Nos. 16-1650 & 16-1651

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD FIELDS,
Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, *et ano*,
Defendants-Appellees.

AMANDA GERACI,
Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, *et al.*
Defendants-Appellees.

On Appeal from the District Court for the Eastern District of Pennsylvania
Nos. 14-cv-4424 & 14-cv-5264

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

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[1] This brief has been prepared and joined by individuals affiliated with various law schools, but it does not purport to present any school's institutional views.

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INTEREST OF *AMICI CURIAE*[2]

This brief is filed with the consent of all parties, and hence no motion for leave to file is necessary. F.R.App.P. 29(a)(2).

Amici are professors who write in First Amendment law. They teach and publish on the First Amendment, and their expertise can aid the Court in the resolution of this case. Specifically, amicus focus this brief on First Amendment protection for the right to record public officials performing public duties in a public forum. Amici employment and titles are listed below for identification purposes only.

- **Jane Bambauer** is an Associate Professor of Law at the University of Arizona James E. Rogers College of Law. Her scholarship focuses on law and technology and data governance, including First Amendment protection for data.
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[2] In accordance with Rule 29(c)(5) of the Federal Rules of Appellate Procedure, no party's counsel authored this brief in whole or part, and no person or persons other than *amici curiae* contributed money intended to fund the preparation or submission of this brief.

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- **Erwin Chemerinsky** is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law. His extensive scholarship focuses on constitutional rights and the First Amendment.
- **Alan K. Chen** is the William M. Beaney Memorial Research Chair and Professor of Law at the University of Denver Sturm College of Law. His scholarship focuses on a wide range of issues concerning free speech doctrine and theory, including the right to record.
- **Margot E. Kaminski** is an Assistant Professor of Law at The Ohio State University Michael E. Moritz College of Law. Her scholarship focuses on emerging technologies and the relationship between privacy and speech rights.

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ARGUMENT

Amici urge this Court to recognize that the First Amendment covers audiovisual recording of public officials performing their duties in a public place. The First Amendment protects not only pure speech and expressive conduct, but

also the corollary rights necessary for free expression and access rights necessary for the functioning of our democracy. Scholars unanimously conclude that the First Amendment protects a "right to record" public officials performing public duties in public locations. *See, e.g.*, Jane Bambauer, *Is Data Speech*, 66 STAN. L. REV. 57, 61 (2014); Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1038-44 (2015); Marc Jonathan Blitz, *The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information-Gathering in the Age of Google Earth*, 14 COLUM. SCI. & TECH. L. REV. 115 (2013); Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 50 (2016); Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEXAS A&M L. REV., 131 (2015); Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. REV. DISCOURSE 230 (2016); Alan Chen & Justin Marceau, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1013-1015 (2016); Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. __ (forthcoming 2017)*;* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment*: *Memory, Discourse and the Right to Record*, 159 U. PA. L. REV. 335, 342 (2011); Glenn Harlan Reynolds & John A. Steakley, *A Due Process Right to Record the Police*, 89 WASH. U. L. REV.

1203, 1204 (2013); Jocelyn Simonson, *Beyond Body Cameras: Defending A Robust Right to Record the Police,* 104 GEO. L.J. 1559 (2016). The district court therefore erred when it applied *Spence v. Washington* and failed to recognize a First Amendment right to record. 418 U.S. 405 (1974).

Amici contend that the First Amendment protects a "right to record" public officials performing public duties on public property for the following reasons: First, video recording can be characterized as speech. *See* part A(1). Second, video is part of a widely accepted communications medium; making a cellular phone video is now culturally recognized as a form of expression. *See* part A(2). Even if recording is not itself speech, it is protected as a corollary right to the right of free expression. *See* part B(1). As a form of newsgathering, recording is often necessary for holding our public institutions accountable and ensuring the proper functioning of our democracy. *See* part B(2). *Amici* explain how protection for a right to record follows from First Amendment theory. *See* part C(1). *Amici* emphasize that when the government's motive is to prevent speech, First Amendment protections apply. *See* part C(2).

Finally, *amici* recognize that the right to record will be subjected to limiting principles. These limiting principles, importantly, do not include misapplying the *Spence* test as the district court did below, or requiring that speech must be critical of the government to be protected. *See* part D(1). Placing these particular limits on

the right to record, as the district court did, breaks with how courts have applied the *Spence* test and with First Amendment dedication to content and viewpoint neutrality. *Amici* provide instead a brief overview of potential limiting principles for the right to record. *See* part D(2). The Court need not reach most of these limiting principles in this case. The wide consensus is that the First Amendment protects the right to audiovisually record a public official performing official duties in public.

As scholars of the First Amendment, *amici* counsel this court to avoid conflicts with other courts of appeals and with First Amendment case law and principles. Allowing the government unfettered discretion to prevent the audiovisual recording of public officials performing their public duties in a public forum runs counter to today's culture of digital mass communication and personal videography. It undermines recent efforts to increase the public accountability of law enforcement through legal observation by third parties. These efforts improve governance, bolster our democracy, and celebrate the autonomy of individual citizens in the face of government action. The First Amendment thus protects recording police officers performing their duties in public.

A. Audiovisual Recording Can be Characterized as Speech or as Part of a Recognized Communications Medium.

The First Amendment fully protects both movies and digital communications. Audiovisual recording can be characterized as speech, in the way

that writing a diary entry or painting a portrait is speech. Even if making a video is not considered equivalent to oral speech, however, video is now a clearly recognized communications medium. Video recording should thus be protected just as we protect acts integral to other communications media.

1. Audiovisual Recording Can be Characterized as Speech.

First Amendment protections have evolved with technology. The First Amendment protects more than just oral communications or the distribution of paper pamphlets. The Supreme Court has held that the First Amendment fully protects both movies and digital communications. *See Burstyn v. Wilson*, 343 U.S. 495 (1952) (protecting movies); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (protecting film watching); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (protecting both pictures and film); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) (protecting online speech). Importantly, the Court treats all movies as protected, without inquiring in each instance into whether a "particularized message" has been expressed under *Spence*. Kreimer, 159 U. PA. L. REV. at 373.

Protection of audiovisual recording flows logically from this doctrine protecting both the exhibition and viewing of video. Bambauer, 66 STAN. L. REV. at 61. Just as writing words on a page and editing a film are recognizably protected speech, recording video can be characterized not as conduct but as fully protected

expression. *See, e.g.,* Chen & Marceau, 116 COLUM. L. REV. at 1013-1015; Kreimer, 159 U. PA. L. REV. at 342.

The First Amendment protects, or even flows from, freedom of thought. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("speech must be protected from the government because speech is the beginning of thought"). Audiovisual recording can be characterized as an exercise of the freedom to ruminate, to build memories. Blitz, 14 COLUM. SCI. & TECH. L. REV. at 148 ("Taking a picture… represents and fixes a visual experience in a particular medium of expression, usually to remember it later"); Kreimer, 159 U. PA. L. REV. at 342, 379. Speech need not have an external audience to be protected. *See Harper & Row*, 471 U.S. 539 at 559 (explaining that unpublished drafts are protected by the First Amendment). If writing in an undistributed diary is speech, making an undistributed recording can be characterized as speech, as well.

2. Audiovisual Recording is Part of a Recognized Communications Medium.

The act of audiovisual recording differs from the act of opening one's mouth to speak, but *amici* counsel that it should nonetheless be protected as part of the recognized communications medium of video. Oral speech is created at precisely the same time it is disseminated. Bhagwat, 56 WM. & MARY L. REV at 1033. By contrast, books are printed before they are distributed; photographs are usually

taken before they are shown to others; and movies are filmed before they are screened. Id. However, even when the act of producing communication is temporally distinct from the act of communicating, courts have extended protection to speech production where that production is integral to a recognized communications medium.

The Supreme Court recognized that "motion pictures are a significant *medium* for the communication of ideas." *Burstyn* at 501 (emphasis added). Today, video has become even more important and prevalent as a medium of communication. Kreimer, 159 U. PA. L. REV. at 339. Video is now a recognized mode of self-expression. Blitz, 14 COLUM. SCI. & TECH. L. REV. at 139; Campbell, 68 STAN. L. REV. at 50 (2016).

Once society recognizes a particular mode of communication, First Amendment protection extends beyond the finished product into the process of making it. Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 717 (2000) ("If the state were to prohibit the use of [film] projectors without a license, First Amendment coverage would undoubtedly be triggered. This is not because projectors constitute speech acts, but because they are integral to the forms of interaction that comprise the genre of the cinema."); Kreimer, 159 U. PA. L. REV. at 382; *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (observing that "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, or that we could value Beethoven without the benefit of strings and woodwinds."); *ACLU v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) cert. denied, 133 S. Ct. 651 (2012) ("[t]his observation holds true when the expressive medium is mechanical rather than manual"). The Supreme Court has held that when the government targets an integral aspect of the production of a recognized communications medium, that action is suspect under the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983) (invalidating a tax on ink and paper used in producing newspapers).

Like putting pen to paper, or buying pen and paper, video recording can be characterized as conduct that is essentially preparatory to speech. Chen & Marceau, 116 COLUM. L. REV. at 1018. Government actions that target audiovisual recording are suspect under the First Amendment because audiovisual recording is integral to expression. "Targeted regulations of audiovisual recording thus single out conduct commonly associated with expression and impose an apparent disproportionate burden on speech." Campbell, 68 STAN. L. REV. at 50-51.

B. Audiovisual Recording Is Protected as a Corollary Right or as Newsgathering.

Video recording of police officers in public falls under the widely recognized protection of corollary rights that are necessary to adequately protect

core First Amendment rights. If courts limit themselves to protecting only oral utterances, or distribution, the government could easily prevent speech by targeting other links in the chain of information production. For this reason, courts have protected both corollary rights generally, and newsgathering rights (also known as "access rights") specifically, in service of democratic values. Audiovisual recording of police officers in public is a clear example of the type of conduct thus protected.

1. The First Amendment Protects the Corollary and Penumbral Rights Necessary for Speech.

Courts have recognized that for core First Amendment rights to be meaningfully protected, it is often necessary to protect certain penumbral or corollary rights. As the Supreme Court has explained, "[w]ithout those peripheral rights, the specific rights would be less secure." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). The First Amendment provides corollary protections beyond core speech, including "not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought..." Id. at 482 (citations omitted).

The Supreme Court has over the years recognized a number of corollary First Amendment protections. These include an implicit First Amendment right to associate with others for expressive purposes, and a right to anonymity in associative membership. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000);

Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). The Supreme Court has extended First Amendment protection not just to the act of writing or printing a newspaper, but to various links in the distribution chain, including the distribution of handbills, acts of door-to-door solicitation, the operation of sound amplification equipment, and the placement of newspaper racks. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Lovel v. City of Griffin*, 303 U.S. 444, 452 (1938); *Watchtower Bible v. Vill. Of Stratton*, 536 U.S. 150, 168-169 (2002); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 378 (1989); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The existence of such corollary rights is "necessary in making the express guarantees [of the First Amendment] fully meaningful." *Griswold*, 381 U.S. at 483. *See also Luis v. United States*, 136 S. Ct. 1083, 1097-1098 (2016) (Thomas concurring) ("Constitutional rights thus implicitly protect those closely related acts necessary to their exercise").

The First Amendment's protections must similarly expand, to some degree, to protecting the gathering of information that is necessary for expression. *See* Bhagwat, 56 WM. & MARY L. REV at 1058 ("the Court has long interpreted the Speech Clause to extend penumbral protection to conduct closely associated with speech"); Bambauer, 66 STAN. L. REV. at 70 ("the collection of data is a necessary precursor to having and sharing it"); Blitz, 14 COLUM. SCI. & TECH. L. REV. at 154-

155 ("It is hard to see how such peripheral rights could fail to include the right to have access to the media and tools that make speech possible"). The First Amendment thus protects not just pure speech or expressive conduct. It also expands where necessary to protect corollary rights so that the government cannot prevent speech by targeting conduct falling just outside a strict definitional ambit. Such corollary protections are necessary to prevent core First Amendment protections from erosion. *Alvarez*, 679 F.3d at 595-96 ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee… 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"); Bambauer, 66 STAN. L. REV. at 73.

2. The First Amendment Protects Audiovisual Recording as a Form of Newsgathering.

Courts have recognized a newsgathering right (or "access right") as a corollary right to the First Amendment, in service of the functioning of our democracy. *See Richmond Newspapers* at 585–87 (Brennan, J., concurring) (identifying "the correlative freedom of access to information"). If newsgatherers, including ordinary citizens, could not access information, protection for the distribution of news stories would be meaningless. *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972) (observing that "without some protection for seeking out the

news, freedom of the press could be eviscerated"); *see* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 O.S.L.J. 249, 256 (2004) ("the government could abridge flows of important information to the public by simply restricting or burdening antecedent conduct that generates those flows"). While information gathering often involves non-expressive conduct, restrictions on information gathering can implicate important First Amendment interests. Id. at 273.

The First Amendment's protections for newsgathering are tied to ensuring the proper functioning of our democracy. *See Richmond Newspapers*, 448 U.S. at 585-87 (1980) (Brennan, J., concurring) (observing that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government") (emphasis in original); Id. at 584 (Stevens, J., concurring) ("the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government"). Thus newsgatherers' access to criminal trials and criminal judicial proceedings is protected because it implicates the ability of ordinary citizens to hold their public officials accountable. *Id. See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (finding unconstitutional a state

statute excluding the public during cases involving minors and sex crimes); *Press-Enterprise Co. v. Superior Court*, 464 U. S. 501 (1984) (finding a public right of access to jury selection in criminal trials); *Press-Enterprise Co. v. Superior Court*, 478 U. S. 1 (1986) (finding a public right of access to pretrial hearings in criminal cases).

The Supreme Court has provided two principles for determining when the access right exists: a historic "tradition of accessibility," and "whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589. These two prongs of "logic and experience" have long been applied by lower courts cases where the court considers whether to allow newsgatherers access to a non-public forum. *See* McDonald, 65 O.S.L.J. at 306.

Recording a police officer performing public duties in a public location is squarely situated within the newsgathering right. This is not a traditional access assessment, as public fora have historically been open to the public "time out of mind." See *Hague v. CIO*, 307 U.S. 496, 515 (1939). As in access cases, however, recording a police officer serving his or her public function is crucial for improving that government function. Spontaneous videos of police officers can have significant real-world impact, "sparking outrage and dialogue about police practices throughout the nation." Jocelyn Simonson *Copwatching*, 104 CALIF. L.

REV. 391, 410 (2016). Calvert, *The First Amendment Right to Record Images of Police in Public Places*, 3 TEX. A&M L. REV. at 132-33. The practice of organized "copwatching"—where organized groups of neighborhood residents monitor and video police conduct—"deters unconstitutional conduct and promotes positive interactions… contribut[ing] to the accountability of police departments through both formal institutions and the informal public sphere." Simonson, 104 CALIF. L. REV. at 409. The central goal of organized copwatching is in fact to improve the institution of policing. Id. at 411.

Observation and video recording can serve to deter misconduct in real time, improving a government institution even as recording occurs. Id. at 415; Kreimer, 159 U. PA. L. REV. at 347. And while police departments across the country have recently been adopting body-worn cameras, copwatching "has the potential to be a more powerful deterrent… because the cameras and footage remain in the control of civilians rather than the state." Simonson, 104 CALIF. L. REV at 416.

The purpose of the newsgathering right is to hold accountable and structurally improve our government institutions. Video recording police officers serves just such a purpose. Kreimer, 159 U. PA. L. REV. at 350. *See, e.g.,* Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-

staten-island.html ("Without video of his final struggle, [Eric] Garner's death may have attracted little notice or uproar… Absent the video, many in the Police Department would have gone on believing his death to have been solely caused by his health problems"). Preventing individuals from recording police officers in public fora, which "time out of mind" have been open to the public for expressive activity, would run against established First Amendment principles and law. *See Houston v. Hill*, 482 U.S. 451, 462-463 (1987) ("The 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.").

C. First Amendment Theory and the Right to Record

First Amendment protection for a right to record police officers performing their duties in public stems not only from the doctrine, but also from the theories that provide the basis for speech protection. The dominant positive theories for why we have First Amendment protection all support protecting a right to record public officials performing official duties in a public forum. Additionally, a negative theory of the First Amendment, which emphasizes restricting government behavior when it targets expression, counsels protecting a right to record.

1. First Amendment Theory Supports Protecting a Right to Record.

Theorists have focused on three reasons why the First Amendment protects

freedom of expression: to foster the marketplace of ideas; to encourage democratic self-governance; and to protect individual autonomy. *See, e.g.,* Robert C. Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011). Protection of free speech fosters a vibrant marketplace of ideas, in which individuals can search for truth. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, *J.*, dissenting). Protection of free speech also enables a functioning system of democratic self-governance; without freedom of expression, citizens would not be able to effectively choose candidates or correct failings in their democracy. *See* Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948). Finally, protection of free speech protects freedom of thought and individual autonomy in the face of majoritarian impulses. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

Under any and all of these theories, the First Amendment protects a right to record that covers at least the official behavior of public officials in a public forum. Scholars have drawn on a variety of these theories when arguing for First Amendment protection for audiovisual recording. Bambauer, 66 STAN. L. REV. at 91-105; Bhagwat, 56 WM. & MARY L. REV. at 1079; Blitz, 14 COLUM. SCI. & TECH. L. REV. at 182; Calvert, 3 TEX. A&M L. REV. at 164-67; Chen & Marceau, 116 COLUM. L. REV at 1001-1010; Kaminski, 97 B.U. L. REV. at *12; Kreimer, 159 U. PA. L. REV. at 379; Simonson, 104 GEO. L.J. at 1571.

Recording the official behavior of public officials in public increases the amount of information available in the marketplace of ideas. Like leafleting, image capture is "an unusually cheap and convenient form of communication." *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994); *see also Martin v. City of Struthers*, 319 U.S. 141, 146 (1943). Image capture facilitates review of police conduct by laypeople and legal professionals alike. *See* Chen & Marceau, 116 COLUM. L. REV at 1007.

Audiovisual recordings of public officials also foster a better system of self-governance by facilitating the collection of information about official government activity, and by allowing citizens to hold police officers accountable for potential misconduct. Under the theory of self-governance, the purpose of the First Amendment is "[t]o give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal." Meiklejohn, Free Speech and Its Relation to Self-Government at 88. The collection of information about police conduct in public currently fuels important policy discussions about law enforcement, including discussions of information we otherwise would not know. *Cf.* Chen & Marceau, 116 COLUM. L. REV. at 1031; *Houston v. Hill*, 482 U.S. at 463 n.12 (1987) ("[T]he strongest case for allowing challenge [to the police] is simply the imponderable risk of abuse… that lies in the state in which no challenge

is allowed.") (internal citation omitted). Recording the police also allows civilians to hold police officers accountable in the moment; the possibility that conduct may be being recorded can deter misconduct and promote respectful policing. *See* Kreimer, 159 U. PA. L. REV. at 347.

Finally, protecting the right to record protects the autonomy of individuals who express themselves by choosing to openly film police officers in the course of duty, and the autonomy of willing viewers and listeners. The government has a duty to allow individuals to be rational, autonomous, and reflective democratic agents. *See* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). The ability of civilians to record public officials at work serves these values. *See* Baker, 28 CONST. COMMENT. at 251 ("autonomy . . . encompass[es] self-expressive rights that include, for example, a right to seek to persuade or unite or associate with others—or to offend, expose, condemn, or disassociate with them."). For many residents of neighborhoods with a high police presence, often neighborhoods with large numbers of people of color, holding up a smartphone towards a police officer is a means to express individual dissent towards local policing practices. *See* Simonson, 104 GEO. L.J. at 1572.

Protecting the recording of police officers also protects the autonomy of any would-be viewers or listeners. Bambauer, 66 STAN. L. REV. at 74; David A.

Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 371 (1991) ("[F]reedom of expression is designed to protect the autonomy of potential listeners."). To interfere with the recording and thus the receipt of audiovisual recordings of police officers is to interfere with the ability of citizens to exercise their autonomy by drawing well-informed conclusions about their local governments. The dominant positive theories of the First Amendment thus all suggest that recording police officers acting in the line of duty in a public forum should be protected.

2. When the Government's Motive is to Prevent Speech, as with Suppressing Audiovisual Recording of the Police, First Amendment Protections Apply.

The right to record is also protected under the so-called "negative" theory of the First Amendment, which focuses on restricting illegitimate government action. *See, e.g.*, Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 451 (2012) (describing a negative justification for the First Amendment as rooted "primarily on the grounds of distrust of government"). Recent cases suggest that if the government deliberately targets expression, the First Amendment intervenes to protect it. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) (finding that the government's improper speech-suppressing motive sufficed to establish a First Amendment violation). The First Amendment protects the right to record when the government targets recording as a way of

targeting the communication of knowledge. Bambauer, 66 STAN. L. REV. at 61; Campbell, 68 STAN. L. REV. at 8; Blitz, 14 COLUM. SCI. & TECH. L. REV. at 159; Chen & Marceau, 116 COLUM. L. REV. at 22.

Scholars disagree as to whether government regulation of recording, such as privacy laws, will always constitute targeting speech and thus be subject to First Amendment scrutiny. *Compare* Bambauer, 66 STAN. L. REV. at 63 ("Privacy regulations are rarely incidental burdens to knowledge") *and* Kreimer, 159 U. PA. L. REV. at 390-391 (similar); *with* Bhagwat, 56 WM. & MARY L. REV. at 1064 ("properly tailored eavesdropping statutes…and wiretapping statutes protect important privacy interests"); Blitz, 14 COLUM. SCI. & TECH. L. REV. at 174 (advocating "leaving room for privacy rights"); Campbell, 68 STAN. L. REV. at 52 ("plenty of restrictions on other types of mechanical devices would *not* trigger any First Amendment scrutiny"); Kaminski, 97 B.U. L. REV. at *4 (arguing that because of privacy, the scope of the right to record will differ in different locations); McDonald, 65 O.S.L.J. at 271 n. 61 ("the right to receive information would certainly not protect eavesdropping activities"). This disagreement over privacy laws—which, importantly, does not extend to disagreement over audiovisual recordings of public officials in public fora—is an example of the ongoing discussion of limiting principles for the right to record.

D. The Right to Record and Limiting Principles

The right to record, like other corollary First Amendment rights, can spur complicated line-drawing issues. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (rejecting an overly broad right to gather information because "there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow"); Bambauer, 66 STAN. L. REV. at 60. Courts of appeals around the country have therefore been careful to cabin the recognized right. Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CALIF. L. REV. CIRCUIT 57, 62 (2013); Kaminski, 97 B.U. L. REV. at *22. Scholars, too, have been in search of limiting principles, outlined below. Bambauer, 66 STAN. L. REV. at 110. Importantly: the limits proposed by the district court are wildly inconsistent with both First Amendment law and fundamental First Amendment principles. *Amici* urge this Court to correct the error below.

1. Limiting Principles this Court Should Reject

The district court attempted to cabin the right to record by applying the *Spence* test, and by requiring oral criticism of the government during the act of recording. Both of these attempts are incorrect as a matter of First Amendment law. The *Spence* test is not used to assess corollary or penumbral rights, or when protecting acts integral to a medium of expression. Requiring oral criticism of the

government in fact constitutes viewpoint discrimination, which itself violates the First Amendment.

The *Spence* test is not the correct approach to limiting a right to record. Courts do not generally require a particularized message when protecting newsgathering rights, other corollary rights, or acts integral to a medium of communication. The Supreme Court has explained that "a narrow, succinctly articulable message is not a condition of constitutional protection" for parades, nor for the "unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995). "For courses of action that are recognized by social practice as comprising media of expression, the question is not whether a message is conveyed, but whether the conduct in question is a part of that recognized medium." Kreimer, 159 U. PA. L. REV. at 372.

Even though *amici* counsel the Court that the *Spence* test was misapplied, there is a strong argument that filming police is itself communication of a particularized message *to the police* in the moment of filming, and thus is expressive conduct. In an era in which civilian recording of the police has become ubiquitous, audiovisual recording of the police communicates dissent and the message "I am holding you accountable" to police officers. *See* Simonson, 104

GEO. L. REV. at 1564.

Requiring recording to be accompanied by oral criticism of the government is likewise not an acceptable limit to the right to record. Protecting citizens who criticize the police but not citizens who support the police is a classic example of unconstitutional viewpoint discrimination. Calvert, 64 UCLA L. REV. DISCOURSE at 247. As a general matter, the Supreme Court does not assess First Amendment protection for video based on the creative intent of the videographer, or how high or low value a work of art or expression the video might be. Blitz, 14 COLUM. SCI. & TECH. L. REV. at 149.

2. Limiting Principles Proposed by Scholars

Scholars agree that the First Amendment protects some form of a right to record, particularly the right to record public officials performing public duties in public places. Scholars differ, however, on appropriate limits to the right. *Amici* here briefly outline proposed limitations, generally without weighing in on their relative strengths and weaknesses, to inform the Court of the breadth of proposals in this area. It is not necessary for the Court to reach most of these limiting principles in this case. Again, it appears that all scholars to date find that the audiovisual recording of public officials performing their official duties in a public location falls squarely within the protections of the First Amendment.

The right to record is exercised in physical spaces shared by many individuals. It thus brings up inevitable questions of how to balance one person's rights with another person's harms. Scholars broadly agree that protecting a right to record does not prevent the government from regulating recording in order to prevent non-speech-related harms. For example, recognizing a right to record does not prevent bans on flash photography to protect sensitive objects, or regulations to prevent the physical obstruction of the police. Bambauer, 66 STAN. L. REV. at 83; Chen & Marceau, 116 COLUM. L. REV. at 23; Simonson, 104 GEO. L.J. at 1577-1578. Courts have similarly recognized that the right to record may be regulated to prevent non-speech harms, such as physical contact with the police. *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014).

The right to record clearly threatens privacy laws, since many privacy laws around the country govern privacy by regulating recording. Kaminski, 97 B.U. L. REV. at *7. As discussed above, scholars differ as to whether privacy harms are speech-related harms or non-speech-related harms, which implicates whether all or only some privacy laws will be subjected to First Amendment scrutiny. Two scholars propose that even though all recording laws should be subjected to First Amendment scrutiny, important privacy interests may still trump speech concerns. Bambauer, 66 STAN. L. REV. at 112; Kreimer, 159 U. PA. L. REV. at 395. These

thorny concerns over how to balance a right to record with adequate privacy protections are not at issue in this case.

One way to contain the right to record would be to restrict it to public locations. Recording in a public forum, where you already have permission to be, is clearly covered by the First Amendment. Blitz, 14 COLUM. SCI. & TECH. L. REV. at 185; Kaminski, 97 B.U. L. REV. at *25. Scholars split, however, on whether or how the recording right extends to private property. Bambauer, 66 STAN. L. REV. at 79 (arguing that the right extends to private property); Chen & Marceau, 116 COLUM. L. REV. at 30 (same); *but see* Kaminski, 97 B.U. L. REV. AT *25 ("the scope of the right to record will differ depending on the recorder's physical location"). This question of whether the right to record should exist on private property is not implicated in this case.

Another way to limit the right to record would be to limit it to matters of public concern. Two scholars have proposed just that. Bhagwat, 56 WM. & MARY L. REV. at 1065-1066; Joel R. Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141 (2014). Others, however, express concerns that limiting the right to matters of public concern runs against the traditional treatment of speech in public fora, where speech on all topics has been fully protected. Kaminski, 97 B.U. L. REV. at *25; *see also Alvarez*, 679 F.3d at 598, n. 7 ("This is not, strictly speaking, a claim about the qualified First Amendment right of access… Access is assumed here…

in traditional public fora"). Others express administrability concerns over restricting recording to "matters of public concern." Blitz, 14 COLUM. SCI. & TECH. L. REV. at 169; Bambauer, 66 STAN. L. REV. at 100, 105.

One could limit the right to record to institutional newsgatherers, but the weight of opinion is against this approach. One scholar suggests not restricting the right to the institutional press, per se, but to institutional newsgatherers. McDonald, 65 O.S.L.J. at 350-351. Many others, however, point to the Supreme Court's continued skepticism of press exceptionalism, and to the difficulty in line-drawing between professional journalists and citizen journalists. Blitz, 14 COLUM. SCI. & TECH. L. REV. at 178; Calvert, 3 TEX. A&M L. REV. at 162-70; Blitz, 14 COLUM. SCI. & TECH. L. REV. at 178; Calvert, 64 UCLA L. REV. DISCOURSE at 251; Kreimer, 159 U. PA. L. REV. at 347, 350.

There is one potential limitation that is implicated in this case: requiring an intent to distribute. The district court noted that neither plaintiff evinced an intent to immediately distribute the resulting recordings. At least one scholar suggests requiring an intent to distribute to protect information gathering rights. McDonald, 65 O.S.L.J. at 348. As discussed, however, *amici* do not believe that requiring an intent to distribute is an appropriate limitation to the right to record. A right to record protects freedom of thought, and freedom of thought requires no audience. Bambauer, 66 STAN. L. REV. at 82-83; Kreimer, 159 U. PA. L. REV. at 377-380.

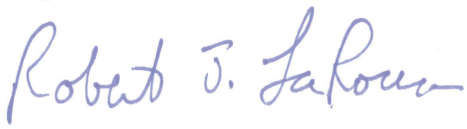
See also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 993 (1978) (addressing First Amendment protection for diaries); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 285 (2011) (the First Amendment should protect "diaries and other forms of discourse meant primarily for self-consumption"). Requiring an intent to distribute also fails to recognize the communicative value of audiovisual recording of police activity in the moment in which recording happens. Simonson, 104 GEO. L.J. at 1575. Requiring an intent to distribute means that many recordings on clear matters of public concern would not be protected. For example, store security videos, which have become important sources of news, are rarely intended for public distribution. *See, e.g.*, AJ Vicens & Jaeah Lee, MOTHER JONES, *Here are 13 Killings by Police Captured on Video in the Past Year*, http://www.motherjones.com/politics/2015/05/police-shootings-caught-on-tape-video (May 20, 2015) (noting that the killing of 22-year-old John Crawford III was captured by a Walmart surveillance camera, and the killing of 12-year-old Tamir Rice was captured by a surveillance camera). In short, requiring an explicit intent to distribute would limit the stock of information on which the marketplace of ideas relies and our democracy depends, implicating the rights of listeners and viewers. The First Amendment does not just protect authors; it

protects the marketplace of ideas, the process of democratic self-governance, and listeners and viewers, too.

CONCLUSION

Amici urge this Court to recognize that the First Amendment protects the audiovisual recording of public officials performing public duties in public fora. Recognition of such a right reflects our current media culture, protects individual autonomy, increases the stock of important information in the world, and protects the values on which our democracy depends. Recent efforts at police accountability are central to the functioning of our democracy and to the autonomy of its citizens. Recording police officers in public is exactly the type of behavior that the First Amendment should, and does, protect.

Respectfully submitted,



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COMBINED CERTIFICATIONS

I hereby certify as follows:

1) I am a member in good standing of the bar of the Third Circuit;

2) This brief complies with the type-volume limitations of the Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,791 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

3) 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 2003 with 14-point Times New Roman;

4) The text of the electronic version of this brief is identical to the text in the paper copy.

5) A virus detection program has been run on the file and no virus was detected. The virus detection program used is Symantec Endpoint Protection version 12.1.1101.401.

6) I have this day, October 31, 2016, served the foregoing brief upon all parties through the ECF filing system.

Dated: October 31, 2016

/s/ Robert J. LaRocca
Robert J. LaRocca