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JOHN W. WHITEHEAD
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March 28, 2024

By Electronic Mail

Hon. Ron DeSantis, Governor
Florida Capitol
400 S. Monroe St.
Tallahassee, FL 32399

Re: Senate Bill 184 “Impeding, Threatening, or Harassing First Responders” Endangers the First Amendment Rights of Citizens to Observe, Film Police

Dear Governor DeSantis:

As a civil liberties organization committed to upholding the constitutional rights of all Americans, The Rutherford Institute¹ recognizes how difficult it can be for the government to strike that necessary yet delicate balance between liberty and safety, both of which are vital for the health of our republic.

Unfortunately, Senate Bill 184,² which would criminalize approaching or remaining within 25 feet of a police officer or other first responder after having been warned not to approach,³ fails to strike that necessary balance.

Indeed, riddled with vague terms and lacking explicit safeguards for protected First Amendment activities such as simply observing or recording the first responder’s actions, SB 184 not only stands to chill free speech activities but could also encourage government officials to undermine the very rights they are sworn to uphold and protect.

It is our opinion, for the reasons outlined herein, that SB 184 is unnecessary for law enforcement safety and, if signed into law in its current version, could give rise to discretionary enforcement and abuse by police officers to prevent civilians from exercising their constitutional right under the First Amendment to record police conduct in public.

¹ The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals’ constitutional rights and educate the public about threats to their freedoms.

² SB 184 passed both houses of the legislature and was enrolled on March 7, 2024:
<https://www.flsenate.gov/Session/Bill/2024/184/?Tab=BillHistory>.

³ <https://www.flsenate.gov/Session/Bill/2024/184/BillText/er/PDF>.

Senate Bill 184 is unconstitutionally vague and unnecessarily redundant.

While a violation under Senate Bill 184 requires an intent to impede or interfere, threaten physical harm, or cause substantial emotional distress in the first responder, most of those terms are so vague that they would fail to provide fair notice of prohibited conduct, encourage arbitrary and discriminatory enforcement, and lead to impingement on First Amendment freedoms.⁴ Furthermore, most protections which SB 184 might provide to law enforcement officers are already adequately covered by the current laws within Florida Statutes Title XLVI, Ch. 843 on obstructing justice, especially Fla. Stat. §§ 843.01 and 843.02.⁵

Senate Bill 184 could chill lawful First Amendment activities.

The fear of arrest and criminal prosecution could create a chilling effect whereby civilians will choose to refrain from observing or recording police activity. Even if a citizen can record from 25 feet away, that will not provide enough proximity to adequately capture details of what is being done or audio of what is being said. Also, a second police officer could increase that distance by placing himself between the primary police officer and the citizen who is recording, whereby the citizen would have to be 25 feet away from the second police officer in addition to the space already between that officer and the primary officer.

The right to record police activity is a protected form of news gathering.

Impairing the ability of civilians to observe and record police conduct is a significant concern. As Judge Martin of the Eleventh Circuit has explained, “[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.”⁶ Likewise, the Tenth Circuit has stated that “[f]ilming the police is a form of news gathering” and “is unambiguously speech-creation” which “acts as a watchdog of government activity, and furthers debate on matters of public concern.”⁷ The court warned that “[i]f 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,” and thus “freedom of the press could be eviscerated.”⁸

SB 184 could give rise to further retaliatory behavior by law enforcement officials.

Unfortunately, several police officers across the country fail to understand or respect the First Amendment right of citizens to observe and record police officers in the performance of their duties. For example, police in New Hampshire seized a woman’s camera and charged her

⁴ See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

⁵ http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0800-0899/0843/0843ContentsIndex.html.

⁶ *Crocker v. Beatty*, 995 F.3d 1232, 1261 (11th Cir. 2021) (Martin, J., concurring in part and dissenting in part).

⁷ *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022) (cleaned up).

⁸ *Id.* (quotation marks omitted).

with criminal offenses for disobeying a police officer, obstructing a government official, and unlawful interception of oral communications in retaliation for simply videotaping a police officer at a traffic stop from a nearby parking lot.⁹ And a police officer in Colorado stood in front of a YouTube journalist to intentionally block his camera view of a DUI traffic stop, shined a flashlight into his camera, drove his police cruiser at the journalist, and repeatedly blasted his air horn.¹⁰ Both courts found that the filming of police was clearly established First Amendment activity, and that the police were therefore not protected from liability under qualified immunity.¹¹

Opposition by police to observation and recording of their activities seems to stem 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.”¹² 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”¹³ Thus, because observing and recording law enforcement personnel might be unpopular with the police officers who are being recorded, civilians run the risk of retaliation for engaging in such activities, and SB 184 would give police officers another tool to retaliate with.

But such retaliation cannot be permitted 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.”¹⁴ At a minimum, the First Amendment “demands some sacrifice of [police] efficiency . . . to the forces of private opposition.”¹⁵

Civilian “journalists” perform a vital service in ensuring transparency and accountability.

Today, civilians equipped with smartphones are increasingly performing the watchdog functions associated with the traditional news press. “The 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.”¹⁶ “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

⁹ *Gericke v. Begin*, 753 F.3d 1, 3-4 (1st Cir. 2014).

¹⁰ *Irizarry*, 38 F.4th at 1285-86.

¹¹ *Gericke*, 753 F.3d at 10; *Irizarry*, 38 F.4th at 1298.

¹² Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PENN. L. REV. 335, 357 (2011).

¹³ *Id.*

¹⁴ *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987).

¹⁵ *Id.* at 463 n.12 (ellipsis in original).

¹⁶ *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014).

and social issues becomes far more blurred.”¹⁷ Thus, developments in technology “make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.”¹⁸

This is surpassingly important because “[s]erendipitous amateur image capture can fill some of the lacunae left by the decimation of salaried news staffs.”¹⁹ Therefore, the right to observe and record interactions between law enforcement personnel and civilians must be zealously protected because such recordings are often responsible for bringing to light events which otherwise would go unnoticed or unreported.

For example, in December 2014, Eric Garner was killed by a chokehold from a police officer. The incident, which was recorded by a private citizen, Ramsey Orta, served to draw mass attention to the interactions between law enforcement personnel and minorities.²⁰ Similarly, in connection with the Walter Scott killing in North Charleston, South Carolina in April 2015, the police officer implicated had stated that he feared for his life after Mr. Scott had disarmed him. But 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.”²¹ And, of course, the civilian recording of George Floyd’s brutal arrest 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.²²

Hopefully, the mere possibility of being recorded, along with the ubiquity of video-recording devices, will make law enforcement officials think twice before using disproportionate or excessive force and, perhaps, reduce the number of injuries and deaths that could and should be avoided because “recording police activity enables citizens to ‘keep them honest,’ an undertaking protected by the First Amendment.”²³ Indeed, just “the prospect of private image capture provides a deterrent to official actions that would evoke liability or condemnation.”²⁴

¹⁷ *Id.* (alteration in original) (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 352 (2010)).

¹⁸ *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

¹⁹ Kreimer, *Pervasive Image Capture and the First Amendment*, 159 U. PENN. L. REV. at 350.

²⁰ See J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1.

²¹ Tony Norman, *Video for Once Allows Police No Excuses*, PITTSBURGH POST-GAZETTE, Apr. 10, 2015, at A-2.

²² 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>.

²³ *Garcia v. Montgomery Cnty.*, 145 F. Supp. 3d 492, 507 (D. Md. 2015).

²⁴ Kreimer, *Pervasive Image Capture and the First Amendment*, 159 U. PENN. L. REV. at 347.

As the courts have recognized, the First Amendment protects the right to gather information about what public officials do on public property.

Due to the prevalence of smartphones, the increasingly common practice of recording police conduct, and several court rulings across the country, in *Irizarry v. Yehia*, although the Tenth Circuit Court of Appeals acknowledged that it had not specifically recognized (but had previously indicated) a First Amendment right to film the police, it found that the right was nonetheless clearly established “beyond debate” by every circuit which had considered the issue—pointing out and summarizing cases from the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuit Courts of Appeal.²⁵ Indeed, over twenty years ago, 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.”²⁶

Further, Article 1, Section 4 of the Florida Constitution states that “[n]o law shall be passed to restrain or abridge the liberty of speech or of the press.” The Florida Supreme Court has made clear that “[t]he scope of the protection accorded to freedom of expression in Florida under article 1, section 4 is the same as is required under the First Amendment.”²⁷ And therefore it is likely that SB 184 could be applied in violation of the Florida Constitution as well.

A somewhat similar law in Arizona was recently struck down as unconstitutional by a federal court. The law made it a class 3 misdemeanor “‘for a person to knowingly make a video recording of law enforcement activity if the person making the video recording is within eight feet’ of the activity and has been directed to stop recording by law enforcement.”²⁸ While the Arizona law is clearly different from the Florida law in many respects, the court noted that the Arizona law was not necessary “to prevent interference with or distractions of law enforcement officers” because, like Florida, “Arizona already has other laws on its books to prevent interference with police officers,”²⁹ and the court further indicated that the law would likely “fail[] to withstand scrutiny under a time, place and manner analysis, or . . . [would be] void for vagueness.”³⁰ Similar concerns apply to SB 184.

Allowing the public to observe and record police activity without obstruction or retaliation helps build trust in the police, which is critical for officer safety.

Because police officers would not likely be granted qualified immunity for attempting to use SB 184 to violate a person’s right to observe or record police conduct in public,³¹ it is in Florida’s own financial interest to ensure that officers do not violate this right. More importantly, allowing the public to observe and record police activity without obstruction or retaliation

²⁵ *Irizarry*, 38 F.4th at 1289-92, 1294.

²⁶ *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

²⁷ *Dep’t of Educ. v. Lewis*, 416 So.2d 455, 461 (Fla. 1982).

²⁸ *Ariz. Broadcasters Ass’n v. Brnovich*, 626 F.Supp.3d 1102, 1105 (D. Ariz. 2022).

²⁹ *Id.* at 1106.

³⁰ *Id.*

³¹ See *Gericke*, 753 F.3d at 10; *Irizarry*, 38 F.4th at 1298.

displays greater transparency, which can help build the public's trust and confidence in the police. Having public trust is critical for officers to safely and effectively perform their duties.³² "When a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, [and] increases the likelihood people will fail to comply with legal directives."³³ Thus, while "police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights," which includes "videotaping that memorializes, without impairing, [police] work in public spaces," "[p]rotecting that right of information gathering not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally."³⁴

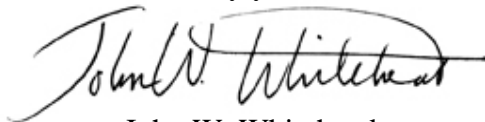
As the Third Circuit explained: "We ask much of our police. They can be our shelter from the storm. Yet officers are public officials carrying out public functions, and the First Amendment requires them to bear bystanders recording their actions. This is vital to promote the access that fosters free discussion of governmental actions, especially when that discussion benefits not only citizens but the officers themselves."³⁵

SB 184 must be revisited in order to ensure that the First Amendment rights of civilians who observe and film the police are protected.

It is therefore essential to ensure that SB 184 at least provides a clear exception for civilians who are observing or recording police conduct so that the proposed law cannot be interpreted too broadly whereby police officers would have wide discretion in making illegitimate excuses to remove or arrest onlookers who are merely observing or filming police conduct. A lack of clarity in SB 184 will cause people to self-censor the subjects whom they would otherwise observe and record when faced with the possibility of such retaliation. And the need for SB 184 is questionable, as police are already protected by the current laws in Florida Statutes Title XLVI, Ch. 843 on obstructing justice, especially Fla. Stat. §§ 843.01 and 843.02.

It is our hope that when reviewing SB 184, you will act to protect the First Amendment rights of civilians who observe and film the police, and have the Florida legislature revisit this misguided legislation with an eye toward addressing its troubling shortcomings.

Sincerely yours,



John W. Whitehead
President

³² See Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20–21 (2008) ("Being viewed as fair and just is critical to successful policing in a democracy.").

³³ Fred. O. Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018).

³⁴ *Gericke*, 753 F.3d at 7-8 (cleaned up).

³⁵ *Fields v. City of Philadelphia*, 862 F.3d 353, 362 (3d Cir. 2017).