No. 19-1015

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEVI FRASIER,
Plaintiff-Appellee,

v.

CHRISTOPHER L. EVANS, et. al.
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Colorado, The Hon. Robert E. Blackburn
District Court No. 15-cv-1759-REB-KLM

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF THE APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P 26.1, The Rutherford Institute hereby discloses that it is a nonprofit corporation. There are no parent corporations or any other corporation that owns stock of The Rutherford Institute.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in the U.S. Supreme Court and other federal courts of appeal on numerous occasions over the Institute's history, including *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017), in which the U.S. Court of Appeals for the Third Circuit held that bystanders have a right to record police officers. *See id.* at 358 (noting "excellent briefing on appeal, including counsel for the parties and eight *amici*").

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 record law enforcement personnel in public places without fear of reprisal.

All parties to this appeal have granted consent to the filing of this *Amicus Curiae* Brief by The Rutherford Institute.

STATEMENT PURSUANT TO RULE 29(a)(4)(E)

Pursuant to Fed. R. App. Pro. 29(a)(4), *Amicus Curiae* states that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (3) no person – other than *Amicus Curiae*, its members or its counsel – contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This case comes before the Court on a matter of significant constitutional and public concern – whether individuals may photograph or videotape law enforcement personnel in public places regardless of whether the recording is "expressive" in nature.

As an initial matter, *Amicus Curiae* agrees with Appellee that such a right is well-established under the First Amendment – and was well-established at the time of the conduct at issue in this case. *See*

Fields, 862 F.3d at 362 ("I conclude that the First Amendment right at issue is and was clearly established [in 2012 and 2013]."") (Nygaard, J., concurring in part and dissenting in part). *Amicus Curiae* writes separately to request that this Court take this opportunity to rule definitively, in conformity with every other federal court of appeal to have considered the issue, that photographing or videotaping law enforcement personnel in public places is protected by the First Amendment. *See id.* at 357 ("Defendants ask us to avoid ruling on the First Amendment issue. Instead, they want us to hold that, regardless of the right's existence, the officers are entitled to qualified immunity and the City cannot be vicariously liable for the officers' acts. We reject this invitation to take the easy way out.").

Not only is the right to photograph and videotape law enforcement activities and personnel in public places now an established First Amendment right across the nation (regardless of whether the activity may be deemed "expressive"), but the right is essential to protect the citizen-press, which plays an ever-increasingly important role in the dissemination of information. Because the photographing and videotaping of law enforcement personnel might be unpopular with the

subjects, citizens in this Circuit run the risk of retaliation, including arrest and incarceration, for engaging in these activities absent a ruling from this Court. Absent a formal holding 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 and law enforcement personnel run the risk of misunderstanding citizens' constitutional rights.

ARGUMENT

I. Regardless of Whether It Is "Expressive," The Right to Photograph and Videotape Law Enforcement Personnel and Activities in Public Fora Is An Established First Amendment Right That Should Be Formally Acknowledged By this Court

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court noted that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. This is the underlying constitutional issue that the Court faces in this case. As Professor Kreimer notes, "[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).

It would be particularly concerning if it were to be otherwise because police operations in public streets and sidewalks "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 the Supreme 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*, 862 F.3d at 355 ("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 this Circuit's sister circuits 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 is a constitutionally protected right to videotape police carrying out their duties in public?" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). 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 *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)). Likewise, the Eleventh Circuit has 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 State Attorney's contention "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, 596 (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 place. *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."). Such a line of cases shows that the First Amendment right to photograph and videotape law enforcement personnel in public fora is now well-established from north to south and

east to west. *See id.* at 355 ("Every Circuit Court of Appeals to the 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.").

By holding that there is a blanket right to record or videotape law enforcement personnel and activities without regard as to whether such conduct is "expressive," this Court would alleviate the need for case-by-case determination for those individuals arrested for undertaking such activities. This is no hypothetical. Until recently, if not continuing, police officers have "invoke[d] the wiretap statute against those who antagonize them by recording them." Kreimer, *Pervasive Image Capture and the First Amendment*, 159 U. Penn. L. Rev. at 359 (collecting cases from Pennsylvania).

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." *Id.* 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.* 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 (footnote omitted). 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 requires "some sacrifice of [police] efficiency . . . to the forces of private opposition." *Id.* at 463 n.12 (internal citation omitted) (ellipses in original).

II. 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, including in this case, citizens armed with smartphones are increasingly performing the watchdog functions associated with the traditional news press. This is particularly 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 bringing to light events that would otherwise go unnoticed or unreported. *See Federal Communications Commission 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.

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 Mr. Scott running away, unarmed, 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).

Any holding that there is not a First Amendment right to photograph or videotape law enforcement absent expressive conduct will cause numerous chilling effects and fail to protect the many "citizen-journalists," such as Mr. Santana and Mr. Orta, who did not set out to challenge police conduct, but ultimately enabled themselves and others to do so because of the images they captured. Likewise, failing to

find such a right 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, the Supreme 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 uses the latest photocomposition methods." *Branzburg*, 408 U.S. at 704. More recently, the Ninth Circuit recognized that "the protections of the First Amendment do not turn on whether the [party] was a trained journalist, formally affiliate with traditional news entities, engage 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.* (quoting *Citizens United v. Federal Election Commission*, 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 this Circuit 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/. By contrast, the implications of a case-by-case analysis of whether the photographing or videotaping of law enforcement personnel is sufficiently "expressive" through trial will cause citizens to self-censor the subjects they would otherwise photograph or videotape when faced with the possibility of arrest and prosecution.

Moreover, holding that a right to photograph or videotape law enforcement would have a minimal burden on law enforcement personnel – perhaps only a tangential one no different from the daily inconveniences they are expected to tolerate. 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., Md.*, 145 F. Supp. 3d 492, 507 (D. Md. 2015) ("recording 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. This Court should hold likewise.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* respectfully requests the Court hold that photographing or videotaping law enforcement personnel in public fora is protected by the First Amendment.

Dated: May 6, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,264 words, excluding the parts of the brief exempted by Fed. R. App. P. 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century.

s/ Christopher F. Moriarty
Christopher F. Moriarty

CERTIFICATE OF DIGITAL SUBMISSION

The undersigned does hereby certify with respect to the foregoing *Amicus Curiae* Brief of The Rutherford Institute that:

(1) All privacy redactions required by 10th Cir. Rule 25.5 have been made;

(2) Printed copies of the foregoing Brief delivered to the Court will be exact copies of the Brief filed using the Court's ECF system;

(3) The digital version submitted using the Court's ECF system was scanned for viruses using the most recent version of Security Manager AV Defender, Version 6.6.6.85, last scanned on May 6, 2019, and that according to the program is free of viruses; and

(4) The Brief complies with the type volume limits of Fed. R. App. P. 32(g)(1).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 6, 2019, the foregoing Amicus Curiae Brief of The Rutherford Institute in Support of the Appellee was filed and served on all counsel of record via the ECF system of the United States Court of Appeals for the Tenth Circuit, thereby delivering it to the counsel of record for Appellants and Appellees listed below:

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