

# MEMORANDUM



**FROM:** Roderick & Solange MacArthur Justice Center  
**TO:** Illinois Civil Rights Attorneys  
**RE:** Legal Primer on Body Camera Provisions in SAFE-T Act

## Introduction

On February 22, 2021, Illinois Governor J.B. Pritzker signed the SAFE-T Act (Safety, Accountability, Fairness and Equity), a landmark criminal justice and policing statute, into law. The Act impacts many aspects of Illinois’s criminal legal system. Among other things, the Act provides for new police training policies, a ban on police use of chokeholds, increased protection for whistleblowers, new guidelines for officer decertification, enhanced rights for detainees, and guidance regarding officer use of body-worn cameras. The Act also eliminates the statewide monetary bail system. The majority of the Act will take effect on July 1, 2021.

This memorandum addresses the provisions of the Act that pertain to body cameras worn by law enforcement officers and the implications of those provisions for criminal defendants and civil rights plaintiffs.

The Act sets a floor for body camera standards.<sup>1</sup> It instructs the Board to develop written body camera policies, “which must be adopted by each law enforcement agency which employs the use of officer-worn body cameras.”<sup>2</sup> At a minimum, the written policy must require all body cameras “be turned on at all times when the officer is [on duty,] in uniform and is responding to calls for service or [is] engaged in any law enforcement-related . . . activity”; capable of recording for 10 hours or more and; able to record at least the 30 seconds prior to camera

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<sup>1</sup> 50 ILL. COMP. STAT. 706/10-20 (2021).

<sup>2</sup> *Id.*

activation.<sup>3</sup> These rules are subject to a few exceptions.<sup>4</sup> The Act also enumerates specific situations when an officer is required to deactivate their body camera.<sup>5</sup> The Act does not (in contrast to the Consent Decree between Illinois and the Chicago Police Department<sup>6</sup>) include a provision that explicitly requires remedial or disciplinary measures for non-compliance.

### **Excessive Force Suits Against Individual Officers**

The Fourth Amendment protects from the use of excessive force by “law enforcement officials . . . in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen. . . .”<sup>7</sup> Excessive force claims are analyzed under the Fourth Amendment’s objective reasonableness standard.<sup>8</sup> Courts must “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”<sup>9</sup>

The inquiry is highly fact-specific and seeks to determine whether the force was reasonable.<sup>10</sup> “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the

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<sup>3</sup> United States v. Green, No. 19-CR-6164CJS, 2020 WL 6748971, at \*3 (W.D.N.Y. July 17, 2020), report and recommendation adopted, No. 19-CR-6164 CJS/MWP, 2020 WL 5810011 (W.D.N.Y. Sept. 30, 2020).

<sup>4</sup> First, they do not apply to body cameras purchased before July 1, 2015. Second, the camera may be turned off if “exigent circumstances” prevent the officer from doing so; “it must be turned on as soon as practicable,” however. If an officer is in a patrol car “equipped with a functioning in-car camera,” they may deactivate their body camera until they “exit[] the patrol vehicle for law enforcement-related encounters.” Cameras may be turned off when an officer is “engaged in community caretaking function,” unless the officer believes the person they are taking care of is in the process of committing a crime.

<sup>5</sup> Body cameras must be deactivated when: an officer is inside a correctional facility that has a “functioning camera system”; “the victim of a crime requests that the camera be turned off”; “a witness of a crime or a community member who wishes to report a crime”; “the officer is interacting with a confidential informant used by the law enforcement agency.” The relevant requests must be captured on the recording, “unless impractical or impossible.” An officer may also continue recording despite a request to deactivate, but the officer must state on the recording the reason for continuing to record.

<sup>6</sup> See *infra* Consent Decree Regarding Chicago Police Department.

<sup>7</sup> *Graham v. Connor*, 490 U.S. 386, 395 (1989).

<sup>8</sup> See *id.*; *Tennessee v. Garner*, 471 U.S. 1 (1985).

<sup>9</sup> *Id.* at 8.

<sup>10</sup> See *Graham*, 490 U.S. at 396 (stating that courts must pay “careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight”).

20/20 vision of hindsight.”<sup>11</sup> Courts often defer to an officer’s judgment in how they perceived a situation, as “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>12</sup>

We have yet to find a case where non-compliance was dispositive on questions of reasonableness or credibility in other Fourth Amendment contexts. However, some courts have relied upon evidence of a pattern of non-compliance with a body camera policy in the context of excessive force claims as part of its reasonableness analysis.<sup>13</sup> Others have considered non-compliance—even a single instance—as one of the *Graham* factors<sup>14</sup> in evaluating the circumstances.<sup>15</sup> Similar to the criminal context, some courts in civil proceedings have found non-compliance can serve as indicia of bad faith.<sup>16</sup>

### **Policy and Practice Claims Against Police Departments**

The Act contains provisions discussing the minimum standards for a written body camera policy. A municipality’s failure to implement these standards governing body cameras could serve as evidence of both a “custom” and “deliberate indifference” for the purposes of *Monell* liability.

Generally speaking, to succeed on a *Monell* claim, a plaintiff must show that a municipality adopted a policy, custom, or practice that was the moving force behind the violation of the plaintiff’s federal rights.<sup>17</sup> If premising *Monell* liability on a failure to comply with municipal or state policies, an advocate needs to (1) plead specific, factual allegations demonstrating the municipality’s (2) deliberate

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 396–97.

<sup>13</sup> *See, e.g.,* Cleveland v. Louisville Metro Gov’t, No. 3:16-CV-588-CRS, 2019 WL 1058154, at \*11 (W.D. Ky. Mar. 6, 2019), *appeal dismissed sub nom.* Cleveland v. Gadegaard, No. 19-5245, 2020 WL 1231785 (6th Cir. Jan. 6, 2020).

<sup>14</sup> *See supra* note 10.

<sup>15</sup> *See, e.g.,* L.F. v. City of Stockton, No. 2:17-CV-01648-KJM-DB, 2020 WL 4043017, at \*11 (E.D. Cal. July 17, 2020)

<sup>16</sup> Alvar v. Kay, No. 16-CV-00548-RM-KLM, 2018 WL 2730673, at \*4 (D. Colo. Jan. 29, 2018) (denying an FRE 702 Motion based upon possibility that the defendant acted in bad faith).

<sup>17</sup> *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

action that is causally linked to (3) the deprivation of federal constitutional rights.<sup>18</sup> Here, a plaintiff could rely on a police department's failure to implement state law standards governing body cameras to show deliberate indifference to a known risk that the plaintiff's constitutional rights would be violated if officers did not wear their body cameras. Such violations could include a failure to collect evidence (as a Fourteenth Amendment Due Process claim) or a failure to train.

The Seventh Circuit has suggested that the failure to implement municipal policies when required to do so can prove that a City was "on notice" of a risk of a constitutional violation and deliberately disregarded that risk, supporting a finding of constitutional liability.<sup>19</sup> The Circuit has found that institutional liability may be premised on a municipality's conscious decision not to take action, especially when departmental policymakers were aware that a failure to act could violate peoples' rights.<sup>20</sup> In particular, where federal or state law has required action to protect individuals from risk and the policymakers fail to take such action, this failure has served as evidence of municipal liability.<sup>21</sup>

The Circuit has noted, "[t]he Supreme Court has made plain that a failure to act amounts to municipal action for *Monell* purposes only if the [municipality] has notice that its program will cause constitutional violations."<sup>22</sup> As such, "notice is essential to an ultimate finding and requires a 'known or obvious' risk that constitutional violations will occur."<sup>23</sup> Often, "proof of a prior pattern of similar constitutional violations" will suffice as notice.<sup>24</sup> Such proof can include docket

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<sup>18</sup> See *McDonough v. Toles*, 476 F. Supp. 3d 882, 894 (D. Minn. 2020); *Pressler v. Nevada Dep't of Pub. Safety*, No. 319CV00494RCJWGC, 2019 WL 7340507, at \*4-5 (D. Nev. Dec. 12, 2019), *report and recommendation adopted*, No. 319CV00494RCJWGC, 2019 WL 7332744 (D. Nev. Dec. 27, 2019).

<sup>19</sup> See, e.g. *Glisson v. Indiana Department of Corrections*, 849 F.3d 372, 379-82 (7th Cir. 2017) (en banc).

<sup>20</sup> See *J.K.J. v. Polk Cty.*, 960 F.3d 367, 378 (7th Cir. 2020), *cert. denied sub nom. Polk Cty. v. J.K.J.*, No. 20-427, 2021 WL 78483 (U.S. Jan. 11, 2021) ("[A] city's policy of inaction in light of notice that its program will cause constitutional violations is the functional equivalent of a decision by the city itself to violate the Constitution.") (internal quotation marks omitted) (quoting *Connick v. Thompson*, 563 U.S. 51, 61-62 (2011)).

<sup>21</sup> See *id.* at 384 (failure to implement Prison Rape Elimination Act supported municipal liability) ("Risk that started as obvious (from the confinement setting and power dynamic between male guards and female inmates) was fully on display (following the Jorgenson incident) within an institution that scoffed at PREA, denigrated female inmates, and devoted not a word of its policies or a minute of any training session to concrete measures to prevent, detect, and respond to sexual assault. The jury stood on solid evidentiary ground seeing the County's dormancy as more than oversight, but instead as deliberate inaction.")

<sup>22</sup> *Id.* at 379 (citing *Connick*, 563 U.S. at 61-62).

<sup>23</sup> *Id.* at 379-80 (citing *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997)).

<sup>24</sup> *Id.* at 380.

analysis of claims involving violations of body cams, Freedom of Information Act requests about body camera disciplinarys, newspaper articles indicating compliance rates, etc. Even if there is no pattern, one can prove municipal liability if “deliberate indifference could be found when the violation of rights is a ‘highly predictable consequence’ of a failure to provide officers what they need to confront ‘recurring’ situations.”<sup>25</sup> In other words, where “the unconstitutional consequences of failing to [act]” are “so patently obvious,” a municipality can be held liable without a prior pattern of such violations.<sup>26</sup>

The second element of *Monell* liability would require that the City deliberately disregarded the risk raised by failure to ensure compliance.<sup>27</sup> This could be proved by showing a pattern of violations or that the violation of rights is a ‘highly predictable consequence’ of the City’s failure to provide officers with proper training and body cameras. It is unclear, at this moment, which route of proof would be more advantageous to show that the City had actual knowledge that without proper protocol, civilians’ constitutional rights could be violated.<sup>28</sup> Advocates can partially rely on the fact that the requirement to wear body cameras is an explicit law<sup>29</sup> that came after from a great deal of national discussion regarding police brutality, excessive force, and need for oversight.<sup>30</sup> Finally, the third element is critical, as courts here are as likely as courts elsewhere to find that “[t]here is no constitutional right to be free from an arrest that is not recorded by a camera,”<sup>31</sup> so the violation of another constitutional right would need to be shown.

In other jurisdictions, courts have been receptive to claims of *Monell* liability in connection with a municipality’s failure to implement state law standards governing body cameras. The federal District Court for the District of Minnesota, for example, held last year that a city’s repeated failure to stop officers

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<sup>25</sup> *Id.* (quoting *Brown*, 520 U.S. at 409).

<sup>26</sup> *Id.* (quoting *Connick*, 563 U.S. at 64).

<sup>27</sup> *See, e.g.* *Glisson v. Indiana Department of Corrections*, 849 F.3d 372, 379–82 (7th Cir. 2017) (en banc).

<sup>28</sup> *See id.*

<sup>29</sup> *Cf.* *Baldwin v. Colley*, No. 15-CV-02762-KAW, 2015 WL 5836923, at \*4 (N.D. Cal. Oct. 7, 2015).

<sup>30</sup> *See* Sarah Hayden, *Criminal Justice Reform Bill Passed in Illinois Draws Ire, Approval of Lawmakers and Police*, QUADCITY TIMES (Jan. 14, 2021), [https://qctimes.com/news/local/govt-and-politics/criminal-justice-reform-bill-passed-in-illinois-draws-ire-approval-of-lawmakers-and-police/article\\_88713e2e-1332-598c-82e9-381b65d19453.html](https://qctimes.com/news/local/govt-and-politics/criminal-justice-reform-bill-passed-in-illinois-draws-ire-approval-of-lawmakers-and-police/article_88713e2e-1332-598c-82e9-381b65d19453.html) [<https://perma.cc/RE2J-WE37>].

<sup>31</sup> *See, e.g.*, *Graham v. Rowe*, No. 19-6757, 2019 WL 3059801, at \*4 (D.N.J. July 10, 2019).

from violating a department's body-camera policy and defying orders from state authorities to track compliance with body-camera requirements lent credibility to a plaintiff's claim that the city had a custom and practice of tolerating and covering up police officers' use of excessive force.<sup>32</sup> Though the underlying claim was for use of excessive force and failure to train officers, the defendants' tolerance of "egregiously widespread violations" of body camera policies served as useful evidence of the city's deliberate indifference to police officers' use of excessive force.<sup>33</sup>

In Nevada, a federal district court has implied that a *Monell* claim for failure to implement state law standards governing body cameras would be viable if a plaintiff could show "*deliberate* action attributable to the municipality [that] directly caused a deprivation of federal rights."<sup>34</sup> The case was brought by a plaintiff who alleged that a police department failed to make or enforce any disciplinary rules for officers who do not use or otherwise attempt to manipulate the body cameras they are required to wear by Nevada law while on duty.<sup>35</sup> The officers' failure to turn on their cameras, the plaintiff alleged, deprived him of critical evidence that could have exonerated him of a crime of which he was accused.<sup>36</sup> The court construed this as a Fourteenth Amendment due process claim based on the alleged failure to collect evidence.<sup>37</sup> Though acknowledging that a municipality could be liable under § 1983 for such a constitutional injury pursuant to "(1) an official policy; (2) a pervasive practice or custom; (3) a failure to train, supervise, or discipline; or (4) a decision or act by a final policymaker," the court ultimately dismissed the claim.<sup>38</sup> The plaintiff had failed to adequately plead factual allegations showing "*deliberate* action attributable to the municipality [that] directly caused a deprivation of federal rights."<sup>39</sup>

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<sup>32</sup> McDonough v. Toles, 476 F. Supp. 3d 882, 894 (D. Minn. 2020).

<sup>33</sup> *Id.*

<sup>34</sup> Pressler v. Nevada Dep't of Pub. Safety, No. 319CV00494RCJWGC, 2019 WL 7340507, at \*4-5 (D. Nev. Dec. 12, 2019), *report and recommendation adopted*, No. 319CV00494RCJWGC, 2019 WL 7332744 (D. Nev. Dec. 27, 2019) (quoting *Horton v. City of Santa Maria*, 915 F.3d 592, 602-03 (9th Cir. 2019)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting *Horton*, 915 F.3d at 602-03).

Other district courts have been less receptive to *Monell* claims.<sup>40</sup> These courts, however, are located in states with no explicit laws mandating that officers *must* wear body cameras.<sup>41</sup> As such, the failure to wear a camera has perhaps seemed less egregious - compliance is more like an aspiration than a floor.<sup>42</sup>

In light of district courts elsewhere recognizing *Monell* liability for failure to implement standards governing body cameras and the relative receptiveness of the Seventh Circuit to *Monell* claims of this type, such a claim could likely succeed.

## **Implied Private Right of Action**

The text of the Act does not explicitly provide for or disclaim the existence of a private right of action. The stated remedy for a violation of the requirement to wear body cameras is criminal enforcement under a new felony charge called “law enforcement misconduct.”<sup>43</sup> The charge makes it a class 3 felony for a law enforcement officer to fail to comply with department policies regarding body cameras.<sup>44</sup> The Act’s only other means for encouraging departments as a whole to comply with the body camera requirement is found within the state Law Enforcement Camera Grant Act.<sup>45</sup> The Act amends the earlier law to give preference in grant funding to agencies complying with the requirement.<sup>46</sup> As there is no explicit private cause of action in the text of the Act, advocates will have to persuade courts to create one.

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<sup>40</sup> See, e.g., *Graham v. Rowe*, No. 19-6757, 2019 WL 3059801, at \*4 (D.N.J. July 10, 2019) (“There is no constitutional right to be free from an arrest that is not recorded by a camera.”); *Baldwin v. Colley*, No. 15-cv-2762, 2015 WL 5836923, at \*4 (N.D. Cal. Oct. 7, 2015) (“Plaintiffs have not cited any authority that squarely supports their position . . . that the City’s non-use of body cameras provides a basis for *Monell* liability. . . . It cannot be said . . . that the failure to use body cameras constitutes deliberate indifference to constitutional rights as a matter of law.”).

<sup>41</sup> See *Baldwin*, 2015 WL 5836923, at \*4.

<sup>42</sup> See, e.g., *id.* (“The Court is unpersuaded by the argument that ‘recurring situations in Antioch and across the nation have made it plainly clear that police misconduct is highly predictable in the absence of body-cams.’ Rather, as Defendants contend, requiring officers to wear body cameras ‘may be a commendable goal for a police department to strive for, should they have the necessary resources.’).

<sup>43</sup> 720 ILL. COMP. STAT. 5/33-9 (2021).

<sup>44</sup> *Id.*

<sup>45</sup> 50 ILL. COMP. STAT. 706/10-15 (2016).

<sup>46</sup> *Id.*

In Illinois, state courts recognize the existence of implied private rights of action.<sup>47</sup> Indeed, Illinois courts “have continually demonstrated a willingness to imply a private remedy, where there exists a clear need to effectuate the purpose of an act.”<sup>48</sup> An implied right of action exists when “(1) [an individual] is a member of the class for whose benefit the Act was enacted; (2) it is consistent with the underlying purpose of the Act; (3) plaintiff’s injury is one the Act was designed to prevent; and (4) it is necessary to provide an adequate remedy for violations of the Act.”<sup>49</sup> In undertaking this analysis, courts inquire as to whether the statute created a custodial right for the plaintiff alongside a corresponding duty on the defendant.<sup>50</sup>

Analogous jurisdictions with similar broadly applicable body camera requirements include Connecticut,<sup>51</sup> South Carolina,<sup>52</sup> Nevada,<sup>53</sup> and California.<sup>54</sup> None of these states, however, included an explicit private right of action in their statutes nor have they so far developed any case law regarding whether an implied cause exists. One other jurisdiction which has adopted laws surrounding the use of

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<sup>47</sup> See *Moore v. Lumpkin*, 630 N.E.2d 982, 989 (Ill. App. Ct. 1994).

<sup>48</sup> *Sawyer Realty Grp., Inc. v. Jarvis Corp.*, 432 N.E.2d 849 (Ill. 1982). See also *Fiumetto v. Garrett Enterprises, Inc.*, 749 N.E.2d 992, 1000 (Ill. App. Ct. 2001) (“In the present case, a private right of action is necessary to make the Unemployment Act effective. Absent such a right, employers could freely coerce employees to refrain from seeking benefits under the Unemployment Act through threats of termination.”); *King v. Senior Servs. Assocs., Inc.*, 792 N.E.2d 412, 418 (Ill. App. Ct. 2003) (“[A]n implied private cause of action is the only method by which an employee involved in providing services to victims of elder abuse and neglect can seek a remedy for discrimination by her employer. The right to be free from employer discrimination is no right at all if there is no remedy for such discrimination.”); *Pechan v. DynaPro, Inc.*, 622 N.E.2d 108, 115 (Ill. App. Ct. 1993) (“We hold that there is an implied private right to damages for individuals who have suffered discrimination under section 9 of the Act.”).

<sup>49</sup> *Rodgers v. St. Mary’s Hosp. of Decatur*, 597 N.E.2d 616, 619 (Ill. 1992) (quoting *Corgan v. Muehling*, 574 N.E.2d 602, 609 (1991)).

<sup>50</sup> See *Bd. of Educ. of City of Chi. v. A, C & S, Inc.*, 546 N.E.2d 580, 600 (Ill. 1989) (in determining whether implied right of action exists, “[c]ourts have inquired whether the statute imposes a duty of behavior on the defendant”). See also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979) (the right- or duty-creating language of [a] statute has generally been the most accurate indicator of the propriety of implication of a cause of action.”) (holding that an implied private right of action exists for victims of sex-based discrimination under Title IX).

<sup>51</sup> CONN. GEN. STAT. ANN. § 29-6d (West 2019) (requiring state police, special police forces, and municipal police officers receiving grant funds to wear body cameras while interacting with the public).

<sup>52</sup> S.C. CODE ANN. § 23-1-240 (2015) (requiring police departments throughout the state to implement a body camera program).

<sup>53</sup> NEV. REV. STAT. ANN. § 289.830 (West 2016) (requiring uniformed peace officers to wear body cameras while interacting with the public).

<sup>54</sup> S.B. 85, 2015 Leg., Reg. Sess. (Cal. 2015) (requiring certain members of the state highway patrol to wear body cameras).



body cameras (though not an explicit mandate to police officers to wear them) has explicitly disclaimed the existence of a private right of action.<sup>55</sup>

Illinois courts have been reluctant to find an implied private cause of action if other adequate remedies exist, either as a part of the statute or through other causes of action. In other words, state courts uphold such implied causes where *no* other remedy protects a person's rights.<sup>56</sup> Where a statute includes its own enforcement mechanism under criminal law or violations can be redressed through, for instance, a federal §1983 civil rights action, the court may not find the action to exist. But this point is not settled.<sup>57</sup> Finally, Illinois courts are amenable to hearing public policy arguments supporting the existence of a private cause of action for a violation.<sup>58</sup>

To find a private right of action under the new body camera provision, an advocate would have to persuade the court that the plaintiff suffered an injury stemming from an officer's failure to turn on his/her camera or wear it. Then, the court would then have to find that the law regarding body cameras was enacted for the benefit of this particular type of plaintiff and to prevent this very kind of injury.<sup>59</sup> There is scant legislative history about the purpose of the Act and whether policed civilians are the "intended beneficiaries" of the body camera law. News articles note, however, that the house bill from which it is derived was authored

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<sup>55</sup> Michigan's Law Enforcement Body-Worn Camera Privacy Act requires that body camera recordings are safeguarded as required for crime victims under the Crime Victim's Rights Act. MICH. COMP. LAWS ANN. § 780.311 (West 2018). An officer's failure to comply, however, does not justify a private right of action. *See id.* § 780.832 ("Nothing in this article shall be construed as creating a cause of action for money damages against the state, a county, a municipality or any of their agencies, instrumentalities, or employees.").

<sup>56</sup> *See Noyola v. Bd. of Educ. of City of Chicago*, 671 N.E.2d 802, 806 (Ill. App. Ct. 1996) ("In this situation, where all the State and local entities charged with implementing the General Assembly's mandate have been alleged to have been derelict in doing so, a private right of action is both necessary and proper to provide the school children with an adequate remedy."), *aff'd sub nom. Noyola v. Bd. of Educ. of the City of Chi.*, 688 N.E.2d 81 (Ill. 1997).

<sup>57</sup> *See, e.g., Heimgaertner v. Benjamin Elec. Mfg. Co.*, 128 N.E.2d 691, 693 (Ill. 1955) ("When a statute is enacted for the protection of a particular class of individuals, a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not specifically mentioned therein.").

<sup>58</sup> *Sawyer Realty Grp., Inc. v. Jarvis Corp.*, 432 N.E.2d 849, 852 (Ill. 1982) ("[T]he public policy underlying certain statutes demands implication of a private remedy to compensate an aggrieved individual belonging to that class of persons whom the statute was designed to protect."); *Montague v. George J. London Mem'l Hosp.*, 396 N.E.2d 1289, 1292 (Ill. App. Ct. 1979) ("[P]ublic policy considerations are material when analyzing statutory provisions with respect to ascertaining whether they may support civil actions such as that pursued by plaintiff in the present case.").

<sup>59</sup> *See Rodgers v. St. Mary's Hosp. of Decatur*, 597 N.E.2d 616, 619 (Ill. 1992).

and heavily sponsored by members of the legislative Black Caucus.<sup>60</sup> Advocates can rely on the fact that Black lawmakers were motivated to pass the law because of the police brutality Black people face nationwide and indeed held more than a dozen public hearings last year on topics included in the Act.<sup>61</sup> Such resources can prove that the Act’s provisions, such as the one regarding body cameras, are aimed at protecting the rights of civilians in their interactions with the police.

The court may begin its analysis by noting that the statute imposes a clear duty on officers to wear a camera and on departments to ensure their officers’ compliance with doing so. From this statutorily imposed duty, the court would draw out the corresponding custodial right for the “victim” of its violation.<sup>62</sup> It is unclear, however, what per se injury would amount from an officer’s failure to turn on a body camera. The lack of a clear right is a detriment to the likelihood of a court finding an implied cause of action.

The key portion of the four-factor test for implied private rights of action to consider here, however, is the fourth prong – whether a cause of action is necessary to provide an adequate remedy for violations of the statute. The fact that the Act explicitly provides for criminal enforcement as the remedy for non-compliance works against the implied cause of action,<sup>63</sup> but Illinois courts have recognized that an implied civil remedy can supplement a statutory criminal remedy.<sup>64</sup> Moreover, advocates can contend that the criminal penalty alone is not an “adequate” remedy. First, any criminal proceeding would be brought by and in the name of the state, not the victim of the officer’s violation. This would offer redress to the state, not the victim. Second, if in the years since the law is passed, officers

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<sup>60</sup> Patrick Smith, *Pritzker Signs Massive Criminal Justice Bill, Law Enforcement Leaders Warn It Will Make Illinois Less Safe*, WBEZ CHICAGO (Feb. 22, 2021, 4:08 PM), <https://www.wbez.org/stories/pritzker-signs-massive-criminal-justice-bill-law-enforcement-leaders-warn-it-will-make-illinois-less-safe/fa59e3a1-b6a9-486e-8a94-75d4a1c4c1fa> [<https://perma.cc/Q8AA-FK9U>] (noting that the Act “was drafted in response to last summer’s protests against police brutality”).

<sup>61</sup> Dean Olsen, *Emotions High During Illinois Lawmakers’ Votes on Black Caucus’ Criminal Justice Reforms*, STATE-J. REG. (Jan. 14, 2021, 12:41 am), <https://www.sj-r.com/story/news/2021/01/14/emotions-high-illinois-lawmakers-vote-criminal-justice-bill/4153580001/> [<https://perma.cc/NA9K-8WJ9>] (“Black lawmakers, mobilized by the killings of Black people at the hands of police in recent years nationwide, said their caucus held more than a dozen public hearings covering more than 40 hours of testimony last year on topics dealt with in the bill.”).

<sup>62</sup> See *Bd. of Educ. of City of Chi. v. A, C & S, Inc.*, 546 N.E.2d 580, 600 (Ill. 1989) (in determining whether implied right of action exists, “[c]ourts have inquired whether the statute imposes a duty of behavior on the defendant”).

<sup>63</sup> See 720 ILL. COMP. STAT. 5/33-9 (2021).

<sup>64</sup> See, e.g., *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 128 N.E.2d 691, 693 (Ill. 1955).

who fail to comply with this provision rarely face criminal sanctions for their behavior, lawyers can argue that an additional remedy is necessary for the protection afforded to victims to be honored. Such public policy arguments are recognized in Illinois in the context of implied causes of action.<sup>65</sup> To that extent, in the years following the statute's implementation, advocacy organizations should observe how often criminal prosecutions for committing a class 3 felony are initiated against officers who intentionally violate the statute and fail to wear/turn on their body camera.

In light of the statutory text and relevant case law, it is less likely that a court would find an implied private right of action for an officer's failure to wear or turn on a body camera. The burden to prove the existence of such a right is high on a plaintiff and lack of clarity regarding the right sought in tandem with the availability of criminal remedies might lead a court to dispose of the need for a further, private cause of action.

### **Consent Decree Regarding Chicago Police Department**

In 2019, the U.S. District Court for the Northern District of Illinois approved a wide-ranging consent decree (Decree) over the Chicago Police Department (CPD).<sup>66</sup> The Decree was entered as a result findings by the United States Department of Justice in 2017 that CPD had a pattern and practice of using discriminatory and excessive force against Black and Latinx people, and in the wake of two lawsuits filed by advocacy and community groups against CPD challenging these practices. Within its Use of Force section, the consent decree includes body camera guidance. There are several provisions within the consent decree that overlap with the Act, but the Act provides a more granular and comprehensive set of body camera guidance.

The Decree states that CPD “will continue to develop, implement, and maintain a system of video recording officers’ encounters with the public” via body camera. The Act is consistent; however, it provides a specific schedule for police

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<sup>65</sup> *Sawyer Realty Grp., Inc. v. Jarvis Corp.*, 432 N.E.2d 849, 852 (Ill. 1982) (holding that a private right of action can be implied where “the public policy underlying certain statutes demands implication of a private remedy to compensate an aggrieved individual belonging to that class of persons whom the statute was designed to protect.”).

<sup>66</sup> *See Illinois v. City of Chi.*, No. 17-CV-6260, 2019 WL 398703 (N.D. Ill. Jan. 31, 2019) (approving the consent decree).

departments to implement body camera usage.<sup>67</sup> The Decree reinforces that “CPD will develop and implement a written policy delineating the circumstances when officers will not be equipped with bodyworn cameras.” All “officers assigned to patrol field duties” must “wear body-worn cameras and microphones with which to record law-enforcement related activities as outlined in the Illinois Law Enforcement Officer-Worn Body Camera Act [(Act)]. . . .” The requirement is not absolute. The Decree does observe the Act’s “limited exceptions” to when and where an officer must operate their camera, “including, but not limited to, when requested by a victim or witness of a crime, or interacting with a confidential informant.”

The Decree sets minimum operation standards for CPD’s body camera policy. Specifically, the policy must “clearly state which officers are required to use body-worn cameras and under which circumstances.” CPD policy must “require officers, subject to limited exceptions specified in writing, to activate their cameras when responding to calls for service and during all law enforcement-related activities that occur while on duty, and to continue recording until the conclusion of the incident.” If an officer fails to record an activity in contravention of CPD policy, that officer must articulate in writing or on camera their reason(s) for failing to record . . . .”

Though the Act’s operational requirements are consistent with the Decree’s, they are significantly more detailed. The Act requires the Illinois Training and Standards Board “develop basic guidelines for the use of officer-worn body cameras by law enforcement agencies,” which must serve as “the basis for the written policy which must be adopted by each law enforcement agency which employs the use of officer-worn body cameras.” The Act requires “[c]ameras . . . be turned on at all times when the officer is in uniform and is responding to calls for service or engaged in any law enforcement-related encounter or activity, that occurs while the officer is on duty.”

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<sup>67</sup> The Act provides that “municipalities and counties with populations of 500,000 or more, body cameras shall be implemented by January 1, 2022.” By January 1, 2023, “municipalities and counties with populations of 100,000 or more but under 500,000” are required to have implemented body cameras. The year after that—“by January 1, 2024”—“municipalities and counties with populations of 50,000 or more but under 100,000 . . . shall” have implemented body cameras. “[B]y January 1, 2025” both “municipalities and counties under 50,000” and “the Department of State Police” shall have body cameras implemented in their respective departments. The Act also provides a measure that preferences relevant departments to receive funding from the Illinois Law Enforcement Training Standards Board under the Law Enforcement Camera Grant Act to ensure they can comply with the implementation requirements.

The Act's operational guidance also includes enumerating specific instances where the camera *must* be turned off,<sup>68</sup> as well as instances where officers *may* deactivate their cameras.<sup>69</sup> There is also minimum operational guidance and functionality for all agency policies, including pre-event recording standards,<sup>70</sup> recording duration minimums,<sup>71</sup> and situations calling for notice of recording.<sup>72</sup> These standards all have analogs in the Decree. Other than the requirement to provide notice of recording to persons with a reasonable expectation of privacy and body camera replacement provisions, the Act's requirements are more granular or specific than analogous provisions in the Decree.

The Decree requires CPD officers provide a certain level of maintenance of their cameras before each "tour of duty," including a visual inspection to "ensure that it is the member's assigned camera, fully charged, and operational[.]" If an officer's "body-worn camera becomes inoperable (including when either or both of the audio or video recording functions is inoperable) or is damaged," the Decree requires that officer "notify a supervisor as soon as practical[.]" In the event an officer reports an inoperable or damaged camera, CPD "will ensure" that officer is "promptly provided with a temporary or replacement body-worn camera, which will in no event be later than the beginning of the member's next tour of duty." The Act provides similar guidance, though it does not require officers inspect their

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<sup>68</sup> Officers are required to turn their cameras off when "(A) the victim of a crime requests that the camera be turned off, and unless impractical or impossible, that request is made on the recording; (B) a witness of a crime or a community member who wishes to report a crime requests that the camera be turned off, and unless impractical or impossible that request is made on the recording; or (C) the officer is interacting with a confidential informant used by the law enforcement agency. However, an officer may continue to record or resume recording a victim or a witness, if exigent circumstances exist, or if the officer has reasonable articulable suspicion that a victim or witness, or confidential informant has committed or is in the process of committing a crime. Under these circumstances, and unless impractical or impossible, the officer must indicate on the recording the reason for continuing to record despite the request of the victim or witness."

<sup>69</sup> "Cameras may be turned off when the officer is engaged in community caretaking functions. However, the camera must be turned on when the officer has reason to believe that the person on whose behalf the officer is performing a community caretaking function has committed or is in the process of committing a crime. If exigent circumstances exist which prevent the camera from being turned on, the camera must be turned on as soon as practicable."

<sup>70</sup> All cameras must be equipped with pre-event recording function "capable of recording at least the 30 seconds prior to camera activation, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015."

<sup>71</sup> All "[c]ameras must be capable of recording for a period of 10 hours or more, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015."

<sup>72</sup> "The officer must provide notice of recording to any person if the person has a reasonable expectation of privacy and proof of notice must be evident in the recording. If exigent circumstances exist which prevent the officer from providing notice, notice must be provided as soon as practicable."

cameras before each tour of duty,<sup>73</sup> nor does the Act include dashboard camera guidance, as the Decree does.<sup>74</sup>

Both the Decree and Act provide guidance on footage retention and storage. The Decree has a general requirement that CPD “establish a download and retention protocol,” and incorporates the provisions of the Law Enforcement Officer-Worn Body Camera Act (Act). Most of the provisions in the Act were incorporated into the Act.<sup>75</sup>

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<sup>73</sup> The Act requires law enforcement agencies “ensure proper care and maintenance of officer-worn body cameras. Upon becoming aware, officers must as soon as practical document and notify the appropriate supervisor of any technical difficulties, failures, or problems with the officer-worn body camera or associated equipment. Upon receiving notice, the appropriate supervisor shall make every reasonable effort to correct and repair any of the officer-worn body camera equipment.”

<sup>74</sup> Specifically, the Decree requires “CPD officers assigned to Department vehicles that are equipped with in-car cameras check that the cameras are fully functional at the beginning of each watch and make appropriate notifications when they are not. CPD will ensure that any nonfunctioning or malfunctioning in-car camera is repaired or replaced within two weeks of a CPD officer reporting that the in-car camera is not functioning properly.”

<sup>75</sup> For instance, the exceptions to the storage policy for the video evidence is identical between both statutes.

<sup>76</sup> Officers are required to turn their cameras off when “(A) the victim of a crime requests that the camera be turned off, and unless impractical or impossible, that request is made on the recording; (B) a witness of a crime or a community member who wishes to report a crime requests that the camera be turned off, and unless impractical or impossible that request is made on the recording; or (C) the officer is interacting with a confidential informant used by the law enforcement agency. However, an officer may continue to record or resume recording a victim or a witness, if exigent circumstances exist, or if the officer has reasonable articulable suspicion that a victim or witness, or confidential informant has committed or is in the process of committing a crime. Under these circumstances, and unless impractical or impossible, the officer must indicate on the recording the reason for continuing to record despite the request of the victim or witness.”

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recording duration minimums,<sup>79</sup> and situations calling for notice of recording.<sup>80</sup> These standards all have analogs in the Decree. Other than the requirement to provide notice of recording to persons with a reasonable expectation of privacy and body camera replacement provisions, the Act's requirements are more granular or specific than analogous provisions in the Decree.

The Decree requires CPD officers provide a certain level of maintenance of their cameras before each "tour of duty," including a visual inspection to "ensure that it is the member's assigned camera, fully charged, and operational[.]" If an officer's "body-worn camera becomes inoperable (including when either or both of the audio or video recording functions is inoperable) or is damaged," the Decree requires that officer "notify a supervisor as soon as practical[.]" In the event an officer reports an inoperable or damaged camera, CPD "will ensure" that officer is "promptly provided with a temporary or replacement body-worn camera, which will in no event be later than the beginning of the member's next tour of duty." The Act provides similar guidance, though it does not require officers inspect their cameras before each tour of duty,<sup>81</sup> nor does the Act include dashboard camera guidance, as the Decree does.<sup>82</sup>

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The Decree also includes disciplinary guidance. It mandates CPD “require periodic random review of officers’ videos for compliance with CPD policy and training purposes[.]” Further, all CPD supervisors must “review videos of incidents involving reportable uses of force by a subordinate[.]” In event an officer violates the body camera policy, the Decree requires CPD policy “specify that officers who knowingly fail to comply with the policy may be subject to progressive discipline, training, or other remedial action.”

This is a key distinction between the Act and Decree. While the Act mandates body camera programs and sets minimum guidance for law enforcement policies, it does not include a provision that necessitates internal discipline or remedial action for non-compliance. A more general, potential inconsistency between the Act and Decree is the Act’s delegation to the Illinois Training and Standards Board to craft “basic guidelines” to serve as the basis of written policies for police departments within the state. These guidelines could conceivably relate to any portion of body camera policy, but most likely relate to requirements concerning when to activate and the scope of exceptions to activation. But without more on what the Board’s guidelines may entail, we cannot conclude there will be no inconsistencies between the consent decree and Act.

### **Criminal Cases**

In jurisdictions where officers are required to utilize body cameras, defendants will sometimes rely on body camera policies to support a motion to suppress evidence. [I would have this piece right here, in a footnote: Generally speaking, a search is unreasonable under the Fourth Amendment if it is conducted without a warrant supported by probable cause.<sup>84</sup> Probable cause to arrest exists when the “totality of the facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, [to] believe[e], in the circumstances shown, that the suspect has committed, or is committing, or is about to commit an offense.”<sup>85</sup> When officers conduct a search that is unreasonable under the Fourth Amendment, the exclusionary rule generally requires suppression of any evidence obtained from the search.<sup>86</sup>]

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<sup>84</sup> *See, e.g.*, *United States v. Parker*, 469 F.3d 1074, 1077 (7th Cir. 2006).

<sup>85</sup> *United States v. Paige*, 870 F.3d 693, 699–700 (7th Cir. 2017) (internal quotation marks and citation omitted).

<sup>86</sup> *See, e.g.*, *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016); *United States v. McGraw*, 571 F.3d 624, 628 (7th Cir. 2009).



Typically, they will argue that the evidence supporting their arrest was found during a search that is unreasonable under the Fourth Amendment, and the officer's likely testimony to the contrary lacks credibility because they failed to comply with the relevant body camera policy. While relevant, an officer's failure to comply with a body camera policy or general order is typically not sufficient to result in the suppression of evidence.

Often, officers will testify that the situation was too dangerous or dynamic for them to pause to activate their cameras.<sup>87</sup> Most body camera policies, including the Act, are not absolute. Instead, the policies will provide for non-compliance in instances where activation is not practicable. Such carveouts permit some level of discretion for officers, and courts will sometimes defer to the officer's judgment in whether activation was practicable or not. Even in instances where courts find an officer's "reason he delayed activating his body camera . . . unpersuasive" and related testimony "inaccurate," they will still consider an officer's "tone" and "demeanor" during evidentiary hearings in evaluating testimony to support probable cause.<sup>88</sup> In other words, non-compliance, without more, is generally not sufficient to result in suppression.<sup>89</sup>

In cases where courts grant motions to suppress based upon partial or a failure to comply with body camera policies, it is generally when the government had to overcome the burden of proof and could not due to an absence of evidence.<sup>90</sup> Some courts have also found non-compliance as sufficient to support a

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<sup>87</sup> See, e.g., *United States v. Griffin*, No. 18-CR-100-PP, 2018 WL 4929397, at \*2 (E.D. Wis. Oct. 11, 2018) (testifying that making sure the suspect "could not retrieve or discard a firearm or any other type of weapon" precluded two officers from activating their cameras, despite a departmental policy).

<sup>88</sup> See, e.g., *United States v. Green*, No. 19-CR-6164CJS, 2020 WL 6748971, at \*6 (W.D.N.Y. July 17, 2020), report and recommendation adopted, No. 19-CR-6164 CJS/MWP, 2020 WL 5810011 (W.D.N.Y. Sept. 30, 2020); *United States v. Macklin*, No. 2:18-CR-20162-JTF, 2018 WL 7342471, at \*6 (W.D. Tenn. Nov. 5, 2018), report and recommendation adopted, No. 2:18-CR-20162-JTF-1, 2019 WL 126854 (W.D. Tenn. Jan. 8, 2019), aff'd, 819 F. App'x 372 (6th Cir. 2020); *United States v. Lett*, No. CR 16-0127-WS, 2016 WL 4487873, at \*3 (S.D. Ala. Aug. 24, 2016) ("The mere absence of a video recording of the subject traffic infractions, without more, neither negates the presence of probable cause for conducting the traffic stop nor otherwise gives rise to a Fourth Amendment violation.")

<sup>89</sup> See, e.g., *United States v. Griffin*, No. 18-CR-100, 2018 WL 6167863, at \*3 (E.D. Wis. Aug. 7, 2018), report and recommendation adopted, No. 18-CR-100-PP, 2018 WL 4929397 (E.D. Wis. Oct. 11, 2018); *United States v. Tillard*, No. 18-CR-6091-FPG-JWF, 2019 WL 8105894, at \*5 (W.D.N.Y. Oct. 4, 2019), report and recommendation adopted, No. 18-CR-6091-FPG, 2020 WL 57198 (W.D.N.Y. Jan. 6, 2020); *United States v. Taylor*, 312 F. Supp. 3d 170, 178 (D.D.C. 2018); *United States v. Brown*, No. 17-CR-58, 2017 WL 8941247, at \*15-16 (D. Nev. Aug. 14, 2017).

<sup>90</sup> See, e.g., *United States v. Lawley*, No. 1:18-CR-4, 2018 WL 3598517, at \*9 (D. Utah July 26, 2018)

motion to dismiss when it can identify bad faith in the officer’s non-compliance.<sup>91</sup> In at least some instances, courts have found that an officer selectively engaging or failing to engage their body cameras negatively impacted the credibility of that officer’s testimony, even where the police department lacked any formal body camera policy.<sup>92</sup> Further, courts have evinced some solicitude to viewing non-compliance as support for a motion to suppress in instances where an officer has accumulated a record of non-compliance with a body camera policy.<sup>93</sup>

The text of the Act’s body camera provision suggests it is sufficiently similar to other jurisdictions. It is likely that Illinois state and federal courts will analyze Fourth Amendment claims that implicate non-compliance in a similar fashion. A failure to adhere to the Act’s requirements will likely not be enough to impeach testimony, as courts appear to analyze multiple factors—only one of which is how fastidious an officer was in operating their body camera—in assessing the credibility of an officers’ testimony.

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<sup>91</sup> See, e.g. *United States v. Taylor*, 312 F. Supp. 3d 170, 178 (D.D.C. 2018); *United States v. Brown*, No. 2:17-CR-58, 2017 WL 8941247, at \*15–16 (D. Nev. Aug. 14, 2017), *adopted by* 2018 WL 451556 (D. Nev. Jan. 16, 2018). Cf. *United States v. Gibson*, 366 F. Supp. 3d 14, 26-27 (D.D.C. 2018) (finding “[b]y failing to adhere to MPD policy and activate their body-worn cameras, the MPD officers deprived the Court from reviewing the best evidence available” but declining to find bad faith by noting that “[t]he Court need not infer that the MPD officers were intentionally not activating their body-worn cameras” and granting suppression on other grounds (emphasis in original)).

<sup>92</sup> See, e.g., *United States v. Bell*, No. 17-CR-90-PP, 2018 WL 2002807, at \*3–8 (E.D. Wis. Apr. 30, 2018). For additional information on Milwaukee Police Department’s body camera rollout, see BRYCE E. PETERSON, LILLY YU, NANCY LA VIGNE & DANIEL S. LAWRENCE, *THE MILWAUKEE POLICE DEPARTMENT’S BODY-WORN CAMERA PROGRAM: EVALUATION FINDINGS AND KEY TAKEAWAYS* (2018), [https://www.urban.org/sites/default/files/publication/98461/the\\_milwaukee\\_police\\_departments\\_body\\_worn\\_camera\\_program\\_1.pdf](https://www.urban.org/sites/default/files/publication/98461/the_milwaukee_police_departments_body_worn_camera_program_1.pdf) [<https://perma.cc/9EHW-HVUK>].

<sup>93</sup> See, e.g., *Griffin*, No. 18-CR-100, 2018 WL 6167863, at \*4–5; *United States v. Tillard*, No. 18-CR-6091-FPG, 2020 WL 57198, at \*7 (W.D.N.Y. Jan. 6, 2020).