No. 23-227

In The
Supreme Court of the United States

SARAH K. MOLINA AND CHRISTINA VOGEL,
Petitioners,

v.

DANIEL BOOK, ET AL.,
Respondents.

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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is a nonprofit civil liberties 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 case raises significant constitutional concerns, especially as to what rights individuals have when observing and recording law enforcement personnel in public places. Focusing on the third question presented in the Petition, *Amicus Curiae* agrees with Petitioners and the lower court's dissenting opinions that such a right was clearly

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[1] Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for a party authored this brief in whole or in part and no person other than *Amicus Curiae*, its members, and its counsel made a monetary contribution intended to fund its preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received notice of *Amicus Curiae's* intention to file this brief at least 10 days prior to the due date.

established at the time of the conduct at issue in this case. *Molina v. City of St. Louis*, 59 F.4th 334, 344-47 (8th Cir. 2023) (Benton, J., dissenting in part and concurring in part) (noting that two prior Eighth Circuit cases "found a clearly established First Amendment right to observe police officers that existed before the events precipitating this case"); *Molina v. City of St. Louis*, 65 F.4th 994 (8th Cir. 2023) (Colloton, J., dissenting from denial of rehearing *en banc*) ("this court already concluded that police officers were on notice of a clearly established right under the First Amendment to observe police conduct…before the incident in this case").

Amicus Curiae writes separately to request that the Court take this opportunity to rule definitively that observing and recording law enforcement personnel in public places is protected by the First Amendment. Not only is the right to observe and record 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. Indeed, "[t]he 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." *Crocker v. Beatty*, 995 F.3d 1232, 1261 (11th Cir. 2021) (Martin, J., concurring in part and dissenting in part).

Because observing and recording law enforcement personnel might be unpopular with the

subjects being recorded, civilians, like the Petitioners in this case, run the risk of retaliation for engaging in such activities. Absent a formal holding from this Court that there is a robust First Amendment right to observe and record law enforcement personnel in public places, people run the risk of self-censoring, law enforcement personnel run the risk of misunderstanding a person's constitutional rights, and lower courts run the risk of misapplying qualified immunity and undermining the First Amendment's protections.

ARGUMENT

1. Observing and Recording 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 Retaliate Against Civilians for 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 civilian 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 record law enforcement personnel when they conduct operations in public. *See, e.g., Irizarry v. Yehia*, 38 F.4th 1282, 1290-92, 1294 (10th Cir. 2022) (listing and summarizing cases finding a First Amendment right to film the police in public from the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits, and holding the right to be clearly

established "beyond debate" in its own circuit, even though neither this Court nor the Tenth Circuit had formally recognized the right).

The Ninth Circuit, for example, 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 held that civilians have a First Amendment right to record 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."). Likewise, the Tenth Circuit found that filming police was clearly established First Amendment activity, and therefore denied qualified immunity to a police officer who

obstructed a civilian's recording. *Irizarry*, 38 F.4th at 1298.

These cases show that the First Amendment right to observe and record law enforcement personnel in public is now well-established. *See Fields*, 862 F.3d at 355 ("Every Circuit Court of Appeals to address this issue . . . has held that there is a First Amendment right to record police activity in public. Today we join this growing consensus." (citations omitted)); *Irizarry*, 38 F.4th at 1290-92, 1294.

As the Seventh, Eighth, and Tenth Circuits have explained, the antecedent acts to recording, like observation, must necessarily be protected as well. *Alvarez*, 679 F.3d at 595-96 (7th Cir. 2012), *supra* at 6-7; *Chestnut v. Wallace*, 947 F.3d 1085, 1091 (8th Cir. 2020) ("if the constitution protects one who records police activity, then surely it protects one who merely observes it"); *Irizarry*, 38 F.4th at 1290 (10th Cir. 2022) ("If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech.").

"Filming the police . . . acts as a watchdog of government activity and furthers debate on matters of public concern." *Irizarry*, 38 F.4th at 1289 (internal quotation marks and citation omitted). Thus, it is likely that opposition to observation and recording of police 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 simplic[i]ter. 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 observe and record law enforcement personnel, this Court would substantially remove the qualified immunity obstacles for individuals, like Petitioners, who experience retaliation for undertaking such protected activities and would thereby hopefully reduce the occurrence of such retaliation.

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

Today, civilians 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, such image-capture and

recordings are more often responsible for bringing to light events which 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 observe and record 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 civilians 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 had 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 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 civilian recording of George Floyd's brutal arrest by Minneapolis police officers graphically depicted the needless violence inflicted 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 observe and record law enforcement, many citizen-journalists' activities will be subject to chilling effects. 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 another court

wrote in recognizing the constitutional rights of civilians 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 may be dissuaded from taking actions to capture future instances of police interaction with civilians. 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 observing and recording law enforcement personnel is a protected right will cause people to self-censor the subjects whom they would otherwise observe and record when faced with the possibility of retaliation.

Moreover, clarifying the right to observe and record 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 some of their colleagues in areas 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 injuries and 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 Eighth Circuit had previously recognized, under the First Amendment, "a 'clearly established right to watch police-citizen interactions at a distance and without interfering'" *Molina*, 59 F.4th at 339 (quoting *Chestnut*, 947 F.3d at 1090), the court has now significantly weakened that right

by granting police qualified immunity when they retaliate against people, like Petitioners here.

Thus, this Court should grant the Petition and make clear that the public has the right to observe and record law enforcement personnel and activities in public fora.

CONCLUSION

For the foregoing reasons and those described by the Petitioners, *Amicus Curiae* respectfully urges this Court to grant the Petition for Certiorari.

Respectfully submitted,

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