

No. 21-1827

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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DIJON SHARPE,

PLAINTIFF-APPELLANT,

v.

WINTERVILLE POLICE DEPARTMENT, et al.

DEFENDANTS-APPELLEES.

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On Appeal from the United States District Court  
for the Eastern District of North Carolina  
4:19-cv-157-D

Judge James C. Dever III

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**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION  
AND AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA  
IN SUPPORT OF APPELLANT AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae American Civil Liberties Union and American Civil Liberties Union of North Carolina state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: November 10, 2021

By: /s/ Irena Como  
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## STATEMENT OF INTEREST<sup>1</sup>

The American Civil Liberties Union (“ACLU”) is a nationwide, non-partisan, non-profit organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The ACLU works to preserve First Amendment rights, including the rights to news-gather, to observe and shed light on government practices, and to criticize government officials. The ACLU also works to safeguard the constitutional rights of individuals during their interactions with police officers, including traffic stops. The ACLU of North Carolina is a state affiliate of the national ACLU.

The ACLU and its affiliates have frequently appeared before state and federal courts, including the U.S. Supreme Court, in cases considering these rights, both as direct counsel and as *amicus curiae*. *See, e.g., Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (*amicus*); *City of Houston v. Hill*, 482 U.S. 451 (1987) (*amicus*); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (*amicus*). The ACLU and its affiliates have also appeared in cases considering and establishing the right to record police officers. *See, e.g., Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017);

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure Rule 29(c), *amici* certify that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

*ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunnliffe*, 655 F.3d 78 (1st Cir. 2011).

Because recording and publishing video of police activities are critical tools for evaluating police practices and holding law enforcement accountable to the public, the proper resolution of this case is a matter of substantial interest to the ACLU and its members.

## INTRODUCTION

The First Amendment protects the right to create, publish, and disseminate recordings of police officers performing their public duties. From footage of law enforcement brutalizing Rodney King in 1991 to the video of Derek Chauvin murdering George Floyd in 2020, such recordings have proven critical to accomplishing the First Amendment's core purposes: the free discussion of government affairs, the uncovering of abuses, and democratic pushes for government accountability and policy change.

While this Court has not squarely addressed whether the First Amendment protects the right to record police officers performing their duties in public, all federal appellate courts that have addressed the question—including the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits—have held that it does. In light of the facts of this case, and in order to provide additional guidance to lower courts and the public, this Court should join that consensus.

In addition, it should hold that, contrary to the district court’s opinion below, the right to record is not limited to recording for future publication. Rather, it protects—and, if anything, derives from—the right to publish and disseminate video, including the right to do so instantaneously. The First Amendment protects the choice of when to publish just as it does the choice of what to publish, and whether to publish at all.

In other words, the First Amendment protects the right to livestream, which enables individuals to simultaneously record and broadcast. Indeed, the ability of videos to inform debates about law enforcement depends on the ease and immediacy with which those videos can be disseminated—in part because police frequently interfere with the recording process or confiscate recorded material before it can be shared. Much like recordings published after the fact, livestreams of police activities—including Diamond Reynolds’ livestream of the chilling aftermath of her fiancé Philando Castile’s killing by police in 2016—have proven central to breaking news stories, invigorating public debate, and exposing government misconduct.<sup>2</sup>

Whether recorded or broadcast immediately, video of police interactions has

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<sup>2</sup> Catherine E. Shoichet, *Facebook Live Video Offers New Perspective on Police Shootings*, CNN (July 7, 2016), <https://www.cnn.com/2016/07/07/us/facebook-live-video-minnesota-police-shooting/index.html>; Daniel Victor & Mike McPhate, *Critics of Police Welcome Facebook Live and Other Tools to Stream Video*, N.Y. Times (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/critics-of-police-welcome-facebook-live-and-other-tools-to-stream-video.html>.

already profoundly shaped public discussions<sup>3</sup> and helped to build influential political movements, including Black Lives Matter. Responding in part to civilians' graphic videos of police violence, governments have altered police practices<sup>4</sup> and curtailed police traffic stops,<sup>5</sup> amid other reforms.<sup>6</sup> Such video of police has also

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<sup>3</sup> See, e.g., Richard Pérez-Peña & Timothy Williams, *Glare of Video Is Shifting Public's View of Police*, N.Y. Times (July 30, 2015), <https://www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html>; Sarah Almukhtar et al., *Black Lives Upended by Policing: Raw Videos Sparking Outrage*, N.Y. Times (Apr. 19, 2018), <https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html>.

<sup>4</sup> See, e.g., Ovetta Wiggins & Erin Cox, *Maryland Enacts Landmark Police Overhaul, First State to Repeal Police Bill of Rights*, Wash. Post (Apr. 10, 2021), [https://www.washingtonpost.com/local/md-politics/hogan-vetoes-police-accountability/2021/04/09/c0ac4096-9967-11eb-962b-78c1d8228819\\_story.html](https://www.washingtonpost.com/local/md-politics/hogan-vetoes-police-accountability/2021/04/09/c0ac4096-9967-11eb-962b-78c1d8228819_story.html); Maryland Police Accountability Act, 2021 Md. Laws Ch. 59 (codified as amended at Md. Code, Crim. Proc. §2-109(c)) (“A police officer may not prohibit or prevent a citizen from recording the police officer’s actions if the citizen is otherwise acting lawfully and safely.”).

<sup>5</sup> See, e.g., Jill Cowan, *Berkeley Moves Closer to Ending Police Traffic Stops*, N.Y. Times (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/us/berkeley-police.html>; Elizabeth Weill-Greenberg, *Brooklyn Center Mayor Unveils Plan to Decrease Police Traffic Enforcement Powers*, The Appeal (May 8, 2021), <https://theappeal.org/brooklyn-center-police-traffic-enforcement-plan/>; John Bacon, *Philadelphia to Become First Major US City to Ban Minor Traffic Stops to Promote Equity, Curb ‘Negative Interactions’ with Police*, USA Today (Oct. 31, 2021), <https://www.usatoday.com/story/news/nation/2021/10/31/philadelphia-ban-minor-police-traffic-stops/6224286001/>.

<sup>6</sup> Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, Brennan Ctr. for Just. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>; *Legislative Responses for Policing—State Bill Tracking Database*, Nat’l Conf. of State Legislatures (Oct. 8, 2021), <https://www.ncsl.org/research/civil-and-criminal->

figured in investigations of police misconduct<sup>7</sup> and served as key evidence in instances of inappropriate or illegal conduct by law enforcement officers.<sup>8</sup>

Equally, the right to record and livestream protects not only bystanders, but also people interacting directly with police officers, including passengers in a car during a traffic stop. Even accepting that filming in proximity to the police may increase the risk of obstruction of duty or officer safety issues in certain circumstances, a categorical, content-based ban on passengers' livestreaming police

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justice/legislative-responses-for-policing.aspx (tracking legislative reforms since the swell of racial justice protests in May 2020).

<sup>7</sup> See Indep. Comm'n on the L.A. Police Dep't, *Report of the Independent Commission on the Los Angeles Police Department* (1991) (hereinafter, "Christopher Commission Report"), available at <https://archive.org/details/ChristopherCommissionLAPD/page/n3/mode/2up>; see also, e.g., N.Y.C. Civilian Compl. Review Bd., *Worth a Thousand Words: Examining Officer Interference with Civilian Recordings of Police* 1 (June 2017), [https://www1.nyc.gov/assets/ccrb/downloads/pdf/20172806\\_report\\_recordinginterference.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/20172806_report_recordinginterference.pdf) (identifying citizen-captured video as "a crucial source of evidence and an invaluable component in the examination of police misconduct").

<sup>8</sup> See, e.g., Michael E. Miller, Lindsey Bever, & Sarah Kaplan, *How a Cellphone Video Led to Murder Charges Against a Cop in North Charleston, S.C.*, Wash. Post (Apr. 8, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/04/08/how-a-cell-phone-video-led-to-murder-charges-against-a-cop-in-north-charleston-s-c/>; Harriet McLeod, *Jury Watches Cellphone Video in the Case of a White South Carolina Police Officer Who Shot a Black Man*, Bus. Insider (Nov. 4, 2016), <https://www.businessinsider.com/jury-watches-cell-phone-video-in-the-case-of-a-white-south-carolina-officer-who-shot-a-black-man-2016-11>; Bill Hutchinson & Mark Osborne, *Baltimore Police Officer Resigns After 'Disturbing' Video Shows Him Repeatedly Punching Civilian*, ABC News (Aug. 13, 2018), <https://abcnews.go.com/US/baltimore-police-officer-suspended-disturbing-video-shows-repeatedly/story?id=57143900>.

during traffic stops is not appropriately tailored to those circumstances. The government can use far more targeted tools—including existing prohibitions on assault, solicitation, or incitement in the penal code—to address those concerns.

For these reasons, this Court should reverse the opinion below and hold that the First Amendment protects the right to record *and* the right to livestream, including when exercised by individuals interacting directly with law enforcement.

## ARGUMENT

### I. THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECORD POLICE OFFICERS.

The First Amendment reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), in order “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957). This “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” for “public men, are, as it were, public property.” *New York Times Co.*, 376 U.S. at 268, 270 (marks and citation omitted).

The right to gather information about how the government functions is foundational to these First Amendment purposes. Just as the “freedom of the press could be eviscerated” absent “some protection for seeking out the news,” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (quoting *Branzburg v.*

*Hayes*, 408 U.S. 665, 681 (1972)), so too could the freedom to evaluate and discuss the government, without some protection for gathering information about public officials. Thus, the Supreme Court has recognized that the “public interest in a free flow of information to the people concerning public officials” is “paramount.” *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). And it has held that the First Amendment “goes beyond protection of the press and the self-expression of individuals to prohibit [the] government from limiting the stock of information from which members of the public may draw.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).<sup>9</sup>

“This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties,” and even their lives. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). Indeed, “[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.” *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987).

Equally, the First Amendment protects the right to record police officers performing their duties as part of the speech-creation process. Nearly seventy years

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<sup>9</sup> While this does not guarantee the public access to all places, it does limit the government’s ability to prohibit information-gathering in places where members of the public are allowed. *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1, 10–11 (1978) (“There is an undoubted right to gather news ‘from any source by means within the law.’”(citation omitted)); *see also Branzburg*, 408 U.S. at 681–82.

ago, the Supreme Court held that “expression by means of motion pictures is included within the free speech and free press guaranty of the First . . . Amendment[.]” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). Even then, it could “not be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behaviors in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.” *Id.* at 501.

This protection necessarily extends to the process of creating video, including recording. Holding otherwise would be “akin to saying that even though a book is protected... the process of writing the book is not.” *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). *See also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–1062 (9th Cir. 2010) (“The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas.”). By the same logic, “[t]he act of recording is itself an inherently expressive activity.” *Animal Legal Defense Fund*, 878 F.3d at 1203. *See also ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“Audio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas.”).

For these reasons, all federal appellate courts that have squarely addressed the issue—specifically, the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits—



have held that the First Amendment protects the right to record police performing their duties in public. *See Fields v. City of Philadelphia*, 862 F.3d 353, 358–59 (3d Cir. 2017) (holding that “the First Amendment protects . . . recording police officers,” both because it “falls squarely within the First Amendment right of access to information” and because “for th[e First Amendment protection of photos and videos] to have meaning[,] the Amendment must also protect the act of creating that material.”); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (holding that “First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist”); *ACLU of Ill.*, 679 F.3d at 600 (holding that the right to record police is protected as a “medium of expression,” “an integral step in the speech process,” and part of “the gathering and dissemination of information about government officials”); *Glik*, 655 F.3d at 82 (holding that the “filming of government officials engaged in their duties” is protected as “gathering information about government officials”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that individuals “ha[ve] a First Amendment right . . . to photograph or videotape police conduct” because “[t]he First Amendment protects . . . a right to record matters of public interest”); *Fordyce v. City of Seattle*, 55 F.3d 436, 438–39 (9th Cir. 1995) (holding that recording police conduct during a protest implicated the “First Amendment right to

gather news” and recognizing a “First Amendment right to film matters of public interest”).

Thus, as federal appellate courts have uniformly held, the First Amendment protects the right to record police officers performing their duties. And, contrary to the district court’s holding below, the “First Amendment principles apply equally to the filming of a traffic stop and the filming of an arrest in a public park.” *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014). “A traffic stop, no matter the additional circumstances, is inescapably a police duty carried out in public... [and] does not extinguish an individual’s right to film.” *Id.* See also *Smith*, 212 F.3d at 1333 (11th Cir. 2000) (holding that individual who drove around town videotaping police cruisers, including during traffic stops “had a First Amendment right . . . to photograph or videotape police conduct”).<sup>10</sup>

Experience has borne out not only the doctrinal but also the practical necessity of protecting the right to record police. Even before the advent of modern cellphones, recordings of police exposed government abuses and informed public debate.<sup>11</sup> Today, such video is even more central to public discussions, in part because

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<sup>10</sup> The facts of the case are detailed in *Smith v. City of Cumming*, No. 1:97-CV-1753-JEC, 1999 U.S. Dist. LEXIS 23875, at \*13 (N.D. Ga. Jan. 11, 1999).

<sup>11</sup> See, e.g., Christopher Commission Report at ii (“Our Commission owes its existence to the George Holliday videotape of the Rodney King incident.”).

technologies that facilitate the ability to record and livestream public officials are widely accessible. See, e.g., ACLU, *Mobile Justice* (describing application that enables users to “record encounters with public officials and law enforcement while streaming to your contacts and your local ACLU”).<sup>12</sup> “[M]odern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.” *Riley v. California*, 573 U.S. 373, 385 (2014). As a result, “many of our images of current events come from bystanders with a ready cell phone or digital camera . . . and news stories are now just as likely to be broken by a [civilian] as a reporter at a major newspaper.” *Glik*, 655 F.3d at 84.

Against this backdrop, civilians have increasingly turned to recording to shed light on police practices.<sup>13</sup> The ability to capture and transmit video has been especially critical for communities of color seeking to inform the broader public about disparate policing.<sup>14</sup> Since the 2014 police killings of Michael Brown and Eric

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<sup>12</sup> Available at, <https://www.aclu.org/issues/criminal-law-reform/reforming-police/mobile-justice>.

<sup>13</sup> See Joanna Stern, *They Used Smartphone Cameras to Record Police Brutality—and Change History*, Wall St. J. (June 13, 2020), <https://www.wsj.com/articles/they-used-smartphone-cameras-to-record-police-brutalityand-change-history-115920208271>.

<sup>14</sup> See Allisa V. Richardson, *Bearing Witness While Black: Theorizing African American Mobile Journalism After Ferguson*, 5 Dig. Journalism 673, 673 (2017)

Garner, mass protests against the over-policing of Black and Brown communities have regularly erupted around the country, often fueled by videos captured on cellphones or other hand-held devices that contradicted official police narratives.<sup>15</sup> In addition, individuals have broadcast their participation in protests, as well as law enforcement's on-the-ground response to them,<sup>16</sup> which have also become an important record of civilian-police interactions.<sup>17</sup>

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(“Modern black citizen journalists have embraced the mobile phone as their storytelling tool of choice . . .”).

<sup>15</sup> See, e.g., Philip Bump, *How the First Statement from Minneapolis Police Made George Floyd's Murder Seem like George Floyd's Fault*, Wash. Post (Apr. 20, 2021), <https://www.washingtonpost.com/politics/2021/04/20/how-first-statement-minneapolis-police-made-george-floyds-murder-seem-like-george-floyds-fault/>; Mark Berman, Wesley Lowery & Kimberly Kindy, *South Carolina Police Officer Charged with Murder after Shooting Man During Traffic Stop*, Wash. Post (Apr. 7, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/04/07/south-carolina-police-officer-will-be-charged-with-murder-after-shooting/>.

<sup>16</sup> See Richard Nieva, “*I Wanted Everybody to See*”: *How Livestreams Change our View of Protests*, CNet (June 11, 2021), <https://www.cnet.com/tech/mobile/i-wanted-everybody-to-see-how-livestreams-change-our-view-of-protests-facebook-twitter/>; Troy Patterson, *The Tiny Media Collective That Is Delivering Some of the Most Vital Reporting from Minneapolis*, The New Yorker (June 3, 2020), <https://www.newyorker.com/culture/culture-desk/the-tiny-media-collective-that-is-delivering-some-of-the-most-vital-reporting-from-minneapolis>.

<sup>17</sup> Shawn Hubler & Julie Bosman, *A Crisis That Began with an Image of Police Violence Keeps Providing More*, N.Y. Times (June 5, 2020, updated Mar. 11, 2021), <https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html>; Alex Horton, *In Violent Protest Incidents, a Theme Emerges: Videos Contradict Police Accounts*, Wash. Post (June 6, 2020), <https://www.washingtonpost.com/nation/2020/06/06/police-protester-incidents-video/>.

## II. THE FIRST AMENDMENT PROTECTS THE RIGHT TO LIVESTREAM VIDEO OF POLICE OFFICERS PERFORMING THEIR DUTIES.

Whether the First Amendment protects the right to livestream should be, if anything, an easier question than whether it protects the right to record. “Livestreaming” is as old as radio and television news. While individuals livestreaming from their cellphones may be novel, media organizations broadcasting live is not. *Cf. Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 636 (1994) (holding that television broadcasts are protected as “engag[ing] in and transmit[ing] speech”).

If the government tried to block a news station from broadcasting live, that would constitute a prior restraint. *See, e.g., Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979) (government “may not constitutionally punish publication [of lawfully-obtained information] absent a need to further [a] state interest of the highest order”); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (government may gag such publication only in “exceptional cases.”).

This is no different. Indeed, more than fifty years ago, the Supreme Court held that “it is as true [of motion pictures] as of other forms of expression that ‘any system of prior restraints . . . comes to . . . [c]ourt bearing a heavy presumption against its constitutional validity.’” *Freedman v. Maryland*, 380 U.S. 51, 57 (1965) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)) (striking down licensing

scheme for exhibiting movies). And many of the federal circuit court decisions recognizing a right to record hold that that right emanates from the protections for broadcasting the resulting video, including “in a form that can readily be disseminated to others.” *Glik*, 655 F.3d at 82. *See also Fields*, 862 F.3d at 358 (holding that the First Amendment protects the right to record in part because “[t]here is no practical difference between allowing police to prevent people from taking recordings and actually banning the . . . distribution of them”).

That livestreaming involves immediate publication is a further reason to ensure vigorous First Amendment protection. The Supreme Court’s distaste for prior restraints is so strong, in part, because of the delays that they inflict. As the Court has explained, “self-imposed” delays—for example, those that arise from internal editing processes—may not pose a First Amendment problem, but “[d]elays imposed by governmental authority are a different matter.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 560 (1976). When it comes to speech, “[a] delay of even a day or two may be of crucial importance in some instances.” *Carroll v. President and Comm’rs of Princess Anne*, 393 U.S. 175, 182 (1968).

People have the right to choose when to speak, including “[w]hen public interest in the matters discussed would naturally be at its height.” *Wood v. Georgia*, 370 U.S. 375, 392 (1962) (citation omitted). And, like the right to publish at all, the right to publish immediately is particularly important when it comes to speech on

matters of public concern. “[T]iming is of the essence in politics,” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring), and “[t]he damage [of a prior restraint] can be particularly great when [it] falls upon the communication of news and commentary on current events,” *Neb. Press Ass’n*, 427 at 559.

This includes video of traffic stops, which are the most common form of interaction between civilians and law enforcement officers—and the most common context for police misconduct and police brutality.<sup>18</sup> They are also a major cause of racial disparities in how individuals and communities are policed.<sup>19</sup> Prohibiting livestreaming of such realities would mean that “immediate speech [could] no longer respond to immediate issues.” *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) (citation omitted).

Even worse, because police too often take actions—including seizing or destroying phones and other recording equipment—that make future publication

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<sup>18</sup> David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. Times (Oct. 31, 2021, updated Nov. 8, 2021), <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html>.

<sup>19</sup> See Frank R. Baumgartner, Derek A. Epp & Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* 68, 85–87, 113 (2018) (finding that Black drivers in North Carolina are significantly more likely to be pulled over than white drivers and significantly more likely to be searched and arrested than white drivers, yet significantly less likely to be found with contraband than white drivers as the result of a discretionary search).

impossible, prohibiting livestreaming could, in effect, block the speech from *ever* being uttered. Courts commonly confront cases in which police seize the phones, cameras, or memory cards used to record them. *See, e.g., Craft v. Billingslea*, 459 F. Supp. 3d 890, 899–900 (E.D. Mich. May 8, 2020) (police seized a man’s phone while he was recording officers restraining, punching, and pepper spraying his friend); *Garcia v. Montgomery County*, 145 F. Supp. 3d 492, 507–11 (D. Md. 2015) (police seized a photojournalist’s camera and memory card after he recorded them arrest two individuals); *J.A. v. Miranda*, No. PX-16-3953, 2017 WL 3840026, at \*1, \*4–6 (D. Md. Sept. 1, 2017) (police beat, arrested, and knocked a man’s phone out of his hand after he recorded them arresting his brother); *King v. City of Indianapolis*, 969 F. Supp. 2d 1085, 1088–89 (S.D. Ind. 2013) (police grabbed plaintiff, who was videotaping the arrest of a drunk driver, and seized his phone).<sup>20</sup> Given such realities, a ban on livestreaming can be, in essence, a ban on any publication of recordings of police at all.

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<sup>20</sup> *See also* U.S. Dep’t of Just., Civil Rights Div., *Investigation of the Baltimore City Police Department* 119 (Aug. 10, 2016), <https://justice.gov/crt/file/883296/download>; U.S. Dep’t of Just., Civil Rights Div., *Investigation of the Ferguson Police Department* 26 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf).



### **III. THE FIRST AMENDMENT PROTECTS THE RIGHTS OF INDIVIDUALS WHO ARE PART OF THE POLICE INTERACTION.**

Below, the district court erroneously held that there is no First Amendment right to livestream, and it also purported to limit that holding only to those who are part of the police interaction. As discussed above, this Court should reject the broad version of that holding—and it should reject the cabined version, too.

The district court articulated four distinctions between a bystander’s right to record and a passenger’s right to livestream that, it held, meant that the First Amendment does not protect the latter. Two of those distinctions—that livestreaming “contemporaneously broadcasts the interaction to another recipient” and “provide[s] the perspective from inside the stopped car,” *Sharpe v. Ellis*, No. 4:19-CV-157-D, 2021 WL 2907883, at \*4 (E.D.N.C. July 9, 2021)—are properly viewed not as reasons to ban livestreaming by passengers, but instead as reasons to protect it. As noted above, choosing the timing of a broadcast is protected by the First Amendment. And, as the Third Circuit has recognized, “[b]ystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture.” *Fields*, 862 F.3d at 359. This is also true for videos captured by those inside of a car during a

traffic stop; indeed, they offer the *opposite* perspective to the one captured by police and may be particularly instrumental in challenging official police narratives.<sup>21</sup>

In addition, the court below suggested that livestreaming from within a car stopped by police presents unique officer safety issues because livestreaming can broadcast not only video but also location and because, hypothetically, livestreaming from within the car could expose a view of “weapons . . . that an officer might not be able to see and thereby embolden a coordinated attack on police.” *Sharpe*, 2021 WL 2907883, at \*4. Relatedly, the court concluded that, even if a First Amendment right to livestream exists, Appellees’ ban “survives intermediate scrutiny” because it promotes “officer and public safety” by “removing features such as live video, real-time commenting, and geolocation data, from being used from inside the stopped car to coordinate an attack on the officers and the public.” *Id.*, at \*5–6.<sup>22</sup>

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<sup>21</sup> Police departments themselves recognize that people who are directly interacting with officers have First Amendment rights. For example, the Baltimore Police Department has an internal policy which directs officers to “allow a person to record their own interaction with police” up to the moment of arrest. Baltimore Police Dep’t, Policy No. 1016: Public Observations/Recording of Officers (Sept. 7, 2021), <https://public.powerdms.com/BALTIMOREMD/documents/51031>.

<sup>22</sup> This alternative holding is also erroneous because the ban—which is limited to livestreaming *police* and no other content—is content-based and, as such, must satisfy strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

The court’s concerns about livestreaming threatening the safety of officers were farfetched: there was no suggestion that Appellant sought to coordinate such an attack in this case. Nor is there reason to credit the concern.

Indeed, other circuit courts have rejected these types of arguments about officer safety. As noted above, the First Circuit has squarely held that “a traffic stop does not extinguish an individual’s right to film,” *Gericke*, 753 F.3d at 7, including where “the person attempting to record both audio and video was an individual whom the police had pulled over during a traffic stop” and so “was not a mere observer to the police encounter but a participant in it.” *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 831 (1st Cir. 2020) (describing the facts of *Gericke*). The First Circuit held that her First Amendment protection was the same as that of a bystander filming an arrest at a distance because, “[i]n both instances, the subject of filming is ‘police carrying out their duties in public.’” *Gericke*, 753 F.3d at 7 (quoting *Glik*, 655 F.3d at 82).

The First Circuit recognized that “the circumstances of some traffic stops . . . might justify a safety measure . . . that would incidentally impact an individual’s exercise of the First Amendment right to film”—but it held that such circumstances are limited: “[A] police order that is specifically directed at the First Amendment right to film police” would be constitutional “only if the officer can reasonably conclude that the filming itself is interfering, or about to interfere, with his duties.”

*Id.* at 8. And it highlighted that the reasonableness of any such order must take account of the “admonition that ‘in our society, police officers are expected to endure significant burdens caused by citizens’ exercise of First Amendment rights.” *Id.* (quoting *Glik*, 655 F.3d at 84). In other words, “*Gericke* explained that the distinct concerns about public safety and interference with official duties implicated by [a traffic] stop did not, without more, ‘extinguish’ the right [to film police officers performing their duties in public].” *Project Veritas*, 982 F.3d at 833.

Similarly, in *Smith*, the Eleventh Circuit held that the right to film officers is protected in the context of a traffic stop. 212 F.3d at 1333. There, the plaintiff had not been party to the traffic stops he recorded, but he had been “following [officers]” and “videotaped [them] on at least six different occasions,” including during traffic stops. *Smith*, 1999 U.S. Dist. LEXIS 23875, at \*13–14. Before the district court in that case, officers raised safety concerns. *Id.* at \*14 (“Smith’s actions made them nervous and they felt their safety was jeopardized.”). On appeal, the Eleventh Circuit recognized that, even in the context of those facts, the plaintiff “had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.” *Smith*, 212 F.3d at 1333.

Lower courts have reached similar conclusions. In *Blakely v. Andrade*, for example, the Northern District of Texas held that a woman who alleged that she “was in the vehicle” that officers pulled and “began recording on her cell phone

when the traffic stop was initiated” had a “First Amendment right to record the police.” *Blakely v. Andrade*, 360 F. Supp. 3d 453, 482 (N.D. Tex. 2019) (citing *Turner*, 848 F.3d at 689). Similarly, the District of Maryland held that an individual had a First Amendment right to record the police arresting his brother while they were all in his mother’s apartment. *J.A.*, 2017 WL 3840026, at \*1, \*5.<sup>23</sup>

The lower court’s decision to the contrary was in error. Even accepting that livestreaming might impact officer safety in some circumstances, “broadly criminalizing” First Amendment activity directed toward an officer is an impermissible way to address those risks, particularly as it would grant officers “unfettered discretion to arrest individuals for words or conduct that annoy or offend them.” *City of Houston*, 482 U.S. at 462 n.11, 465.

“A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). While the government clearly has a compelling interest in stopping

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<sup>23</sup> To the extent that Appellees rely on *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010) to argue that the First Amendment does not protect the right of a passenger to record a traffic stop, it is worth noting that *Kelly* did not “rule[ ] on the First Amendment right, instead merely holding that at the time of [the] ruling[] the claimed right was not clearly established.” *Fields*, 862 F.3d at 357. Moreover, when the Third Circuit squarely recognized the right to record in a subsequent decision, it noted that the facts of citizen recording had evolved “in the years since our *Kelly* decision” given “technological progress and the ubiquity of smartphone ownership.” *Id.* at 357–58.

a coordinated attack on officers, the proscription at issue here targets far more; it prohibits *any* livestreaming of police, regardless of, for example, whether the content praises or criticizes the officers, or whether any violence is likely, or intended, to occur. It also does not consider whether the content shows the officers acting courteously and within legal bounds, or using racial epithets and excessive force,<sup>24</sup> such that the officer might have a personal and impermissible reason for shutting down the livestream.

In addition, accepting the lower court’s logic that the combination of disclosing geo-location and two-way communication presents unique safety concerns and can be banned for that reason would open the door to denying all manner of First Amendment speech, from texting one’s location and the fact of being stopped by officers to one’s friends to engaging in any form of communication with anyone other than the officer during a traffic stop at all.

Moreover, other existing restrictions could far better target the potential harm here. For example, assault of an officer is already illegal under North Carolina law, N.C. Gen. Stat. § 14-34.7, as is “willfully and unlawfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging . . . a duty of his office,” *id.* § 14-223.

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<sup>24</sup> See, e.g., Sophie Lewis, *Virginia Police Officer Fired After Black Army Lieutenant is Pepper-Sprayed and Handcuffed During Traffic Stop*, CBS News (Apr. 12, 2021), <https://www.cbsnews.com/news/virginia-police-officer-fired-pepper-spray-handcuff-black-army-lieutenant-traffic-stop/>.

Similarly, prohibiting incitement or solicitation of an attack, whether via livestream or otherwise, would be better tailored to the government's safety concerns. Appellants' decision to instead prohibit an entire class of speech that brings a unique and immediate perspective to an issue of central public concern is impermissible.

### CONCLUSION

For these reasons, this Court should reverse the court below and hold that the First Amendment protects the right to record and the right to livestream police performing their duties, including when exercised by passengers in stopped cars.

Dated: November 10, 2021

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief of Amici Curiae in Support of Plaintiff–Appellant and Reversal complies with the type-volume limitation, typeface requirements, and type style requirements of Fed. R. App. P. 32(a) because it contains 5,474 words and has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using the word-processing system Microsoft Word 2016.

Dated: November 10, 2021

By: /s/ Irena Como  
Irena Como

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## CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

Dated: November 10, 2021

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