



August 14, 2017

OPEN LETTER CONCERNING FIRST AMENDMENT RETALIATION

Via Fax (225) 925-6106
& U.S. Mail-Delivery Confirmation
Col. Kevin W. Reeves
Superintendent, Louisiana State Police
7919 Independence Boulevard
Baton Rouge, LA 70806

Dear Col. Reeves:

The ACLU Foundation of Louisiana has determined—after several interviews and a review of public records—that a Louisiana State Trooper took retaliatory action against a driver who engaged in speech protected by the First Amendment of the United States Constitution as well as by Article I, Section 7 of the Louisiana State Constitution.

On December 28, 2016, the driver was heading east on Interstate 20 near Rayville when he passed a trooper parked on the opposite side of the interstate. The driver gave “the finger” to the trooper as he passed. Minutes later, the trooper pulled the driver over and, after conferring with other troopers who arrived at the scene, issued a citation to the driver for an alleged violation of La. R.S. 14:122, “Public Intimidation,” a felony that carries a maximum punishment of five years’ imprisonment and a \$1,000 fine.

The trooper’s action of pulling the driver over and issuing the citation was contrary to law. “Public Intimidation” is defined as “the use of violence, force, or threats upon [a public officer or public employee] with the intent to influence his conduct in relation to his position, employment, or duty.” La. R.S. 14:122. The driver used no violence, force, or threat on the trooper, and there is no evidence of intent to influence the trooper’s official conduct. His gesture does not fit the statutory definition of “public intimidation,” and it was not a crime.

More importantly, this gesture is protected speech. *See, e.g., Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990); *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1102 (W.D. Ark. 2000); *see also Brockway v. Shepherd*, 942 F. Supp. 1012, 1017 (M.D. Pa. 1996); *Commonwealth v. Kelly*, 2000 PA Super 254, 758 A.2d 1284, 1288 (Pa. Super. Ct. 2000).

To illustrate, the plaintiff in *Duran* was arrested on a disorderly conduct charge after shouting expletives and making obscene gestures toward a police officer. 904 F.2d at 1372. The court held that the officer’s arrest may have been retaliatory. *Id.* at 1377-78. “If true, this would constitute a serious First Amendment violation [because] the First Amendment ‘protects a significant amount of verbal criticism and challenge directed at police officers.’” *Id.* at 1378 (quoting *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)).

“While police, no less than anybody else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment,” the Court said. *Id.* at 1378.

Similarly, the *Nichols* plaintiff sued a police officer who issued a disorderly conduct citation in response to the plaintiff gesturing at him with his middle finger. 110 F. Supp. 2d at 1102. “While we agree the gesture utilized by [the plaintiff] was crude . . . it was . . . protected as ‘free speech’ under the First Amendment,” the district court ruled. *Id.* at 1110. As these cases demonstrate, the “weight of federal authority establishes that directing the middle finger at a police officer is protected expression under the First Amendment” absent a showing that it is otherwise illegal in the specific factual context. *Corey v. Nassan*, 2006 U.S. Dist. LEXIS 68521 at *36 (W.D. Pa. Sept. 25, 2006) (citation omitted).

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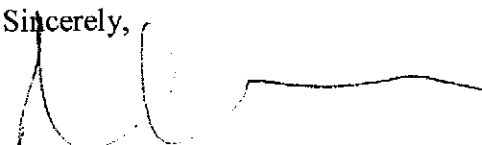
Because the driver in this case was engaged in Constitutionally protected speech, and the Louisiana State Trooper’s actions in chilling that speech were motivated by the driver’s passing gesture, the trooper was engaged in illegal First Amendment retaliation. *See Cripps v. State Dep’t of Agric. & Forestry*, 819 F.3d 221, 229 (5th Cir. 2016) (citing *Keenan v. Tejada*, 290 F.3d 252 (5th Cir. 2002)). Moreover, the trooper had no probable cause to pull over the driver: He alleged no traffic violation or illegal activity other than “Public Intimidation.” Notably, the state attorney who reviewed the citation declined to prosecute the case; he obviously agreed that the charge was baseless.

We bring this incident to your attention to urge you to ensure that your officers understand the full scope of rights that are collectively known as free speech and are protected under the First Amendment. Among the freedoms this country provides is the right to criticize the government and public officials, including police officers. As the United States Supreme Court instructs, the First Amendment “protects a significant amount of verbal criticism and challenge directed at police officers.” *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).

We appreciate that the job of policing in the 21st century can be difficult, and we hope your officers will focus on more serious and legitimate threats to public safety rather than on actions that violate the rights of the public.

If you have any questions, please feel free to contact me.

Sincerely,



Marjorie Esman
Executive Director