No. 21-1827

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DIJON SHARPE,

Plaintiff–Appellant,

v.

WINTERVILLE POLICE DEPARTMENT, Officer WILLIAM BLAKE ELLIS, in his official capacity only, and Officer MYERS PARKET HELMS IV, in his individual and official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Case No. 4:19-cv-00157-D (Hon. James C. Dever III)

BRIEF OF AMICI CURIAE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC, AND THE DUKE UNIVERSITY SCHOOL OF LAW FIRST AMENDMENT CLINIC IN SUPPORT OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1827 Caption: Dijon Sharpe v. Winterville Police Department, et al.

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If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Lin Weeks Date: 11/10/2021

Counsel for: Amici Curiae

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No. 21-1827 Caption: Dijon Sharpe v. Winterville Police Department, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

University of Virginia School of Law First Amendment Clinic
(name of party/amicus)

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Counsel for: Amici Curiae

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No. 21-1827 Caption: Dijon Sharpe v. Winterville Police Department, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

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(name of party/amicus)

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Counsel for: Amici Curiae

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IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Amici have obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The University of Virginia School of Law First Amendment Clinic and the Duke University School of Law First Amendment Clinic ("the Clinics") have public missions to protect and advance the freedoms of speech, press, assembly, and petition. The Clinics represent clients with First Amendment claims and provide public commentary and analysis on freedom of expression issues. In light of their frequent representation of journalists, and other individuals engaged in citizen oversight of the government, the Clinics have a strong interest in promoting the sound interpretation of the First Amendment in a way that does not dilute the right to record law enforcement activity.

RULE 29(A)(4)(E) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than amici, their members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

This case presents a question of central importance to a free press—whether the right to record police activity in public encompasses the right to broadcast that recording contemporaneously with the activity (that is, in "real time"). If allowed to stand, the district court's holding that the First Amendment does not protect the right to livestream a traffic stop *at all* could significantly impair the ability of the press and public to gather and disseminate information about government conduct. It also runs counter to the overwhelming consensus in the federal courts that the act of recording government activity in public—which often is broadcast in real time—is clearly protected by the First Amendment and subject, like all First Amendment activity, only to reasonable time, place, and manner restrictions. Accordingly, amicus offers three arguments in support of Appellant.

First, the district court's assertion of a legal distinction between livestreaming and other forms of recording inverts the appropriate First Amendment analysis. If anything, the immediacy offered by livestreaming weighs in favor of its First Amendment protection, because the technology offers a uniquely unfiltered view into events as they unfold, and serves to protect the material from being deleted, modified, or otherwise suppressed. *Cf. Knight v. Montgomery Cnty.*, 470 F. Supp. 3d 760, 767-68 (M.D. Tenn. 2020) (crediting plaintiffs' argument that livestreaming may be distinct from video recording, and

indeed *more* expressive, due to its "communicative nature on social media"). As such, seen either as a corollary of the right to record or as an independent expressive act with unique communicative value, livestreaming is First Amendment activity.

Second, the district court cited officer safety concerns in finding both that a right to livestream a traffic stop does not exist and that, even if it did exist, a policy barring livestreaming by a passenger during a traffic stop would survive intermediate scrutiny. *Sharpe v. Ellis*, No. 19-157, 2021 WL 2907883, at *4-*7 (E.D.N.C. July 9, 2021). While the district court did not address whether a right to livestream existed for bystanders (including, for instance, photojournalists), it is difficult to see how the hypothetical officer safety concern identified by the court—that a livestream could disclose the location of the encounter and facilitate, for instance, a "coordinated attack," *id.* at *4—would exist only in the passenger context. Put more concretely, a television news crew positioned across the street from a traffic stop and reporting live would provide the public with effectively the same information as a passenger livestream, including the location. The logic underpinning the district court's holding could therefore be read to justify restrictions on newsgathering that have long been held violative of the U.S. Constitution. *See, e.g.*, *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) ("Defendants have made no claim before this court that Anderson was

in an improper place and it seems clear that employees of the news media have a right to be in public places and on public property to gather information, photographically or otherwise.").

Finally, ***third***, although this Court has not, as yet, recognized a clearly established constitutional right to record police activity, subject only to reasonable time, place, and manner restrictions, six other circuits have done so, and no court has held affirmatively that the right to record *or* livestream categorically does not exist. "Filming the police contributes to the public's ability to hold the police accountable," *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017), and this accountability of the state to the public—the public's ability to "see, examine, and be informed of their government," *ACLU of Ill. v. Alvarez*, 679 F.3d 583, (7th Cir. 2012)—is a "basic, vital, and well-established liberty safeguarded by the First Amendment." *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011). Amici therefore urge this Court to follow the prevailing trend and recognize that the press and public have a First Amendment right to record police activity in public, which would include the real-time broadcast of that recording.

ARGUMENT

I. The First Amendment protects the right to broadcast police activity in real time, as recording and broadcasting are inherently connected, and real-time broadcasting promotes government transparency and accountability.

A. The right to record encompasses the right to broadcast recorded footage to others.

The district court's assertion of a legal distinction between livestreaming and other forms of recording misconstrues the relationship between capturing and sharing information. The court created a legal and a practical distinction where one does not exist. "There is no fixed First Amendment line between the act of creating speech and the speech itself." *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017). Whether a restriction "applies to creating, distributing, or consuming speech makes no difference[;]" all such restrictions burden speech and are suspect. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 793 n.1 (2011). No other court has distinguished between a right to record and a right to simultaneously broadcast that footage. Principal Brief of Petitioner-Appellant at 43, Sharpe v. Winterville Police Dep't, No. 21-1827 (4th Cir. Nov. 3, 2021). Further, as society embraces increasingly rapid forms of communication, any distinction between creating a record and disseminating it will continue to erode. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 376 (2011).

Livestreaming is the act of instantaneously broadcasting recorded footage. It collapses recordation and publication into one action and allows content to be shared as it is captured. While Facebook Live and other new technologies have enabled more individuals to stream content, the news media has long relied on live feeds from its cameras to convey information to viewers. Live images are powerful and frequently used tools in reporting, including feeds capturing traffic conditions and incidents. *See, e.g.*, Triangle Traffic—Cameras, Speed Data, Accident Reports, https://perma.cc/TF86-PRJ3 (last visited Nov. 5, 2021).

As such, if a right to record exists, a corollary right to broadcast the recording must also exist. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("[T]he act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech . . . as a corollary of the right to disseminate the resulting recording."). And the immediacy of the broadcast should make no difference—otherwise the First Amendment would apply differently to a live "breaking news" segment versus a story on the evening news, an untenable and absurd result. *See Quraishi v. St. Charles Cnty.*, 986 F.3d 831, 834 (8th Cir. 2021) (finding that police interference with a live broadcast was unconstitutional because "[r]eporting is a First Amendment activity," and "[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1979)).

B. Even if this Court considers the act of live broadcasting to be distinct from recording, First Amendment protection would similarly apply.

Even if the right to record police activity in public is analytically distinct from the real-time broadcast of that recording, the latter is still clearly expressive and worthy of First Amendment protection. Immediate access to information is often beneficial, particularly when that information has implications for government transparency and accountability. For example, courts often recognize the importance for members of the press, or other concerned members of the public, to gain immediate access to court proceedings and judicial records. *See, e.g.*, *Grove Fresh Distrib., Inc. v. Everfresh Juice Co*., 24 F.3d 893, 897 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous."), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009); *see also Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) ("[T]his Court has rejected pleas by litigants that the public right of access can be accommodated 'by releasing the information after [the] trial has concluded, when all danger of prejudice will be past,' reasoning that 'the value of openness . . . is threatened whenever immediate access to ongoing proceedings is denied, whatever

provision is made for later public disclosure.'") (quoting *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir. 1991)).

Access to judicial records and a right to live broadcast police activity achieve similar public benefits: accountability of law enforcement. *See In re App. Aff. for Search Warrant*, 923 F.2d at 331 ("Society has an understandable interest not only in the administration of criminal trials, but also in law enforcement systems and how well they work. The public has legitimate concerns about methods and techniques of police investigation: for example . . . whether they are unnecessarily brutal or instead cognizant of suspects' rights."). The immediate dissemination of information about police activity thus can serve a dual purpose—it captures an independent record of an encounter to compare against the official account, and it can demonstrate that allegations of police misconduct are, in fact, unfounded. *See, e.g.*, Alex Horton, *In Violent Protest Incidents, a Theme Emerges: Videos Contradict Police Accounts*, Wash. Post (June 6, 2020), https://perma.cc/UTU8-5VX7 ("Taken together, the incidents show how instant verification of police accounts have altered the landscape of accountability."); Justin Zaremba, *Dashcam Proves Woman Lied About Cop Aiming Gun at Her*, NJ.com (Dec. 2, 2015), https://perma.cc/3JUT-JH8S.

Further, a prohibition on livestreaming may amount to a prior restraint. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 609 (1976) (White, J., concurring)

("Even if [prior restraints] are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech . . . Indeed, it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.") (quoting Alexander Bickel, The Morality of Consent 61 (1975)); *Elrod v. Burns*, 427 U.S. 347, 373–7 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citing *N.Y. Times v. United States*, 403 U.S. 713 (1971)). Mandating a delay between a recording and its dissemination needlessly imposes a pre-publication restraint on the ability to share information essential to the public interest. *See, e.g.*, *In re App. Aff. for Search Warrant*, 923 F.2d at 331 (noting that the public's already significant interests in oversight of the government may be magnified in the context of the criminal justice system). Categorically excluding livestreaming from First Amendment protection—and thus permitting such restraints—would be particularly injurious to members of the news media, as the public relies on the media to keep them informed. *See Neb. Press Ass'n v. Stuart,* 427 U.S. at 587 (Brennan, J., concurring) ("Commentary and reporting on the criminal justice system is at the core of First Amendment values.").

As such, the act of livestreaming may itself be considered a form of expression, entitled to independent protection under the First Amendment. *See Knight*, 470 F. Supp. 3d at 767 (finding, for the purposes of a motion to dismiss,

that "due to its communicative nature on social media," plaintiffs had "plausibly suggest[ed] that livestreaming is expressive conduct").

C. Live broadcasting has unique communicative value.

While the right to record police activity in public is an indispensable protection for the press and public alike, live broadcasting is especially valuable in that it conveys immediacy, urgency, and cannot be manipulated or suppressed. For instance, when Philando Castile was fatally shot by a police officer at point-blank range during a traffic stop in 2016, his girlfriend Diamond Reynolds promptly started streaming the immediate aftermath on Facebook Live, which was viewed millions of times and led to national and international attention. *See* Fred Ritchin, *In the Livestream Era, 'The Trauma Is Widespread'*, Time (July 11, 2016), https://perma.cc/7K98-LE4V.

Further, live footage carries inherent, enhanced credibility, as it cannot be edited or modified. Indeed, traditional news outlets increasingly incorporate livestreaming technology over the internet to gather and disseminate time-sensitive news as it happens. After a bystander captured the fatal shooting of Alfred Olango in San Diego in 2016, Fox 5 San Diego used Facebook Live to stream the press conference later that day. *See* Rachel Taves Sheffield, *Facebook Live as Recordmaking Technology*, 85 Archivaria 96, 100 (2018). Livestreaming also precludes the possible suppression or deletion of a recording, as Facebook Live

and analogous services typically automatically upload streamed content to the cloud. *See, e.g.*, Facebook Help Center, *Can I Save My Facebook Live Video to my Computer After It's Ended?*, https://perma.cc/YVD4-8DRJ (last visited Nov. 4, 2021) ("Once your live stream has ended your video will automatically post to your timeline and save to your Facebook video library."). This security offered by livestreaming is critical for contemporary journalism, particularly as journalists in any medium increasingly use their smartphones to capture audio and video footage of the stories they cover. Joseph Bien-Kahn, *7 Tips for Reporting Live Via Your Phone from Anywhere*, Wired (Nov. 16, 2016), https://perma.cc/8UBP-VCM5 ("Rather than shoot video of an event and store it on your mobile device—which could be confiscated or destroyed—you should livestream it to make sure the footage is secure."). And the concern that government officials may have an incentive to delete or destroy footage is not hypothetical. *See, e.g.*, *Philadelphia Police Officer Tyree Burnett Charged After Allegedly Deleting Video from Man's Cellphone During Arrest*, CBS Philly (July 21, 2021), https://cbsloc.al/3mRCF5v; Chris Koeberl, *Denver Police Accused of Using Excessive Force, Illegal Search*, Fox 31 (Nov. 24, 2014), https://perma.cc/A5RY-HPYJ (reporting that officers seized tablet and deleted recording of incident, which was recovered from the cloud); Timothy B. Lee, *Journalist Recovers Video of His Arrest After Police Deleted It*, Ars Technica (Feb. 6, 2012), https://perma.cc/LJT6-PNFN.

In sum, the act of livestreaming is inherently expressive and protected by the First Amendment, either as a corollary of the right to record or as an independent form of expression, and it has unique communicative value as it conveys the immediacy of an event and is less susceptible to modification or deletion.

II. The hypothetical threat to officer safety identified by the district court is insufficient to categorically exclude livestreaming from First Amendment protection.

The right to livestream should be protected by the First Amendment in the traffic stop context, subject to reasonable time, place, and manner restrictions applicable to all First Amendment-protected activity. Defendants-Appellees posited below that "even a 'passive realtime broadcast' of officers performing their duties may create serious officer safety concerns." Defs. Reply Mem. Supp. J. Pleadings at 5. At base, however, the hypothetical danger pointed to by Defendants-Appellees and the district court is significantly more conjectural than the dangers identified by the Supreme Court as unique to the traffic stop context, and, if that danger does exist, it would flow equally from a bystander or member of the press livestreaming a traffic stop.

The Supreme Court has recognized that the potential for weapons to be concealed in cars creates a risk to officer safety at traffic stops. *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983) (recognizing that "investigative [situations] involving suspects in vehicles are especially fraught with danger to police

officers," and noting that "suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves [appear to] be armed"). But that threat would not be heightened by livestreaming. To the contrary, livestreaming a traffic stop would place the passengers' actions on display to the public and thus actually disincentivize illegal action by the vehicle's passengers. Indeed, a livestream brings oversight to the police and the recorders alike by broadcasting the conduct of both parties, a fact that serves to underscore the need for First Amendment protections for livestreaming.

Officers can and do take steps to preserve their safety at traffic stops without inhibiting live broadcast. The Supreme Court has explained that officers may order passengers out of the vehicle to search for weapons, but they are not permitted to impose "a greater intrusion." *Knowles v. Iowa*, 525 U.S. 113, 114, 119 (1998). "While concern for safety during a routine traffic stop may justify the minimal additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search." *Id.* at 117. Officers are able to order an individual out of a vehicle and search for weapons without seizing an individual's phone or otherwise impeding their ability to record the encounter.

Defendants-Appellees' concern that a livestream might escalate a traffic-stop to a "crowd-control" operation is not sufficiently connected to the actual act of

livestreaming to justify a restriction on expressive conduct. *See* Defs. Reply Memorandum for Judgment on the Pleadings at 6. In *Gericke v. Begin*, the First Circuit held that "a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties." 753 F.3d 1, 8 (1st Cir. 2014). The speculative formation of a crowd at the scene of a traffic stop poses neither an active nor imminent risk of interference—were it so, officers could reasonably shut down a news crew recording an incident, out of concern it would attract rubbernecking. In "[c]ases where officer safety has been raised, the courts have repeatedly rejected generalized, unsubstantiated claims related to officer safety as a basis for extending a traffic stop." *State v. Coleman*, 890 N.W.2d 284, 301 (Iowa 2017).

While the risk of a crowd forming and interfering with police is speculative, recent history reveals all too frequent incidents where law enforcement has arrested and used force against journalists who were identified and clearly identifiable as such. *See* Sarah Matthews, Chris Young, and Courtney Douglas, Reporters Comm. for Freedom of the Press, Press Freedoms in the United States 2020, 8–12 (2021) (documenting threefold increase in physical attacks on journalists—large majority by law enforcement—compared to the preceding three years and a 15-fold

increase in arrests compared to 2019, all but 10 of which occurred during Black Lives Matter protests). For precisely that reason, federal courts in Portland and Minneapolis have both issued injunctions barring officers from dispersing journalists covering protests, in recognition of the importance of the First Amendment right to document, and often livestream, the effectuation of crowd control measures by the police. *See Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020); *Goyette v. Minneapolis*, No. 20-cv-1302, 2021 WL 5003065 (D. Minn. Oct. 28, 2021).

Even if there were evidence in the record that livestreaming poses a risk to officer safety during traffic stops, restricting the live broadcasting of only the individuals involved in a stop, while allowing bystanders to stream the stop, would be significantly underinclusive because live footage shared by observers would conceivably produce the same speculative risk to officer safety. Plaintiff-Appellant's Principal Br. at 55–56. Live footage captured by a bystander on a sidewalk, or even by a news crew's camera, could of course be viewed by individuals who may want to interfere with a stop. That live footage could reveal street signage or other landmarks revealing the specific location of a stop, even if the feed does not directly reveal geolocation information (and a news crew would routinely identify the location of a live spot). If this Court credits the proffered officer safety rationale in this case, it is difficult to see how identical logic would

not justify restrictions on the news media or other observers broadcasting live footage of a traffic stop, which would be dramatically *over*-inclusive in terms of burdening clearly protected activity.

In short, the officer safety rationale credited by the district court does not have a limiting principle. There is no practical or legal distinction between a passenger livestreaming and a news crew broadcasting, and, while officers may take steps to maintain control of the scene of a traffic stop, those steps must be directly linked to an actual threat to officer safety on the individual facts of a particular incident. Otherwise, the hypothetical threat of a "coordinated attack" or the attraction of onlookers would be sufficient to justify a restriction on livestreaming by passengers or bystanders alike. *See United States v. Alvarez*, 567 U.S. 709, 723 (2012) (holding that our First Amendment tradition stands against "governmental power [that] has no clear limiting principle").

III. This Court should follow the overwhelming weight of existing authority and recognize the right to record as clearly established.

This Court last addressed the existence of a right to record police activity in public more than a decade ago in *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009), when it noted that a "First Amendment right to record police activities on public property was not clearly established in this circuit." At the time of that decision, only the Ninth and Eleventh Circuits had affirmatively established the

right to record. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

The legal landscape is markedly different today. All of the odd-numbered Circuits—the First, Third, Fifth, Seventh, Ninth, and Eleventh—have expressly recognized the right to record as clearly established. *Glik* 655 F.3d at 82; *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017); *Turner*, 848 F.3d at 688; *Gericke*, 753 F.3d at 8; *Alvarez*, 679 F.3d at 595. Further, two district courts in the Fourth Circuit have likewise recognized that the weight of persuasive authority supports the existence of the right. *Dyer v. Smith*, No. 3:19-CV-921, 2021 WL 694811, at *7 (E.D. Va. Feb. 23, 2021); *Hulbert v. Pope*, No. SAG-18-00461, 2021 WL 1599219, at *9 (D. Md. Apr. 22, 2021), *recons. denied* No. CV SAG-18-00461, 2021 WL 4640668 (D. Md. Oct. 6, 2021). The Eighth Circuit recently held that "[r]eporting is First Amendment activity," such that it is clearly established that officers may not deploy less-lethal munitions at a law abiding television news crew. *Quraishi*, 986 F.3d at 838; *see also Chestnut v. Wallace*, 947 F.3d 1085, 1090–91 (8th Cir. 2020) (denying qualified immunity to officer who arrested man for observing arrest). And the Tenth Circuit has recognized that photography constitutes the "creation of speech," and expressed agreement with the Seventh Circuit's recognition of "some degree of protection for gathering news and information." *Western Watersheds Project v. Michael*, 869 F.3d 1189, 1196–1198

(10th Cir. 2017) (applying law enforcement right to record jurisprudence in odd-numbered circuits to find "photographing animals" to be protected speech). Indeed, every federal court of appeals to consider the question has held that the right exists, and no court has ever suggested that it does not (even if it was not clearly established at the time of the incident in question). *Hulbert*, 2021 WL 1599219, at *9.

The right to record police activity in public is not just key to promoting government transparency and accountability—it is often a matter of journalist safety. *See* Statement of Interest of the United States at 1–2, *Garcia v. Montgomery Cty.*, No. 8:12-cv-03592 (D. Md. Mar. 4, 2013), https://perma.cc/V4CC-G8BB (warning that discretionary public-order offences can be "all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights"). As noted above, public protests are often the most dangerous assignments for photojournalists, and the protests of the last year have demonstrated, starkly, the need for meaningful constitutional protections to ensure that journalists can document the police response to the demonstrations without fear of arrest or the use of force. To ensure that journalists covering law enforcement can do so safely, this Court should join the overwhelming consensus among the federal courts of appeal and recognize that the

First Amendment confers a right to record—and broadcast in real-time—police activity in public.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of personal capacity claims against Officer Helms and the claims against the Town of Winterville, and remand.

Respectfully submitted,

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