

In The
Supreme Court of the United States

JAMES P. CROCKER,

Petitioner,

v.

STEVEN ERIC BEATTY,

Respondent.

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

**MOTION OF THE RUTHERFORD INSTITUTE
FOR LEAVE TO FILE AN *AMICUS* BRIEF AND
AMICUS CURIAE BRIEF IN SUPPORT OF
THE PETITIONER**

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No. 21-786

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**MOTION FOR LEAVE TO FILE *AMICUS*
CURIAE BRIEF OF
THE RUTHERFORD INSTITUTE
IN SUPPORT OF PETITIONER**

Pursuant to Rule 37.2(b), The Rutherford Institute respectfully moves for leave to file the accompanying *amicus curiae* brief in support of the Petitioner. The Petitioner has consented to the filing of this brief, but the Respondent has withheld consent.

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the First Amendment right of individuals to photograph and videotape law

enforcement personnel in public places without fear of reprisal. Accordingly, attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court and federal courts of appeal on numerous occasions over the Institute's history, including on the issues raised in the Petition.

For example, attorneys for the Institute filed an *amicus* brief in *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017), in which the Third Circuit held that bystanders have a right to record police officers. The court noted the "excellent briefing on appeal, including counsel for the parties and eight *amici*." *Id.* at 358. Likewise, *Amicus Curiae* filed an *amicus* brief in *Frasier v. Evans*, 992 F.3d 1003, 1020 n.4 (10th Cir. 2021) ("We . . . thank *amici* for their helpful briefing on the issue of whether the right exists.").

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this case because the Institute is keenly interested in the protection of individuals' civil liberties from infringement by the government. The issue presented in this case—whether a police officer has qualified immunity to seize a citizen's cell phone to stop a recording of the officer's actions—implicates significant First Amendment protections. The Rutherford Institute brings a particularized analysis to the issues presented in this case, and its experience in these matters might assist the Court in reaching a just resolution.

Wherefore, The Rutherford Institute respectfully requests that this motion for leave to file the accompanying *amicus curiae* brief be granted.

December 29, 2021

Respectfully submitted,

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INTEREST OF AMICUS CURIAE¹

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and the laws of the United States.

SUMMARY OF THE ARGUMENT

This Petition comes before the Court on a matter that raises significant constitutional and public concern – whether individuals may photograph or videotape law enforcement personnel

¹ The Petitioner has consented to the filing of this *amicus* brief, but the Respondent has withheld consent after receiving timely notice of the intent to file this *amicus* brief more than 10 days prior to filing in accordance with Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

in public places. As an initial matter, *Amicus Curiae* agrees with Petitioner that such a right was well-established at the time of the conduct at issue in this case. See *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding a First Amendment right to photograph or videotape police conduct); *Crocker v. Beatty*, 995 F.3d 1232, 1260 (11th Cir. 2021) (Martin, J., concurring in part and dissenting in part) (“read[ing] *Smith* to clearly establish a general rule that the First Amendment protects a person’s right to record police conduct”).

Amicus Curiae writes separately to request that the Court take this opportunity to rule definitively that photographing or videotaping law enforcement personnel in public places is protected by the First Amendment. Not only is the right to photograph and videotape law enforcement activities and personnel in public places an established First Amendment right, but the right is essential to protect the citizen-press, which plays an ever-increasingly important role in the dissemination of information. See *id.* at 1261 (Martin, J., concurring in part and dissenting in part) (“The right to record police activity is important not only as a form of expression, but also as a practical check on police power. Recordings of police misconduct have played a vital role in the national conversation about criminal justice for decades”). Because photographing and videotaping law enforcement personnel might be unpopular with the subjects, citizens, like the Petitioner in this case, run the risk of retaliation, including arrest and incarceration, for engaging in these activities. Absent a formal holding from this Court that there is a robust First Amendment right to photograph or videotape law

enforcement personnel and activities in public places, citizens run the risk of self-censoring, law enforcement personnel run the risk of misunderstanding citizens' constitutional rights, and lower courts run the risk of misapplying qualified immunity and undermining the First Amendment's protections.

ARGUMENT

1. **Photographing and Videotaping Law Enforcement Personnel in Public Is A First Amendment Right Which Should Be Formally Acknowledged by This Court and Preclude Qualified Immunity for Officers Who Prevent Citizens from Recording Police Activity**

In *Branzburg v. Hayes*, this Court noted that “without some protection for seeking out the news, freedom of the press could be eviscerated.” 408 U.S. 665, 681 (1972). Professor Kreimer explains that “[i]mage capture can document activities that are proper subjects of public deliberation but which the protagonists would prefer to keep hidden and deniable.” Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Penn. L. Rev. 335, 345 (2011). Police regularly operate on public streets and sidewalks, which “are areas that have historically been open to the public for speech activities.” *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). Moreover, the conduct of police, as government officials, is a matter of public concern, and speech regarding matters of public concern is, as this Court has repeatedly reiterated, including in

Snyder v. Phelps, 562 U.S. 443, 451-52 (2011), at the heart of the First Amendment. Such a “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The recording of citizen interactions with law enforcement is hardly a new phenomenon. See Charles E. Jones, *The Political Repression of the Black Panther Party 1966–1971: The Case of the Oakland Bay Area*, 18 J. Black Stud. 415, 417 (1988) (reporting on the “Panther Police Patrol,” which deployed tape recorders and cameras to document police stops). See also *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017) (“In 1991 George Holliday recorded video of the Los Angeles Police Department officers beating Rodney King and submitted it to the local news. Filming police on the job was rare then but common now. With advances in technology and the widespread ownership of smartphones, ‘civilian recording of police officers is ubiquitous.’” (citation omitted)).

Accordingly, it is no surprise that several federal courts of appeals have found a constitutional right to videotape and photograph law enforcement personnel when they conduct operations in public. For example, the Ninth Circuit has held that an individual’s “First Amendment rights were clearly established at the time of his arrest” when photographing police actions. *Adkins v. Limtiaco*, 537 F. App’x 721, 722 (9th Cir. 2013). The First Circuit framed the question directly by asking “is there a constitutionally protected right to videotape police carrying out their duties in public?” *Glik v.*

Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011). In answering that question, the court held that

[b]asic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative.

....

... Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting “the free discussion of governmental affairs.”

Id. (quoting *Mills v. Alabama*, 384 U.S. 214, 216 (1966)). In so ruling, the First Circuit applied the following logic: if police officers must accept “a significant amount of verbal criticism and challenge directed at” them, then they must be expected to exercise similar restraint “when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.” *Id.* at 84 (quoting in part *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)). Likewise, the Eleventh Circuit had previously held that citizens have a First Amendment right to photograph or videotape the police because “the First Amendment protects the right to gather information about what public officials do on public property.” *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

Perhaps more tellingly, in upholding the right to record law enforcement personnel, the Seventh

Circuit described as “an extreme position” and “an extraordinary argument” the contention of the State’s Attorney “that openly recording what police officers say while performing their duties in traditional public fora — streets, sidewalks, plazas, and parks — is *wholly unprotected* by the First Amendment.” *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012). The Seventh Circuit went on to hold that

[a]udio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are “included within the free speech and free press guaranty of the First and Fourteenth Amendments.” Laws that restrict the use of expressive media have obvious effects on speech and press rights; the Supreme Court has “voiced particular concern with laws that foreclose an entire medium of expression.”

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected, as the State’s Attorney insists. By way of a simple

analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.

Id. at 595-96 (internal citations omitted).

More recently, the Third Circuit upheld the right of individuals to photograph or videotape law enforcement personnel in public. *See Fields*, 862 F.3d at 360 (“In sum, under the First Amendment’s right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.”). These cases show that the First Amendment right to photograph and videotape law enforcement personnel in public is now well-established in some – but not all – Circuits. *See id.* at 355 (“Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public. Today we join this growing consensus.” (citations omitted)).

It is likely that the opposition to photography and videotaping activities stems from the fact that “many would prefer to be in a position to shape perceptions of their actions without competing digital records. Police officers often view private digital image capture as a challenge to their authority.” Kreimer, *Pervasive Image Capture and*

the First Amendment, 159 U. Penn. L. Rev. at 357. This, rather than purported safety concerns associated with being recorded, has resulted in a “rich set of cases in which police have sought to prosecute critics or potential critics who capture their images. In these cases, police officers and other officials have enlisted both existing statutes and creative prosecutorial discretion in the struggle to constrain inconvenient image capture.” *Id.* Until recently, if not continuing, police officers have “invoke[d] the wiretap statute against those who antagonize them by recording them.” *Id.* at 359 n.79 (collecting cases from Pennsylvania).

Indeed,

[t]he typical police officer, plaintiff, or complainant in the image-capture cases canvassed above is not concerned with avoiding observation or preserving seclusion simpliciter. She is interested, rather, in assuring that evidence of dubious or potentially embarrassing actions is not credibly conveyed by the observer to a wider audience by transmission of the captured image. There are few cases on record of police officers arresting tourists who capture videos of polite official responses to inquiries for directions. Prohibitions on image capture are deployed to suppress inconvenient truths.

Id. at 383. Such conduct cannot be countenanced in a society in which “[t]he freedom of individuals

verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” *Hill*, 482 U.S. at 462-63. At a minimum, the First Amendment “demands some sacrifice of [police] efficiency . . . to the forces of private opposition.” *Id.* at 463 n.12 (ellipsis in original).

By granting the Petition and affirming that there is a right to record or videotape law enforcement personnel and activities, this Court would alleviate the need for case-by-case determinations for those individuals arrested for undertaking such activities and would clarify the issue for other courts which will almost certainly face this issue in the future.

2. The Emergence of Citizen-Journalists and the Key Role They Play Demonstrates the Necessity of the Enshrinement of a First Amendment Right to Photograph and Videotape Law Enforcement Personnel in Public Fora

Today, citizens armed with smartphones are increasingly performing the watchdog functions associated with the traditional news press. This is surpassingly important because “[s]erendipitous amateur image capture can fill some of the lacunae left by the decimation of salaried news staffs.” Kreimer, *Pervasive Image Capture and the First Amendment*, 159 U. Penn. L. Rev. at 350. As demonstrated below, now such image capture and recordings are more often responsible for bringing to light events that otherwise would go unnoticed or

unreported. See *Fed. Commc'ns Comm'n v. CBS Corp.*, 567 U.S. 953, 953 (2012) (Roberts, C.J., concurring) (“As every schoolchild knows, a picture is worth a thousand words.”). As such, protecting the right to photograph and videotape interactions between law enforcement personnel and individuals must be enshrined.

This is particularly important because, as Professor Richardson observes, “courts repeatedly defer to the judgments of all officers, with no inquiry into the particular officer’s training, experience, and skill.” L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 Ind. L.J. 1143, 1155 (2012). Accordingly, cameras have become an effective tool for ordinary citizens to protect against and expose police abuses. Unfortunately, it has taken several recent events to demonstrate the importance of the citizen-journalist – whether or not he or she intended to be one – in shedding light on police killings of minorities. For example, in December 2014, a black man, Eric Garner, was killed by a chokehold from a police officer. While the grand jury did not indict the police officer, the killing, which was recorded by a private citizen, Ramsey Orta, served to draw mass attention to the interactions between law enforcement personnel and minorities. See J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. Times, Dec. 4, 2014, at A1.

Similarly, in connection with the Walter Scott killing in North Charleston, South Carolina on April 4, 2015, the police officer implicated stated that he feared for his life after Mr. Scott had disarmed him. The video recording by Feidin

Santana, an individual who happened to be walking by at the time, shows an unarmed Mr. Scott running away before being shot eight times. The footage also shows the officer placing an object (possibly a stun gun) near the body of Mr. Scott. As one report stated, Mr. Santana's video "opened the eyes of millions of Americans who previously doubted that a police officer would be capable of shooting anyone who didn't truly deserve it. It takes away their certainty (until the next unrecorded shooting) that it is always the victim's fault." Tony Norman, *Video for Once Allows Police No Excuses*, Pittsburgh Post-Gazette, Apr. 10, 2015, at A-2.

As the Court is no doubt aware, these are sadly not isolated instances. Accordingly, "because the police have traditionally been the ones with control over official narratives about police conduct in court and in the news, the ability to counter those narratives with stories backed up by video has transformed the nature of both public opinion and court testimony." Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 Geo. L.J. 1559, 1571 (2016).

And, of course, the citizen-captured video of George Floyd's brutal arrest by Minneapolis police officers graphically depicted the needless violence inflicted on minority communities by law enforcement, sparking nationwide protests and what has been described as the largest movement in the country's history. See Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

Absent a holding that there is an unequivocal First Amendment right to photograph and videotape law enforcement, many citizen-journalists' activities will be subject to chilling effects, at least in those Circuits that have not expressly recognized that right. Failing to hold such a right exists would rely on an outdated notion of what constitutes the press and, perhaps more concerning, who is entitled to First Amendment protections. Over forty years ago, this Court recognized that "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg*, 408 U.S. at 704.

More recently, the Ninth Circuit recognized that "[t]he protections of the First Amendment do not turn on whether the [party] was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story." *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014). It pointed out that "a First Amendment distinction between the institutional press and other speakers is unworkable: 'With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.'" *Id.* (alteration in original) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010)). As one court wrote in recognizing the constitutional rights of citizens to record police in public, developments in technology "make clear why the news-gathering

protections of the First Amendment cannot turn on professional credentials or status.” *Glik*, 655 F.3d at 84.

Absent a holding from this Court, individuals in various Circuits that have not recognized the right may be dissuaded from taking actions to capture future instances of citizen-police interaction. Such concerns are by no means hypothetical. Mr. Santana moved out of the North Charleston area and stated that “[o]ne of my concerns before giving the video to the family was retaliation from the police department.” Josh Sanburn, *The Witness*, Time, <http://time.com/ramsey-orta-eric-garner-video/>. The implications of a lack of clarity or consistency on whether photographing or videotaping law enforcement personnel is a protected right will cause citizens to self-censor the subjects they would otherwise record when faced with the possibility of arrest and jail.

Moreover, any holding that a right to photograph or videotape law enforcement will have a minimal burden on law enforcement personnel – perhaps only a tangential one no different from the daily inconveniences they are expected to tolerate and under which their colleagues in Circuits that have recognized the right already operate. Additionally, the “threat” of being recorded, along with the ubiquity of video-recording devices, could be expected to make law enforcement officials think twice before using disproportionate force and, perhaps, reduce the number of deaths that could and should have been avoided. *See Garcia v. Montgomery Cnty.*, 145 F. Supp. 3d 492, 507 (D. Md. 2015) (“[R]ecording police activity enables citizens to

‘keep them honest,’ an undertaking protected by the First Amendment.”). Indeed, “[c]aptured images need not be conveyed to others to have a salutary effect. Just as public surveillance cameras are said to reduce crime, the prospect of private image capture provides a deterrent to official actions that would evoke liability or condemnation.” Kreimer, *Pervasive Image Capture and the First Amendment*, 159 U. Penn. L. Rev. at 347.

In sum, as the Third Circuit noted:

We ask much of our police. They can be our shelter from the storm. Yet officers are public officials carrying out public functions, and the First Amendment requires them to bear bystanders recording their actions. This is vital to promote the access that fosters free discussion of governmental actions, especially when that discussion benefits not only citizens but the officers themselves.

Fields, 862 F.3d at 362.

Although the Eleventh Circuit had also recognized this First Amendment right to record police in *Smith*, 212 F.3d at 1333, over twenty years later the court has now made that right meaningless by granting police qualified immunity when they seize the phones of people, like Petitioner, to prevent them from recording police activity in public. See *Crocker*, 995 F.3d at 1240-43. Thus, this Court should grant the Petition and make clear that the

public has the right to photograph or videotape law enforcement personnel and activities in public fora.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, the Court should grant the Petition.

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