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IN THE SUPREME COURT OF MONTANA

No. DA 23-0462

City of Kalispell,
Plaintiff and Appellee,

v.

Sean Michael Doman,
Defendant and Appellant.

On appeal from the Montana Eleventh Judicial District Court, Flathead County, the Honorable Robert Allison, Presiding

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MONTANA AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iiii

NOTICE AND CONSENT PURSUANT TO RULE 12(7) vi

STATEMENT OF INTEREST OF AMICI CURIAE 1

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 5

I. This Court should address Doman's constitutional argument under its plain error doctrine 5

II. The U.S. and Montana Constitutions protect the right to record police officers performing their duties in public 7

  A. Federal courts recognize a right to record 7

  B. This Court should also recognize the right to record 9

    1. Text 9

    2. History 10

    3. Structure 12

III. Doman's conviction violates the U.S. and Montana Constitutions 13

  A. Doman was subjected to a content-based restriction that cannot withstand strict scrutiny 15

  B. Even assuming the restriction was content-neutral, it cannot survive intermediate scrutiny 19

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

Reed v. Lieurance,
863 F.3d 1196 (9th Cir. 2017) 17

ACLU of Ill. v. Alvarez,
679 F.3d 583 (7th Cir. 2012)... 7, 8, 20

ACLU of Nevada v. Las Vegas,
333 F.3d 1092 (9th Cir. 2003) 14

Askins v. U.S. Dep't of Homeland Sec.,
899 F.3d 1035 (9th Cir. 2018) .... passim

City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC,
142 S. Ct. 1464 (2022)...15

City of Houston v. Hill,
482 U.S. 451 (1987)...19

Fields v. City of Philadelphia,
862 F.3d 353 (3d Cir. 2017) 7, 8, 9

Gericke v. Begin,
753 F.3d 1 (1st Cir. 2014) 8, 20

Glik v. Cunniffe,
655 F.3d 78 (1st Cir. 2011) 7, 8, 9, 19

Great Falls Tribune v. Dist. Ct. of Eighth Jud. Dist.,
(1980), 186 Mont. 433, 608 P.2d 116 9

Hague v. CIO,
307 U.S. 496 (1939)...14

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

McDonald v. Jacobsen,
2022 MT 160, 409 Mont. 405, 515 P.3d 777 10

Montana Democratic Party v. Jacobsen,
2024 MT 66, 416 Mont. 44, 545 P.3d 1074 .... 9, 12, 16

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 11

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) 14, 16

Police Dept. of Chicago v. Mosley,
408 U.S. 92 (1972) 14

Reed v. Town of Gilbert,
576 U.S. 155 (2015) 15, 16

Schoof v. Nesbit,
2014 MT 6, 373 Mont. 226, 316 P.3d 831 13

State v. Pizzichiello,
1999 MT 123, 294 Mont. 436, 983 P.2d 888 6

Sharpe v. Winterville Police Dep't,
59 F.4th 674 (4th Cir. 2023) 7

Skinner v. Pistoria,
(1981), 194 Mont. 257, 633 P.2d 672 12

Smith v. City of Cumming,
212 F.3d 1332 (11th Cir. 2000) 7

Snyder v. Phelps,
562 U.S. 443 (2011) 9

State v. Akers,
2017 MT 311, 389 Mont. 531, 408 P.3d 142 5

State v. Buttolph,
2023 MT 238, 414 Mont. 207, 539 P.3d 1111 6

State v. Dugan,
2013 MT 38, 369 Mont. 39, 303 P.3d 755 5

State v. Finley,
(1996), 276 Mont. 126, 915 P.2d 208 5

State v. Taylor,
2010 MT 94, 356 Mont. 167, 231 P.3d 79. 5

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969) 12

Turner Broad. Sys. v. Fed. Commc'n Comm'n,
512 U.S. 622 (1994) 17

Turner v. Lieutenant Driver,
848 F.3d 678 (5th Cir. 2017) 7

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 19, 20

Statutes

§ 45-7-302, MCA 4, 13, 17

§ 49-4-211, MCA 14

Other Authorities

2 Montana Constitutional Convention Proceedings (1979) 11

5 Montana Constititutional Convention Proceedings (1979) 11

Constitutional Provisions

Mont. Const. art II, § 6 12

Mont. Const. art II, § 7 .... passim

Mont. Const. art. II, § 8 13

Mont. Const. art. II, § 9 13

U.S. Const. amend I .... passim

NOTICE AND CONSENT PURSUANT TO RULE 12(7)

Counsel for the parties received timely notice of amici's intent to file a motion for leave to submit an amicus brief and consented thereto. The Court granted amici's motion for leave to file on January 9, 2025.

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") of Montana is a non-profit, non-partisan membership organization devoted to protecting civil rights and liberties for all Montanans. It is the state affiliate of the ACLU, which is among the oldest, largest, and most active civil rights organizations in America. For decades, the ACLU and its affiliates have litigated questions involving civil rights and liberties in the state and federal courts, including cases involving the right to record police officers in public places.

INTRODUCTION

As multiple federal courts of appeals have held, the First Amendment to the U.S. Constitution confers a right to record police officers performing their official duties in public. And the Montana Constitution goes further. Article II, section 7 of the Montana Constitution is worded more broadly than the First Amendment and was designed to provide Montanans with even greater protections for speech and expression than its federal counterpart. Together, the First Amendment and article II, section 7, squarely protect Montanans who record police officers in public, including appellant Sean Doman.

Doman was arrested for and convicted of obstructing a peace officer after he recorded police officers performing their duties in public. At all times while exercising his right to record, Doman was standing on a public sidewalk, a traditional

public forum where free expression receives the utmost constitutional protection. In addition, Doman stayed several yards away from the street where police were conducting a traffic stop that Doman was recording, and when the police confronted him Doman expressly invoked his constitutional right to record. By arresting and prosecuting him, Montana law enforcement interfered with that right and violated the U.S. and Montana Constitutions.

The police and the City of Kalispell have nevertheless defended this prosecution. They reason that the police did not entirely prohibit Doman from recording but instead demanded he record from much further away—a demand with which Doman failed to comply. That rationale is wrong for two reasons.

First, the police made clear that they instructed Doman to move only because he was exercising his right to record, and not because of anything else he was doing—a content-based restriction on speech that is subject to, and cannot survive, strict scrutiny. Second, even if the restriction was not content-based, it could not be justified as a reasonable time, place, and manner restriction because it was not narrowly tailored to serve a significant government interest and it left open no alternative channels for communication. Doman was not interfering with the police by recording events on the street while standing on a public sidewalk, and the police had no reasonable grounds to ask him to move far away, where capturing audio from the traffic stop would have been impossible.

Doman's conviction violates his constitutional rights and threatens the rights of all Montanans. This Court, exercising its plain-error review, should reverse that conviction.

BACKGROUND

On July 17, 2022, Sean Doman was biking down a residential street in Kalispell, Montana, when he saw Officer Dustin Willey conducting a traffic stop. (State's Ex. 1, at Video 2 at 4:41.[1]) Doman stopped his bicycle on the public sidewalk, approximately 15 feet from the cars, and pulled out his cellphone to record the stop. (*Id.* at 4:50; Doman Op. Br. at 3, 14; Tr. Audio at 4:46:20, 4:52:10.) From there, he did not approach the stopped car, which had pulled over to the side of the road, or Willey, who was in his patrol car several feet behind the stopped vehicle.

Because Doman was filming him, Willey called for backup. (*Id.* at 5:05; Tr. Audio at 03:13:10.) Some minutes later, Officer George Minaglia arrived and parked his vehicle approximately behind Willey's. (Video 3 at 00:13.) Minaglia immediately confronted Doman, telling him to move down the sidewalk. (*Id.* at 00:15.) Doman then moved several yards down the sidewalk but also asserted his constitutional right to record. (*Id.* at 00:26–33.) Minaglia agreed Doman had a right to record but asked him to move even farther away. (*Id.* at 00:29.) Doman responded that he wanted to

[1] State's Exhibit 1 has 3 videos. Like the appellant, amici cite directly to the videos.

be able to record audio and that he was on public property. (*Id.* at 00:42.) Minaglia told Doman he could record audio from a spot next to a tree opposite a house further down the street. However, from that position, Doman would have been fully behind the stopped car on the passenger side, with no view of the driver, and would have been unable to record audio, as Minaglia conceded at trial.[2] (Tr. Audio at 5:10:28.)

When Doman verbally refused to move further away, Minaglia approached him, grabbed the phone from his hand, and threw it on the ground. (Video 3 at 1:02.) Doman got off his bicycle, picked up his phone, and resumed filming. (*Id.* at 1:11.)

Minaglia then gave Doman a "last warning" to move back farther away or be arrested, and Doman again complied, beginning to back up while still filming. (*Id.* at 1:37.) Doman continued backing up and asked "how far" Minaglia wanted him to go. (*Id.* at 1:46.) As he was backing up, Doman called Minaglia a tyrant. (*Id.* at 1:48.) Minaglia then approached Doman, again grabbed the phone out of his hand, and arrested him. (*Id.* at 1:49.) By this point, Doman had backed up significantly from the traffic stop—he was well behind Willey's car and nearby Minaglia's.

Doman was charged with obstructing a peace officer under Montana Code section 45-7-302. A jury found Doman guilty, and he was sentenced to pay certain

[2] Using Google Maps, amici estimate the distance to the tree Minaglia referenced was at least an additional 20 feet away from where Doman was standing when arrested.

fines and fees and to serve 180 days in jail, all but one day suspended. The Eleventh Judicial District Court affirmed the conviction, and Doman appealed.

ARGUMENT

I. This Court should address Doman's constitutional argument under its plain error doctrine.

The district court declined to consider Doman's constitutional challenge because it concluded that Doman raised that challenge for the first time on appeal. But this Court may review forfeited claims "that implicate a defendant's fundamental constitutional rights," if "failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Finley* (1996), 276 Mont. 126, 137, 915 P.2d 208, 215. "Under this test, the Court asks two questions. First: does this alleged error implicate a fundamental right? Second: would failure to review the alleged error result in one of the above-listed consequences?" *State v. Taylor*, 2010 MT 94, ¶ 14, 356 Mont. 167, 231 P.3d 79. Here, the answer to both questions is yes, and this Court should reach the merits of Doman's claim.

First, Doman's constitutional claim implicates a fundamental constitutional right. *State v. Akers*, 2017 MT 311, ¶¶ 13, 17, 389 Mont. 531, 408 P.3d 142.[3] As

[3] *See, e.g.*, *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 303 P.3d 755 ("The right to free speech is a fundamental personal right and 'essential to the common quest for truth and the vitality of society as a whole." (citations omitted)).

explained below, federal appellate courts have recognized a "right to record law enforcement officers engaged in the exercise of their official duties in public places," *see Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018), and the Montana Constitution should be construed to offer at least as much protection.

Second, failure to review this issue would result in a manifest miscarriage of justice and compromise the integrity of the judicial process. Doman's constitutional argument suggests that his conviction is incompatible with the U.S. and Montana Constitutions. Allowing such a conviction to stand would "significantly diminish the rights and protections" available not only to Doman himself, but also to all Montanans. *See State v. Pizzichiello*, 1999 MT 123, ¶ 17, 294 Mont. 436, 983 P.2d 888 (citation and quotation marks omitted).

It is especially appropriate for this Court to reach Doman's constitutional argument because, even before his arrest, Doman asserted his constitutional right to record. (Video 3 at 00:28.) True, Doman did not move to dismiss the indictment on that basis. But at trial Doman's counsel objected to language in the jury instructions that stated "the right to record police activity in a public space is limited," (Tr. Audio at 9:20), and requested additional language concerning the right. (*Id.* at 6:10:10.) The trial court revised the objected-to language but denied the requested additional language, which suggests that the court in fact considered the issue. *See State v. Buttolph*, 2023 MT 238, ¶ 17, 414 Mont. 207, 539 P.3d 1111 (claim properly

preserved for appeal when District Court considered the issue but was not "directly faced with the question" at issue in appellate case). This is not a case where constitutional concerns are raised for the first time on appeal.

II. The U.S. and Montana Constitutions protect the right to record police officers performing their duties in public.

Montanans seeking to engage in expressive conduct are protected by two constitutions. Under unanimous federal case law in the federal courts of appeal, the First Amendment to the U.S. Constitution confers a right to record police officers performing their duties in public. Additionally, properly construed, article II, section 7 of the Montana Constitution provides even stronger protection for the right to record. Amici address each constitution in turn.

A. Federal courts recognize a right to record.

Every federal circuit court to address the issue, including the Ninth Circuit, has held that the First Amendment encompasses a right to record police officers performing their duties in public. *See, e.g.*, *Askins*, 899 F.3d at 1043–44; *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353, 359–60 (3d Cir. 2017); *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 681 (4th Cir. 2023); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Irizarry v. Yehia*, 38 F.4th 1282, 1294–95 (10th Cir. 2022); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

As these courts have recognized, the First Amendment's free speech and press rights, which undoubtedly protect the right to publish recorded videos, would be rendered meaningless if "the antecedent act of making the recording" was unprotected. *Alvarez*, 679 F.3d at 595. "There is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them." *Fields*, 862 F.3d at 358. Because "[a]udio and audiovisual recording are communication technologies" that "enable speech," prohibiting citizens from recording police officers in public spaces significantly curtails their First Amendment speech rights. *Alvarez*, 679 F.3d at 597.

Federal courts have held that this right to record police officers protects filming police officers conducting traffic stops or making arrests[4] and secretly recording police officers' actions and conversations,[5] among other activity.[6]

Federal courts have also recognized that the right to record serves important police-accountability purposes. "Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values, and is entitled

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[4] *See, e.g.*, *Glik*, 655 F.3d at 84*; Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014)*; Fields*, 862 F.3d at 361–62.

[5] *See, e.g.*, *Alvarez*, 679 F.3d at 595.

[6] *See, e.g.*, *Askins*, 899 F.3d at 1044 (photographing law enforcement activities on the U.S./Mexico border).

to special protection.'" *Fields*, 862 F.3d at 359 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)). And filming the police carrying out their duties in public "not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of the government more generally." *Glik*, 655 F.3d at 82–83.

In short, the First Amendment right to record police officers performing their duties in public is well established in federal caselaw.

B. This Court should also recognize the right to record.

This Court has recognized that the Montana Constitution frequently offers protections going beyond those of the U.S. Constitution. *Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 16, 416 Mont. 44, 545 P.3d 1074.[7] It should do so here as well. As explained below, this Court should hold that the Montana Constitution offers Montanans an even more robust right to record police officers performing their duties in public spaces than its federal counterpart.

1. *Text.*

This Court interprets the Montana Constitution by starting with the text. *Great Falls Tribune v. Dist. Ct. of Eighth Jud. Dist.* (1980), 186 Mont. 433, 438, 608 P.2d 116, 119. The Court is careful to give effect to each clause and to avoid constructions that "fail[] to give effect to all of the words used." *McDonald v. Jacobsen*, 2022 MT

[7] *See, e.g.*, *State v. Goetz*, 2008 MT 296, ¶ 42, 345 Mont. 421, 191 P.3d 489; *Walker v. State*, 2003 MT 134, ¶ 73, 316 Mont. 103, 68 P.3d 872; *State v. Bassett*, 1999 MT 109, 294 Mont. 327, 982 P.2d 410.

160, ¶ 40, 409 Mont. 405, 515 P.3d 777 (citations omitted). Accordingly, in assessing whether the Montana Constitution confers a broader right to record than the U.S. Constitution, it is significant that article II, section 7, contains broad language going far beyond the text of the First Amendment.

Unlike the First Amendment, section 7 confers freedom of expression in addition to freedom of speech. And unlike the First Amendment, which is framed solely as a restraint on government, section 7 adds an *affirmative* right of Montanans to be "free to speak or publish." In its entirety, section 7 reads:

> No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty. In all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.

These robust rights—against impairments of speech and expression, and in favor of freely speaking and publishing—cut powerfully in favor of recognizing a broad right to record the police under the Montana Constitution. As the federal caselaw recognizes, recording makes it possible for people to publish those recordings and express views about them. Those are precisely the sorts of activities the text of section 7 protects.

2. *History.*

The history of Montana's Constitution supports a broad reading of article II, section 7. The current version of section 7 resembles language initially adopted in

1889, with one important difference: in 1972, delegates added "or expression" after the word "speech." The delegates expressly stated that this change was meant to be "substantive," in order to "extend[]" "[t]he freedom of speech." 2 Montana Constitutional Convention Proceedings, 1971–1972, at 629–30 (1979).[8]

In articulating its rationale for this substantive change, the Committee wrote that "this extension" of section 7 would "provide impetus to the courts in Montana … to re-balance the general backseat Status of States in the safeguarding of civil liberties." *Id.* The Committee also "stress[ed] the primacy of these guarantees in the hope that their enforcement will not continue merely in the wake of the federal case law." *Id.*; 5 Convention Proceedings 1649. These statements, which were included in the Committee's report and read aloud on the convention floor, make it crystal clear the framers intended for Montana courts to read the rights to speech and expression more expansively than the federal courts.

The framers' stated intention is particularly meaningful because, in the years leading up to the 1972 convention, federal courts were interpreting the First Amendment quite broadly. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Thus,

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[8] The 1979 publication of the Montana Constitutional Convention Proceedings has seven volumes. Amici cite to these proceedings by volume number, "Convention Proceedings," and page number, if applicable (e.g., 2 Convention Proceedings 629). Each volume can be accessed at https://law.umt.libguides.com/c.php?g=1412606&p=10609874.

when Montana's delegates adopted new language for the express purpose of providing Montanans with freedoms going beyond the U.S. Constitution, the delegates necessarily meant to go beyond even the expansive reading of the federal right that prevailed at the time.

3. *Structure.*

This Court also looks to the Constitution as a whole to determine the framers' intent. *See Jacobsen*, ¶ 18. Here, the Montana Constitution's overarching commitment to government accountability confirms that article II, section 7, contains a broad right to record the police.

For example, article II, section 6 provides the public with the right to peaceably assemble and "protest governmental action." This right reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Skinner v. Pistoria* (1981), 194 Mont. 257, 261, 633 P.2d 672, 674–75 (citation omitted). Because "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," section 6 of the Montana Constitution protects "the right to comment on public matters." *Id.* (citation omitted)

The Montana Constitution also emphasizes government transparency. It provides Montanans with rights to participate in government activities, Mont. Const. art. II, § 8, and "to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions." *Id.* § 9. This is because Montanans "want to know their government and what it is doing," and they want to scrutinize "the deliberations of all public matters." *Schoof v. Nesbit*, 2014 MT 6, ¶ 24, 373 Mont. 226, 316 P.3d 831 (citation omitted). Recognizing a broad right to record the police would be consistent with this overall emphasis on government transparency and accountability.

III. Doman's conviction violates the U.S. and Montana Constitutions.

Doman's arrest and prosecution violated his speech rights under the U.S. Constitution as well as his rights to speech, expression, and publication under the Montana Constitution. Although he was on a public sidewalk peacefully recording a traffic stop occurring in the street, Doman was convicted of obstructing a peace officer under § 45-7-302, MCA, which prohibits "knowingly obstruct[ing], impair[ing], or hinder[ing] the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function." The facts of the arrest make clear that Doman was arrested and deemed to have violated the law not because of where he was standing, or even because his phone was recording, but because his phone was specifically *recording the police*. Applying § 45-7-302, MCA

to Doman under these facts violated the well-established protections of the First Amendment right to record and the more robust protections of article II, section 7, of the Montana Constitution.

A sidewalk is a "quintessential traditional public forum[]," *ACLU of Nevada v. Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003), and "[t]he government's ability to regulate speech in a traditional public forum," is "sharply circumscribed." *Askins*, 899 F.3d at 1043 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Sidewalks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In fact, the Montana legislature has enacted laws ensuring that all people have "full and free use of" sidewalks. § 49-4-211, MCA. Accordingly, any content-based restriction of speech on a sidewalk is subject to strict scrutiny. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). As explained below, the restriction in this case was content-based and cannot survive strict scrutiny. But even if the restriction at issue here was content-neutral, it would still be unconstitutional because it was not a reasonable time, place, or manner regulation of the right to record.

A. Doman was subjected to a content-based restriction that cannot withstand strict scrutiny.

A regulation is content-based and subject to strict scrutiny if it "'target[s] speech based on its communicative content'—[that is], if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015)). That is the situation here. This was a content-based restriction because the record demonstrates that Doman was arrested, prosecuted, and convicted not because of where he was standing, or even because he was using his phone, but because he was using his phone to record the police.

First, Willey conceded that he called for backup only because Doman was filming the traffic stop and that he did not need help with the traffic stop itself. (Tr. Audio at 3:13:10; 4:10:07; 4:10:20.) Had Doman been standing in the exact same location and using his phone to play a game, or photograph birds, Willey would not have called for backup, and no police officer would have confronted him.

Second, once Minaglia arrived, he instructed Doman to move much further away, and arrested him for not moving enough, only because Doman was exercising his constitutional right to record the traffic stop. Indeed, just 40 seconds into his conversation with Doman, Minaglia forcibly grabbed the phone out of Doman's hand and tossed it to the ground. (Video 3 at 00:23–1:03.) True, Minaglia claimed

that he was respecting Doman's right to record, and he told Doman that he could continue to record if he did so in a different location. But that demand only confirmed that Doman would not have been asked to move if he had been standing in the same spot, holding the same phone, but using it for something besides recording the police. Doman was targeted for arrest and prosecution not only because he used his phone to engage in expressive activity, but because that expressive activity comprised recording the police instead of, say, texting friends.

That is a quintessential content-based restriction. Indeed, Minaglia conceded at trial that if Doman had moved as far away as instructed, Doman would not have been able to record audio of the traffic stop. (Tr. Audio at 5:10:28.) Thus, police "single[d] out specific subject matter for differential treatment," an "obvious" example of a content-based regulation of speech. *Reed*, 576 U.S. at 163, 169.

As a content-based restriction, Doman's conviction is unconstitutional unless it can withstand strict scrutiny, meaning the government must prove the restriction was "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Perry Educ. Ass'n*, 460 U.S. at 45; *see also Jacobsen*, ¶ 46 (under strict scrutiny, government must show restriction "is the least onerous path to a compelling state interest"). Strict scrutiny is "an exacting test" requiring "some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal." *Turner Broad. Sys. v. Fed.*

Commc'n Comm'n, 512 U.S. 622, 680 (1994) (O'Connor, J., concurring) (plurality opinion). Here, the restriction imposed on Doman comes nowhere close to satisfying this test.

First, the government has no legitimate interest, let alone a compelling one, in preventing people on sidewalks from observing and recording police activity in the street. The Ninth Circuit has made clear, for example, that the First Amendment prohibits arresting someone under § 45-7-302, MCA simply for observing government activities. *Reed v. Lieurance*, 863 F.3d 1196, 1212 (9th Cir. 2017). It is therefore unclear how the government could have an interest in prohibiting someone from observing government activities on a public street while holding a phone on a sidewalk from a distance of at least 15 feet away.

Second, even assuming that the City could have a compelling interest in preventing certain people on sidewalks from recording police activity in the street, the enforcement action against Doman was not plausibly, let alone narrowly, tailored to such an interest. Here, the Ninth Circuit's decision in *Askins* is instructive. In *Askins* two individuals "took photographs of activities at U.S. ports of entry on the United States-Mexico border." 899 F.3d at 1038. "Both were stopped and searched by officers of the United States Customs and Border Protection ("CBP"), and their photos were destroyed." *Id.* They then filed suit for violation of their First Amendment rights. The Ninth Circuit held that—even in light of the government's

generalized interest in protecting the United States' territorial integrity—the government could not demonstrate that prohibiting the photographs was "the least restrictive means available to further its compelling interest." *Id.* at 1045. "General assertions of national security" were not enough to justify the broad restriction, "particularly where plaintiffs have alleged that CBP is restricting First Amendment activities in traditional public fora such as streets and sidewalks." *Id.*

So too here. It may well be plausible to imagine some scenario—such as an officer's discussion with a confidential informant, or police rendering aid to a young accident victim—where the City could arguably have some interest in keeping pedestrians more than 15 feet away. But that was not this case. This was a traffic stop, and Doman was not interfering with it in any way. Instead, he was quietly recording from a safe distance. And although Minaglia claimed that Doman was distracting him, Willey conceded that Minaglia was not needed to assist with the stop; Willey called him because Doman was recording. (Tr. Audio at 3:13:10; 4:10:07.)

Nor, contrary to Minaglia's citation, was Doman a safety concern. "[G]eneral assertions" are not enough, "particularly where [the government] is restricting First Amendment activities in traditional public fora such as streets and sidewalks." *Askins*, 899 F.3d at 1045. As Minaglia confirmed when he grabbed Doman's phone, Doman was deemed to be a "safety concern" because his phone was recording. To

be sure, Minaglia might have felt more comfortable if Doman had followed his command to move to a more remote location. But "[i]n our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights," and "[t]he same restraint demanded of police officers in the face of 'provocative and challenging' speech, must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.'" *Glik*, 655 F.3d at 84 (quoting *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)).

Thus, even assuming there might be some situation where the police could have a compelling interest in preventing someone from recording 15 feet away from police activity in the street, this was not such a situation, and therefore the enforcement action against Doman was not narrowly tailored to any such interest. *Cf. Glik* 655 F.3d at 84 (plaintiff's First Amendment rights were violated when he was arrested for filming an arrest from 10 feet away).

B. Even assuming the restriction was content-neutral, it cannot survive intermediate scrutiny.

Even if Doman's arrest and prosecution had been content-neutral, they would still violate the U.S. and Montana Constitutions. A content-neutral restriction on speech is unconstitutional unless it is a reasonable "time, place, or manner" restriction that is "narrowly tailored to serve a significant governmental interest," and "leave[s] open ample alternative channels for communication." *Ward v. Rock*

Against Racism, 491 U.S. 781, 791 (1989) (citation omitted); *see Askins*, 899 F.3d at 1044. Here, for two reasons, the restriction in this case cannot satisfy that test, particularly in light of the Montana Constitution's robust protections for speech, expression, and publication.

First, as explained above, the City has not articulated any reasonable interest in preventing people on sidewalks from recording traffic stops occurring in the street, nor has it explained how its actions against Doman were tailored to that interest. "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." *Gericke*, 753 F.3d at 8. But Minaglia—the arresting officer—was not engaged in any official duty related to the traffic stop; instead, he arrived solely to address Doman's presence. The record is clear that Doman posed no reasonable threat of interference with either Minaglia's or Willey's duties. The police and City must explain why they need to prohibit someone from quietly filming a traffic stop, on a public sidewalk, from at least 15 feet away. They have not done so.

Second, the restriction did not "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791. It is undisputed that Doman would not have been able to record audio from the spot Minaglia instructed him to stand. "Audio recording is entitled to first Amendment protection." *Alvarez*, 679 F.3d at 597.

"Restricting the use of an audio or audiovisual recording device," by prohibiting it from recording any audio of the intended subject of the recording, "suppresses speech just as effectively as restricting the dissemination of the resulting recording." *Id.* at 596. Such a restriction cannot survive intermediate scrutiny, even if it still allows individuals to "lawfully watch and listen to the officers' public communications, take still photographs, make video recordings with microphones switched off, or take shorthand notes and transcribe the conversations or otherwise reconstruct the dialogue later." *Id.* at 606; *see also* Mont. Const. art. II, § 7 ("Every person shall be free to … publish whatever he will on any subject ….").

CONCLUSION

For the foregoing reasons, amici respectfully ask this Court to reverse Sean Doman's conviction.

Dated: February 18, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; it is double spaced except for footnotes and for indented material; and the word count is 5,000, as calculated by Microsoft Word, excluding those sections exempted under Rule 11(4)(d).

DATED this 18th day of February, 2025.

/s/ *Alex Rate*
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