 28 U.S.C. §§1331, 1343(3) and (4), as this action seeks redress for the violation of plaintiffs constitutional and civil rights.

3. This court has supplemental jurisdiction over Plaintiffs' state common law claims pursuant to 28 U.S.C. § 1367(a).

VENUE

4. Venue is proper in the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 1391(b) and (c).

PARTIES

5. The Plaintiff, JOHN BORG, is a citizen and resident of Westport, Connecticut.

6. The Plaintiff, ALISON BORG is a citizen and resident of Westport, Connecticut.

7. The Plaintiff, ROBIN BORG, is the minor child of Alison and John Borg, and is a citizen and resident of Westport.

8. The Defendant, DETECTIVE JOHN ROCKE, was at all times material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

9. The Defendant, DETECTIVE GEORGE TAYLOR, was at all times material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

10. The Defendant, DETECTIVE ANTHONY P. PREZIOSO, was at all times material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

11. The Defendant, OFFICER JOHN LACHIOMA, was at all times material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

12. The Defendant, OFFICER DANIEL PAZ, was at all times material to the allegations in this Complaint, acting in his capacity as a Police Officer employed by the Town of Westport, Connecticut and was acting under color of state law.

13. The Defendant, the TOWN OF WESTPORT, Connecticut, is a municipality and a political subdivision of the State of Connecticut, for which the individual Defendants serve as police officers.

14. The Town of Westport has established or delegated to Defendant, Chief of Police DALE E. CALL, the responsibility for establishing and implementing policies, practices, procedures, and customs used by law enforcement officers employed by Town of Westport regarding searches of private residences.

FACTUAL ALLEGATIONS

15. On or about January 15, 2015 the Defendant police officers requested from one of the Plaintiffs' immediate neighbors that the Westport Police Department be allowed to install video cameras to conduct covert surveillance of the Plaintiffs' Westport home, in an effort to obtain evidence of criminal activity.

16. On or about January 30, 2015 defendants ROCKE and PREZIOSO met with the neighbor, installed the video surveillance equipment, and covertly began filming Plaintiffs' home. The areas under surveillance included the interior of the Plaintiffs' home as well as the curtilage.

17. On February 12, 2015, Defendants ROCKE and TAYLOR went to a second neighbor's residence for the purpose of installing the surveillance cameras pointed at the Plaintiff's home, installed video cameras, and did begin said surveillance on the Plaintiffs' residence. The areas under surveillance also included the interior of the Plaintiffs' home as well as the curtilage.

18. On March 26, 2015, defendant officer LACHIOMA downloaded the surveillance video footage, and the footage was preserved as evidence to be used against the Plaintiffs.

19. On April 5, 2015, defendant PAZ reviewed the surveillance video footage, to determine whether the Plaintiffs had engaged in criminal activity.

20. Beginning on January 30, 2015, and lasting until at least April 20, 3015, the Defendants had conducted continuing, around-the-clock covert

surveillance of the interior of the Plaintiffs' home and the curtilage area in an attempt to obtain evidence of criminal activity.

21. The Defendants' prolonged and pervasive video surveillance of the Plaintiffs' residence recorded intimate details connected the Plaintiffs' home and family.

22. John and Alison Borg are both psychologists, and see patients from their home. The covert video surveillance further captured details of John and Alison Borg's working life and those of the patients who visited, all of whom reasonably expected to enjoy the confidentiality of the therapist- patient relationship.

23. The Plaintiffs had a reasonable expectation of privacy in interior of their home and in the curtilage area.

24. The defendants' continuing surveillance of the Plaintiffs' home over a period of nearly 12 weeks for the purpose of obtaining evidence of criminal activity, constituted a search within the meaning of the Fourth Amendment.

25. The Defendants' did not obtain a search warrant prior conducting the ongoing video surveillance and consequently violated the Fourth Amendment's prohibition against unreasonable searches.

26. Statutory notice of the Plaintiffs' claims and intention to bring this action was sent to the Town of Westport in accordance with § 7-101a and § 7-465 of the General Statutes.

FIRST COUNT: 42 U.S.C. § 1983.
Unreasonable Warrantless Search in Violation of the Fourth Amendment

1-26. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-26, above.

27. In committing the acts complained of herein, Defendants acted under color of state law to deprive Plaintiffs of certain constitutionally protected rights under the Fourth and Fourteenth Amendments to the Constitution of the United States including the right to be free from unreasonable searches.

28. John and Alison Borg have suffered and continue to suffer mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of their family life over a period of twelve weeks.

29. The minor Plaintiff, Robin Borg, has suffered and continues to suffer from a heightened level of anxiety, fear of police, feeling unsafe in own home, mental anguish, shock, fright, and embarrassment of having the government secretly videotaping the intimate details of her life over a period of twelve weeks.

30. As a direct and proximate result of the government's continuous covert video surveillance of their home over a period of nearly twelve weeks, the Plaintiffs have suffered general and special damages as alleged in this Complaint, and are entitled to relief under 42 U.S.C. § 1983.

SECOND COUNT: 42 U.S.C. § 1983– MONELL VIOLATION

1-30. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-30 of the First Count.

31. Upon information and belief, the Town of Westport, by and through its Police Department, regularly conducts warrantless, covert video surveillance of its residents.

32. The Town of Westport, by and through the Chief of Police, Dale E. Call, is vested with the authority to make the policy for the Town of Westport on the use of covert video surveillance.

33. The Town of Westport, by and through the Chief of Police, Dale E. Call had knowledge of the practice of warrantless covert video surveillance, or had they diligently exercised its duties to instruct, supervise, control, and discipline the Westport Police Department on a continuing basis, should have had knowledge of the wrongs that had been committed, as heretofore alleged, were about to be committed.

34. The Defendant, DALE E. CALL, in his capacity as Chief of Police of the Westport Police Department, and the Defendant, the TOWN OF WESTPORT, implicitly or explicitly adopted and implemented careless and reckless policies, customs, or practices, that included allowing the Westport Police Department to conduct warrantless video surveillance of private homes and property, in such a way as to violate constitutionally protected rights.

35. The Town of Westport and Chief of Police Call had power to prevent the commission of these warrantless searches and could have done so by reasonable diligence, but intentionally, knowingly, or recklessly failed or refused to do so. The allegations in this paragraph are likely to have evidentiary support after reasonable opportunity for further investigation and or discovery.

36. The Defendant, DALE E. CALL, in his capacity as Chief of Police of the Westport Police Department, and the Defendant, the TOWN OF WESTPORT, failed to train the Westport Police Department in the law of search and seizure, which allowed the Westport Police Department to conduct warrantless video surveillance of private homes and property, in such a way as to violate constitutionally protected rights.

37. As a direct and proximate result of the acts and omissions by the Town of Westport, by and through its police department and Chief of Police Call, as set forth herein, the plaintiffs suffered general and special damages in connection with the deprivation of their constitutional rights guaranteed by the fourth and 14th amendments to the Constitution of United States, and protected by 42 U.S.C. § 1983.

THIRD COUNT: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(against the defendant officers)

1-30. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-30 of the First Count.

32. The aforementioned actions by the defendant officers were intentional, willful and deliberate, and

caused the Plaintiffs to suffer from severe emotional distress, which the defendant officers knew or should have known would have resulted from their actions.

32. Said conduct was extreme and outrageous.

33. The defendants' conduct was the sole cause of the Plaintiffs' distress.

34. The emotional distress sustained by the Plaintiffs was severe.

35. As a result of the defendants' actions, the plaintiff suffered damages, as set forth above.

FOURTH COUNT: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(against the defendant officers)

1-30. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-30 of the First Count.

31. The defendant officers were negligent in causing the Plaintiff to suffer emotional distress in that the defendants should have realized that their conduct involved an unreasonable risk of causing emotional distress, and that distress might result in illness or bodily harm, and did cause the plaintiff bodily harm.

32. As a result of the defendant's negligence, the plaintiffs suffered damages, as set forth above.

FIFTH COUNT: NEGLIGENCE
(against the defendant officers)

1-30. Plaintiffs reallege and incorporate herein by reference the allegations set forth in paragraphs 1-30 of the First Count.

31. As a police officers for the Town of Westport, the defendant officers owed the Plaintiffs a duty of care.

32. The defendant officers breached that duty of care by the aforementioned search, which had no justification or excuse in law, and were instead illegal, improper and unrelated to any activity in which law enforcement officers may rightfully engage in the course of protecting persons or property or ensuring civil order.

33. As a result of the defendants' actions, the plaintiff suffered damages, as set forth above.

SIXTH COUNT: TOWN OF WESTPORT'S DUTY TO INDEMNIFY PURSUANT TO GEN. STAT.§ 52-557n

1. The Plaintiffs incorporate by reference the allegations set forth in Fourth Count as though fully set forth herein.

2. The Plaintiffs incorporate by reference the allegations set forth in Fifth Count as though fully set forth herein.

3. Pursuant to Gen. Stat. § 52-557n, the Town of Westport is liable for the injuries and losses complained of caused by the negligent acts or omissions of any officer or agent thereof acting within the scope of his employment or official duties, as complained of herein.

SEVENTH COUNT: TOWN OF WESTPORT'S DUTY TO INDEMNIFY PURSUANT TO GEN. STAT. § 7-465

1. The Plaintiff incorporates by reference the allegations set forth in First Count as though fully set forth herein.

2. The Town of Westport is legally liable to pay on behalf of defendants all sums which each becomes obligated to pay by reason of the imposed upon such employee by law for damages awarded for the physical damages to the person or property of the Plaintiff as a result of the events complained of herein pursuant to Gen. Stat. § 7- 465.

THE PLAINTIFFS,

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[*Certificate of Service omitted in printing of this Appendix*.]