

NO. 19-1015

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

LEVI FRASIER,

PLAINTIFF-APPELLEE,

v.

Denver Police Officers

CHRISTOPHER L. EVANS, et al.,

DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
District of Colorado (Denver)
Case No. 15-cv-01759-REB-KLM

The Honorable Robert E. Blackburn, United States District Court Judge

**BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF PLAINTIFF-APPELLEE LEVI FRASIER AND
AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: May 6, 2019

By: /s/ Sophia Cope
Sophia Cope

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STATEMENT OF INTEREST¹

Amicus Curiae Electronic Frontier Foundation (EFF) is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 31,000 members. EFF has done extensive work to promote government transparency and accountability, including by working to advance the right of individuals to record the police and other government officials. EFF filed an *amicus* brief in a similar case in the U.S. Court of Appeals for the Third Circuit, *Fields v. City of Philadelphia* (No. 16-1650).

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

INTRODUCTION

Individuals have the unambiguous right under the First Amendment to record images and audio of police officers exercising their official duties. This is especially important given that modern photo and video technology is ubiquitous and flourishing.

Powered by smartphones, tablets, modern cameras, and social media applications (“apps”), ordinary people can quickly, easily, and inexpensively record and share compelling and newsworthy scenes, including those involving police misconduct. Bystander recordings contribute to the democratic process by informing the debate on important public policy issues, including whether police officers employ excessive force, which Plaintiff-Appellee Frasier believed the Defendants-Appellants, Denver police officers, did in this case. As the First Circuit explained when upholding the First Amendment right to record the police, “The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.” *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

Obtaining the full benefit of such recordings is only possible if *making* them is constitutionally protected. This Court should follow its sister circuits in holding

that the First Amendment protects not only the sharing, but also the recording of images and audio of on-duty police officers. This is because photography and videography are inherently expressive activities, and because recording police officers is a protected form of information gathering about a matter of profound public concern: how government officials exercise their extraordinary powers.

ARGUMENT

I. PEOPLE USE POWERFUL TECHNOLOGIES TO RECORD AND SHARE PHOTOS AND VIDEOS

A. Mobile Devices Are Ubiquitous, and People Use Them to Record Photos and Videos

Today, the widespread adoption of mobile devices—including tablet computers, which Plaintiff-Appellee Frasier used in this case—means that the right to record extends not just to select individuals, but to every individual who possesses a mobile device capable of taking photos or videos.

As Chief Justice Roberts wrote, 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). *See also Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017) (Nygaard, J., concurring in the part, dissenting in part) (noting the “proliferation of personal electronic devices that have integrated image capture into our daily lives, making it a routine aspect of the way in which people record and communicate events”).

Ninety-five percent of American adults own a cell phone, including 77% who own a smartphone that provides Internet access; and 53% of American adults own a tablet computer that has the same capabilities as a smartphone.² Globally, the number of mobile subscriptions is 7.9 billion.³

Additionally, cell phones have completely changed the way people take photos and videos. With people taking over a trillion photos every year, 85% of them are captured by smartphones.⁴ Rapid technological innovation has fueled this usage and yielded sophisticated cell phones that come equipped with advanced cameras and Internet access.⁵

B. People Share Photos and Videos Using Social Media Apps

The ease with which individuals can take photos and videos while going about their everyday lives is complemented by the ease with which they can share them. Sixty-seven percent of smartphone owners use their devices to share photos

² Pew Research Center, *Mobile Fact Sheet* (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

³ *Ericsson Mobility Report* (Nov. 2018), <https://www.ericsson.com/en/mobility-report/reports/november-2018/mobile-subscriptions-worldwide-q3-2018>.

⁴ Caroline Cakebread, *People will take 1.2 trillion digital photos this year—thanks to smartphones*, *Business Insider* (Aug. 31, 2017), <https://www.businessinsider.com/12-trillion-photos-to-be-taken-in-2017-thanks-to-smartphones-chart-2017-8>.

⁵ *The Evolution of Cell Phone Design Between 1983-2009*, *Webdesigner Depot* (May 22, 2009), <http://www.webdesignerdepot.com/2009/05/the-evolution-of-cell-phone-design-between-1983-2009/>.

or videos, and 35% do so frequently.⁶ This sharing often occurs on the Internet via a plethora of social media apps including Facebook, Twitter, Instagram and YouTube.

These social media apps, like many others, allow users to upload photos and videos previously taken with a smartphone, or to take photos and videos within the apps themselves and post them instantly, making the capture-and-publish process seamless. Users may also link to photos and videos hosted on other websites. Photos and videos shared on these platforms may be viewable only to “friends” or “followers,” or to the general public, depending on how a user has configured an account’s privacy settings.⁷

Facebook is a general purpose social media platform that has 2.38 billion monthly active users, including nearly 1.74 billion who are active through their mobile devices.⁸ Every day, Facebook users post 300 million photographs⁹ and

⁶ Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center (April 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>.

⁷ Electronic Frontier Foundation, *Protecting Yourself on Social Networks*, Surveillance Self-Defense (Oct. 30, 2018), <https://ssd.eff.org/en/module/protecting-yourself-social-networks>.

⁸ *The Top 20 Valuable Facebook Statistics – Updated April 2019*, Zephoria Digital Marketing, <https://zephoria.com/top-15-valuable-facebook-statistics/>.

⁹ *Id.*

watch 100 million hours of video¹⁰. Twitter, which is similar to Facebook but limits “tweets” to 280 characters,¹¹ has over 326 million monthly active users, 80% of whom access Twitter with their mobile devices¹². Twitter users send more than 500 million tweets each day,¹³ with photo-based tweets getting the most engagement¹⁴.

Social media apps such as Instagram and YouTube focus specifically on sharing photos and videos. Instagram allows users to share both photos and videos, while YouTube is dedicated to videos. Instagram has over one billion monthly active users¹⁵ who generate 95 million posts per day¹⁶. YouTube has over 1.9 billion monthly active users, who upload 400 hours of video *every minute* and

¹⁰ *The 12 Biggest Facebook Video and Live Statistics*, MediaKix (Sept. 18, 2018), <http://mediakix.com/2016/08/facebook-video-statistics-everyone-needs-know/#gs.96p9mo>.

¹¹ Kurt Wagner, *Twitter is giving everyone longer tweets, but you probably won't use them*, Vox (Nov. 7, 2017), <https://www.vox.com/2017/11/7/16615914/twitter-longer-tweets-280-characters-update-available-everyone>.

¹² Kit Smith, *58 Incredible and Interesting Twitter Stats*, Brandwatch (Jan. 3, 2019), <https://www.brandwatch.com/blog/twitter-stats-and-statistics/>

¹³ *Id.*

¹⁴ Phillip Ross, *Photos Get the Most Engagement on Twitter*, Socialbakers (Nov. 21, 2014), <https://www.socialbakers.com/blog/2306-photos-get-the-most-engagement-on-twitter>.

¹⁵ Instagram, *Our Story*, <https://instagram-press.com/our-story/>.

¹⁶ Todd Clarke, *22+ Instagram Stats That Marketers Can't Ignore This Year*, Hootsuite (March 5, 2019), <https://blog.hootsuite.com/instagram-statistics/>.

watch over a billion hours of video every day, with more than 70% of those views coming from mobile devices.¹⁷

Some technologies allow users to record and share videos simultaneously, which is called “live streaming.” Facebook Live enables users to show viewers exactly what they are observing in real time.¹⁸ So does Periscope, which is accessible via the Twitter app or as a stand-alone app.¹⁹ Ten million people have Periscope accounts, and people in the aggregate watch 40 years of Periscope live broadcasts every day.²⁰

II. PEOPLE RECORD AND SHARE NEWSWORTHY PHOTOS AND VIDEOS OF POLICE SHOOTINGS AND OTHER MISCONDUCT

Ordinary people act as citizen journalists, using new technologies to record newsworthy events and publish them to a global audience. Seven percent of U.S. adults post their own news videos on social media and 7% submit their own

¹⁷ Kit Smith, *46 Fascinating and Incredible YouTube Statistics*, Brandwatch (Jan. 4, 2019), <https://www.brandwatch.com/blog/youtube-stats/>.

¹⁸ Facebook, *Facebook Live*, <https://live.fb.com/>.

¹⁹ Periscope, *About Us*, <https://www.periscope.tv/about>; Twitter, *How to create live videos on Twitter*, <https://help.twitter.com/en/using-twitter/twitter-live>.

²⁰ Periscope, *Periscope, by the numbers* (Aug. 12, 2015), <https://medium.com/periscope/periscope-by-the-numbers-6b23dc6a1704#.9ja29il34>.

content to news sites.²¹ Of the most watched news videos on YouTube, 39% were recorded and shared by ordinary people.²² Images shared on social media often spread rapidly or “go viral” and/or are picked up by traditional news outlets. Bystander recordings of police misconduct are particularly powerful and facilitate public accountability.

In this case, Plaintiff-Appellee Frasier’s recording, which showed Denver police officers punching a suspect to get drugs out of his mouth and tripping his pregnant girlfriend, produced this desired accountability. *See* Resp. Br. at 17-19. After Frasier shared his video with a local television news station, FOX31 Denver, reporter Chris Halsne covered the story extensively and shared the video on social media.²³ Halsne won an Emmy for his reporting.²⁴ Frasier also publicized the

²¹ Pew Research Center, *The Audience for Digital News Videos* (March 26, 2014), <http://www.journalism.org/2014/03/26/the-audience-for-digital-news-videos/#fnref-42098-6>.

²² Pew Research Center, *YouTube & News* (July 16, 2012), <http://www.journalism.org/2012/07/16/youtube-news/>.

²³ *See, e.g.*, Chris Halsne & Chris Koeberl, *Denver Police accused of using excessive force, illegal search*, FOX31 Denver (Nov. 24, 2014), <https://kdvr.com/2014/11/24/denver-police-accused-of-excessive-force-illegal-search/>; <https://www.facebook.com/241410146029972/posts/levi-frasier-the-man-who-recorded-this-video-of-denver-police-punching-a-suspect/473272239510427/>.

²⁴ *FOX31 Denver wins 15 Heartland Regional Emmy awards, including “Best Evening Newscast,”* FOX31 Denver (July 22, 2015), <https://kdvr.com/2015/07/22/fox31-denver-wins-15-heartland-regional-emmy-awards-including-best-evening-newscast/>.

incident on his Twitter account.²⁵ He testified that he shared the video “[t]o be able to bring to light what had happened to Mr. Flores and his girlfriend. Being able to watch civil officers ... wrong one of our society members the way that I had witnessed it, the whole public needs to see that.” SA at 92. Other media outlets also covered the incident, including the *Denver Post*, which wrote an editorial.²⁶

Following this media coverage, the Denver Police Department revised its Operations Manual to ban such conduct.²⁷ DPD further revised its manual to explicitly state that civilians have a right to record the police and that officers may not infringe on this right.²⁸

Additionally, the Colorado Legislature passed two statutes. The first created a statutory right for civilians to record police officers.²⁹ The second created a civil cause of action against police officers who interfere with an individual’s lawful attempt to record an incident involving a police officer, or who destroy, damage, or seize a recording or recording device.³⁰

²⁵ See <https://twitter.com/levifrasier>.

²⁶ *Protect the right to record police*, Denver Post Editorial Board (Feb. 13, 2015), <https://www.denverpost.com/2015/02/13/protect-the-right-to-record-police/>.

²⁷ Denver Police Department, *Operations Manual* § 116.06(3)(b) (Revised 03-16), https://www.denvergov.org/content/dam/denvergov/Portals/720/documents/OperationsManual/OMSBook/OM_Book.pdf.

²⁸ *Id.* at §107.04(3) (Revised 02/26/2019).

²⁹ Colo. Rev. Stat. § 16-3-311.

³⁰ Colo. Rev. Stat. § 13-21-128.

Plaintiff-Appellee Frasier is not alone in bringing police brutality to the public's attention. Bystander recordings of fatal police shootings and other misconduct have repeatedly ensured that these troubling episodes receive the public scrutiny that they deserve, which facilitates police accountability. Bystander recordings also greatly contribute to the quality of public discussion about police use of force and continuing racial disparities in our criminal justice system.

For example, on June 19, 2018, Officer Michael Rosfeld initiated a traffic stop of a vehicle that matched the description of a vehicle associated with a shooting. Two males jumped out and began to run away, including teenager Antwon Rose. A bystander recorded the incident with her cell phone and posted the video on Facebook.³¹ The video depicts Officer Rosfeld fatally shooting Rose as he ran away. While Rose had an empty handgun magazine in his back pocket, Officer Rosfeld admitted that he never saw Rose with a gun before he opened fire.³² Officer Rosfeld was charged in the killing but was found not guilty, a

³¹ *Black unarmed teen Antwon Rose shot in Pittsburgh*, The Guardian (June 28, 2018), <https://www.youtube.com/watch?v=ib6Q69-ta3A>.

³² German Lopez, *East Pittsburg Police Officer Charged for Shooting of 17-year-old Antwon Rose*, Vox (June 27, 2018), <https://www.vox.com/identities/2018/6/20/17484480/antwon-rose-east-pittsburgh-police-shooting-video>.

controversial verdict that fueled the local conversation about the need for police reforms.³³

On July 6, 2016 a police officer in Falcon Heights, Minnesota, fatally shot Philando Castile during a traffic stop. Diamond Reynolds, his girlfriend who was in the car, live-streamed the immediate aftermath of the shooting on Facebook Live.³⁴ The next day, traditional news media republished the recording to a broader audience.³⁵ After watching the video, Minnesota Governor Mark Dayton asked: “Would this have happened if the driver were white, if the passenger were white? I don’t think it would have.”³⁶ Officer Jeronimo Yanez was fired from the police department, and was charged in the killing, but was found not guilty.³⁷

³³ Paula Reed Ward & Shelly Bradbury, *Former officer Michael Rosfeld found not guilty in death of Antwon Rose*, Pittsburgh Post-Gazette (March 22, 2019), <https://www.post-gazette.com/news/crime-courts/2019/03/22/michael-rosfeld-trial-verdict-antwon-rose-police-shooting-east-pittsburgh/stories/201903210103>.

³⁴ *Facebook Live video of Falcon Heights shooting in Minnesota of Philando Castile* (July 6, 2016), https://www.youtube.com/watch?v=Ia5_q7hZN5Y.

³⁵ *New police shooting caught on camera*, ABC News (July 7, 2016), <https://www.youtube.com/watch?v=p5Pt1nkw3Mk>.

³⁶ Matt Furber & Richard Pérez Peña, *After Philando Castile’s Killing, Obama Calls Police Shooting ‘an American Issue*, N.Y. Times (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html>.

³⁷ Ralph Ellis and Bill Kirkos, *Officer who shot Philando Castile found not guilty on all counts*, CNN (June 16, 2017), <https://www.cnn.com/2017/06/16/us/philando-castile-trial-verdict/index.html>.

Other examples of bystander recordings of police-induced civilian fatalities abound. In April 2015, following a traffic stop of Walter Scott in North Charleston, South Carolina, a bystander recorded a police officer fatally shooting Scott in the back as he attempted to flee the scene.³⁸ In February 2015 in Pasco, Washington, a bystander recorded police fatally shooting Antonio Zambrano-Montes, a Hispanic man, as he fled with his hands in the air.³⁹ In July 2014 in New York City, a bystander recorded Eric Garner screaming “I can’t breathe” as police officers killed him with a chokehold during an arrest for selling loose cigarettes.⁴⁰

People have also recorded the protests that erupted after police shootings. For example, following the fatal police shooting of Michael Brown in August 2014, protestors in Ferguson, Missouri, used Vine—a social media app that limited

³⁸ Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. Times (April 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.

³⁹ Julie Turkewitz & Richard A. Oppel Jr., *Killing in Washington State Offers “Ferguson” Moment for Hispanics*, N.Y. Times (Feb. 16, 2015), <http://www.nytimes.com/2015/02/17/us/killing-in-washington-state-offers-ferguson-moment-for-hispanics.html>.

⁴⁰ *Original Eric Garner fatal arrest video*, N.Y. Daily News (July 17, 2014), <https://www.youtube.com/watch?v=LfXqYwyzQpM>; Benjamin Mueller & Ashley Southall, *25,000 March in New York to Protest Police Violence*, N.Y. Times (Dec. 13, 2014), <http://www.nytimes.com/2014/12/14/nyregion/in-new-york-thousands-march-in-continuing-protests-over-garner-case.html>.

videos to six-second loops—to chronicle the tense aftermath.⁴¹ In July 2016, DeRay Mckesson, a Black Lives Matter activist, live-streamed on Periscope his own arrest during a protest against the shooting of Alton Sterling.⁴²

Bystander videos have also exposed to public scrutiny many non-fatal episodes of police excessive force. The 1991 recording of Los Angeles police officers beating Rodney King may be the first time a bystander’s video of police misconduct was broadcast to a global audience.⁴³

More recently, on August 11, 2018, Baltimore Police Officer Arthur Williams confronted Deshawn McGrier, whose friend recorded the encounter. Officer Williams demanded McGrier’s identification. McGrier pushed Officer Williams’ hand off him and said, “Don’t touch me.” Officer Williams then began to repeatedly punch McGrier’s face until McGrier fell to the ground. McGrier’s

⁴¹ Colin Daileida, *We know about Ferguson’s police brutality because of Vine*, Mashable (Oct. 27, 2016), http://mashable.com/2016/10/27/vine-police-brutality-protests-ferguson/?utm_cid=mash-com-Tw-main-link#SsoOKYD8qOqW.

⁴² DeRay Mckesson, *#BatonRouge. Protest.*, <https://www.periscope.tv/deray/1DXxyZjvrWVKM>; Yamiche Alcindor, *DeRay Mckesson, Arrested While Protesting in Baton Rouge, Is Released*, N.Y. Times (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/deray-mckesson-arrested-in-baton-rouge-protest.html>.

⁴³ *The viral video that set a city on fire*, CNN (April 28, 2017), <https://www.youtube.com/watch?v=1zLA2gzQQ0g>.

friend posted the video on Instagram and Facebook. McGrier was treated at a hospital for a fractured jaw among other injuries.⁴⁴

In response to the video, the Baltimore Police Department suspended Officer Williams and a grand jury indicted him on assault charges. Williams resigned. After viewing the video, Baltimore Police Commissioner Gary Tuggle explained, “there isn’t any room for the activity that I saw in the [video] and it is extremely disturbing.” Baltimore’s mayor said, “We are working day and night to bring about a new era of community-based, [c]onstitutional policing and will not be deterred by this or any other instance that threatens our efforts to reestablish trust of all citizens in the Baltimore Police Department.”⁴⁵

⁴⁴ Kevin Rector & Talia Richman, *Baltimore Police Officer Suspended with Pay after Viral Video Shows Him Punching, Tackling Man*, Baltimore Sun (Aug. 11, 2018), <https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-police-incident-20180811-story.html>.

⁴⁵ P.R. Lockhart, *A Baltimore Police Officer Brutally Beat a Black Man. It’s Creating New Problems for the Department*, Vox (Aug. 14, 2018) <https://www.vox.com/identities/2018/8/13/17684438/baltimore-police-department-violence-dashawn-mcgrier-arthur-williams-indictment-assault-video>.

The many additional examples of non-fatal episodes of police excessive force caught on video by citizen journalists include:

- In November 2011, police employed by the University of California at Davis discharged pepper spray directly into the faces of nonviolent student protesters.⁴⁶
- In June 2015, outside a pool party in suburban McKinney, Texas, a police officer pointed a gun at black teenagers in bathing suits, then shoved a girl's face into the ground.⁴⁷
- In October 2015, when a black student at the Spring Valley High School in Columbia, South Carolina, refused to leave her seat, a police officer flipped the student onto the ground and dragged her across the floor.⁴⁸

⁴⁶ *UC Davis Protesters Pepper Sprayed* (Nov. 18, 2011), <https://www.youtube.com/watch?v=6AdDLhPwpp4>; Philip Kennicott, *UC Davis pepper-spraying raises questions about role of police*, Wash. Post (Nov. 20, 2011), https://www.washingtonpost.com/lifestyle/style/uc-davis-pepper-spraying-raises-questions-about-role-of-police/2011/11/20/gIQAOr8dfN_story.html.

⁴⁷ Carol Cole-Frowe & Richard Fausset, *Jarring Image of Police's Use of Force at Texas Pool Party*, N.Y. Times (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/mckinney-tex-pool-party-dispute-leads-to-police-officer-suspension.html>.

⁴⁸ Richard Fausset & Ashley Southall, *Video Shows Officer Flipping Student in South Carolina, Prompting Inquiry*, N.Y. Times (Oct. 26, 2015), <http://www.nytimes.com/2015/10/27/us/officers-classroom-fight-with-student-is-caught-on-video.html>.

Finally, cell phone recordings of police have shed light on many additional types of alleged police misconduct, including: militarization of police at protests;⁴⁹ interrogation without a *Miranda* warning;⁵⁰ verbal abuse, such as swearing and calling a civilian a “smartass”;⁵¹ allowing bystanders to verbally abuse a suspect;⁵² and threatening to “come up” with a reason to arrest a civilian⁵³.

⁴⁹ Robert Mackey, *Images of Militarized Police in Baton Rouge Draw Global Attention*, *The Intercept* (July 11, 2016), <https://theintercept.com/2016/07/11/images-militarized-police-baton-rouge-draw-global-attention/>.

⁵⁰ Jim Dwyer, *A Switch Is Flipped, and Justice Listens In*, *N.Y. Times* (Dec. 8, 2007), <http://www.nytimes.com/2007/12/08/nyregion/08about.html>.

⁵¹ Jeanne Meserve & Mike Ahlers, *Passenger says TSA agents harassed him*, *CNN* (June 20, 2009), http://www.cnn.com/2009/US/06/20/tsa.lawsuit/index.html?eref=rss_us#cnnSTCTex.

⁵² *Video Shows Cops Letting Onlookers Taunt Suspect*, *CBS2 Chicago* (March 23, 2011), <http://chicago.cbslocal.com/2011/03/23/video-shows-cops-letting-onlookers-taunt-suspect/>.

⁵³ Patrick O’Connell & Georgina Gustin, *Officer in trouble over motorist’s video in St. George*, *St. Louis Post-Dispatch* (Sept. 11, 2007), http://www.stltoday.com/news/local/crime-and-courts/officer-in-trouble-over-motorist-s-video-in-st-george/article_f360a76e-0af8-11e1-9a1c-0019bb30f31a.html.

III. THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECORD ON-DUTY POLICE BECAUSE RECORDING IMAGES AND AUDIO IS AN INTEGRAL COMPONENT OF INHERENTLY EXPRESSIVE MEDIUMS

A. The First Amendment Protects Photos and Videos Because They Are Inherently Expressive Mediums

Photos and videos are inherently expressive mediums entitled to First Amendment protection—regardless of whether the capturer intended to convey a clear message, whether a photo or video actually does convey a clear message, whether the capturer intended to publish it, or whether it was in fact published. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568 (1995) (holding that mediums with “inherent expressiveness” are protected by the First Amendment).

The Supreme Court has made it clear that visual and audio mediums are protected by the First Amendment. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952), the Court held that movies are protected by the First Amendment. *See also Superior Films, Inc. v. Dep’t of Educ. of State of Ohio, Div. of Film Censorship*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (“the First Amendment draws no distinction between the various methods of communicating ideas”). In *Kaplan v. California*, 413 U.S. 115, 119–20 (1973), the Court held that photographs are protected by the First Amendment. In *Schad v. Borough of Mount*

Ephraim, 452 U.S. 61, 65 (1981), the Court held that radio and television are protected by the First Amendment.

Many other mediums of expression likewise enjoy full First Amendment protection. *See Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (listing many of these mediums); *Cardtoons v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996) (parody baseball cards); *Hurley*, 515 U.S. at 568 (parades); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (monuments)

It is further indisputable that modern photography and videography involve mediums of expression protected by the First Amendment because cell phones and other mobile devices, and the photo and video apps they contain, are Internet-connected. The Supreme Court explained in *Reno v. ACLU*, 521 U.S. 844, 870 (1997), that the Internet is a “dynamic, multifaceted category of communication” where anyone “can become a town crier with a voice that resonates farther than it could from any soapbox.” Therefore, the Internet enjoys full First Amendment protection. *Id.*

Importantly, the First Amendment protects photos and videos because they are inherently expressive, regardless of whether a specific message is ascribed to a particular photo or video. As the Supreme Court explained with respect to the inherently expressive medium of parades, “a narrow, succinctly articulable

message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” *Hurley*, 515 U.S. at 569.

Nor must a particular photo or video be disseminated to receive First Amendment protection—a photo or video is itself expressive. Sharing or publishing is also protected by the First Amendment, *see, e.g., New York Times Co. v. U.S.*, 403 U.S. 713 (1971), but this is not required.⁵⁴ Similarly, live performances are protected mediums of expression, not because there must be an audience, but because they are always expressive.⁵⁵ As the Seventh Circuit explained in the context of recording the police, “Audio and audiovisual recording are communication technologies, and as such, they enable speech. Criminalizing all nonconsensual audio recording necessarily limits the information *that might later be published or broadcast*—whether to the general public or to a single family

⁵⁴ Publishing also implicates the First Amendment rights of viewers. *See Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (discussing the First Amendment right to receive information and ideas); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (freedom of speech “necessarily protects” the right to receive information and ideas).

⁵⁵ *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 377 (2011) (“It is simply not the case. . . that an external audience is or should be a necessary condition of First Amendment protection.”).

member or friend—and thus burdens First Amendment rights.” *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012) (emphasis added).

B. The First Amendment Protects the *Process* of Photographing and Video-Recording On-Duty Police Because Recording Images and Audio Is an Integral Component of Inherently Expressive Mediums

If photos and videos are unequivocally protected by the First Amendment, it follows that the process of making photos and videos must also be protected as an integral component of these inherently expressive mediums. In short, photography and videography are inherently expressive activities.

The Supreme Court has made clear that “speech” is a process that contains a continuum of events protected by the First Amendment. *See Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 336 (2010) (“Laws enacted to control or suppress speech may operate at different points in the speech process.”). Thus, not only are photos and videos themselves, as end-products in the speech process, protected by the First Amendment (as well as their subsequent sharing or publication), so is the *creation* of a photo or video. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (“the creation and dissemination of information are speech within the meaning of the First Amendment”); *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 793 n.1 (2011) (“Whether government regulation applies to creating, distributing, or consuming speech makes no difference.”).

In *U.S. v. Stevens*, 559 U.S. 460 (2010), the Supreme Court ruled unconstitutional a federal statute that outlawed not only the possession or sale of photos and videos of animal cruelty, but also their creation. In holding that the entire statute was substantially overbroad under the First Amendment, *id.* at 482, the Court recognized that the act of creating a “speech” end-product deserves as much protection as the end-product itself.

As this Court stated in *Western Watersheds Project v. Michael*, “If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech.” 869 F.3d 1189, 1196 (10th Cir. 2017) (internal quotations and citation omitted).

Other circuits, in upholding the First Amendment right to record the police, have also noted the continuum between the protected act of creation and the protected end-products of speech. The Fifth Circuit in *Turner v. Lieutenant Driver*, stated, “[T]he First Amendment protects the act of making film, as ‘there is no fixed First Amendment line between the act of creating speech and the speech itself.’” 848 F.3d 678, 689 (5th Cir. 2017) (quoting *Alvarez*, 679 F.3d at 596). The Fifth Circuit further explained:

[T]he Supreme Court has never “drawn a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be

reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation.”

Id. (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010)).

IV. THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECORD ON-DUTY POLICE BECAUSE RECORDING THE POLICE IS PROTECTED INFORMATION GATHERING ABOUT MATTERS OF PUBLIC CONCERN

A. Information Gathering Is Protected by the First Amendment

Not only are photos and videos inherently expressive mediums protected by the First Amendment irrespective of whether they are disseminated, their sharing or publication—including any newsworthy information they may contain—is also protected by the First Amendment. *See supra* Sec. III. Yet newsworthy information cannot be shared if it is not first gathered, accessed, or received. Thus, not only are photography and videography protected as inherently expressive activities, the recording of on-duty police officers in particular is a form of protected information gathering about matters of public concern.

In *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), the Supreme Court stated, “Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.” *Accord Alvarez*, 679 F.3d at 598; *Turner*, 848 F.3d at 688. *See also Journal Pub. Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986) (court order

preventing media outlets from interviewing former jurors violated First Amendment).

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), the Supreme Court, citing *Branzburg*, ruled in favor of the newspapers and held that criminal trials must be open to the public. The Court stated, “The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.” *Id.* at 576–77. *See also U.S. v. Walker*, 2019 WL 325111 at *11 (10th Cir. 2019) (court order sealing hearing transcript violated First Amendment).

Similarly, in striking down the removal of books from a public school library, the Supreme Court emphasized that, under the First Amendment, “the right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom.” *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (emphasis in original). *See also Doe v. City of Albuquerque*, 667 F.3d 1111, 1135 (10th Cir. 2012) (city ordinance banning sex offenders from entering public libraries violates First Amendment right to receive information).

Other circuits, in upholding the First Amendment right to record the police, have explained that protecting the act of recording is a necessary predicate to protecting the dissemination of photos and videos: “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[.]” *Turner*, 848 F.3d at 689 n.41 (quoting *Alvarez*, 679 F.3d at 595) (emphasis in original).

B. Recording On-Duty Police Facilitates Government Accountability

Recording the police is protected information gathering particularly because it is about matters of profound public concern: how police officers exercise their extraordinary governmental powers. And this information can play a critical role in holding the police publicly accountable.

One of the “major purposes” of the First Amendment is “to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). *Accord Glik*, 655 F.3d at 82; *Alvarez*, 679 F.3d at 601; *Turner*, 848 F.3d at 689. *See also Richmond Newspapers*, 448 U.S. at 575 (one of the “core purposes” of the First Amendment is to facilitate “communication on matters relating to the functioning of government”); *Thornhill v. State of Alabama*, 310 U.S. 88, 101–02 (1940) (individuals have “the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment”).

However, were police officers granted the power to restrict bystander recordings, they would control the information ultimately available to the public about their own conduct, such as that of the Denver police officers recorded by

Plaintiff-Appellee Frasier in this case. “[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). *Accord Fields*, 862 F.3d at 359; *Alvarez*, 679 F.3d at 597; *Turner*, 848 F.3d at 688.

Other circuits, in upholding the First Amendment right to record the police, have recognized that bystander recordings reflect matters of significant public interest and that these recordings facilitate government accountability. The Eleventh Circuit stated, “The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.” *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). The Fifth Circuit stated, “Filming the police contributes to the public’s ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy.” *Turner*, 848 F.3d at 689. The Third Circuit stated, “These videos have helped police departments identify and discipline problem officers.” *Fields*, 862 F.3d at 360.

And this Court agreed with the Seventh Circuit that “the First Amendment provides at least some degree of protection for gathering news and information,

particularly news and information about the affairs of government.” *Western Watersheds Project*, 869 F.3d at 1197 (quoting *Alvarez*, 679 F.3d at 597).

C. Recordings Made by Police Officers Cannot Substitute Bystander Recordings

While recordings made by police officers themselves (such as with body-worn cameras or dashboard cameras) may provide some benefits,⁵⁶ they are inadequate substitutes for bystander recordings.

In most instances, law enforcement agencies have yet to fully implement body-worn cameras, and where agencies have adopted them, officers frequently failed to record.⁵⁷ Yet research has shown that only when officers have no discretion in whether to record do use of force rates decrease.⁵⁸

⁵⁶ Brett Chapman, *Body-Worn Cameras: What the Evidence Tells Us*, National Institute of Justice (Nov. 15, 2018), <https://www.nij.gov/journals/280/Pages/body-worn-cameras-what-evidence-tells-us.aspx>.

⁵⁷ Lafayette Group, *Major Cities Chiefs and Major County Sheriffs Survey of Technology Needs—Body Worn Cameras*, pp. 8-9 (2015), <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rvnT.EAJQwK4/v0>. After surveying 70 law enforcement agencies nationwide, *see id.* at p. 30, only 20% responded that they have a fully operational body-worn-camera program. About half (49.28%) reported that officers captured three hours or less of footage per day. Only 2.99% estimated their officers captured seven or more hours of footage per day. Significantly, 37.68% had “not yet determined” the average number of hours their officers were catching on video each day.

⁵⁸ Barak Ariel, *et al.*, *Report: increases in police use of force in the presence of body-worn cameras are driven by officer discretion*, *J. Exp. Criminol.* (2016) 12: 453, <https://doi.org/10.1007/s11292-016-9261-3>.

Even where police cameras do catch newsworthy incidents, the recordings are often released only at the discretion of the government.⁵⁹ For example, Chicago officials refused for 13 months to release a dashboard camera video of a police officer fatally shooting Laquan McDonald.⁶⁰

Additionally, bystanders often record valuable information that officers with body-worn cameras cannot record. An officer's body-worn camera cannot fully capture what the officer is doing, and an officer engaged in a physical altercation may be moving around so much that the body-worn camera video is chaotic or blurry.⁶¹

The Third Circuit recognized the limits to police-created videos: "Bystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture.

⁵⁹ Ryan J. Foley, *AP analysis: Police routinely deny access to officer video footage*, PBS News Hour (Mar. 13, 2019), <https://www.pbs.org/newshour/nation/ap-analysis-police-routinely-deny-access-to-officer-video-footage>.

⁶⁰ Kyung Lah, *Laquan McDonald shooting: Why did it take 13 months to release video?*, CNN (Dec. 2, 2015), <http://www.cnn.com/2015/12/01/us/chicago-police-shooting-explainer/>.

⁶¹ Timothy Williams, James Thomas, Samuel Jacoby & Damien Cave, *Police Body Cameras: What Do You See?*, N.Y. Times (April 1, 2016), <http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html>; German Lopez, *The failure of police body cameras*, Vox (July 21, 2017), <https://www.vox.com/policy-and-politics/2017/7/21/15983842/police-body-cameras-failures>.

Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public.” *Fields*, 862 F.3d at 359.

V. THIS CIRCUIT SHOULD JOIN ITS SISTER CIRCUITS IN CLEARLY PROTECTING THE FIRST AMENDMENT RIGHT TO RECORD ON-DUTY POLICE

This Court should take the instant opportunity to unequivocally hold that bystanders have a First Amendment right to record police officers exercising their official duties.

This Court came close in *Western Watersheds*, which acknowledged that several “sibling circuits have held that the First Amendment protects the recording of officers’ conduct in public.” *Western Watersheds Project*, 869 F.3d at 1196. In holding that the plaintiffs in that case had a First Amendment right to collect resource data on public lands, this Court explained that “[a]n individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter.” *Id.*⁶²

⁶² Additionally, in *Mocek v. City of Albuquerque*, 813 F.3d 912 (10th Cir. 2015), this Court stated that “even if [the court] agreed there is a First Amendment right to record law enforcement officers in *public*, [the court] would still need to determine whether that conduct is protected at an airport security checkpoint.” *Id.* at 931 (emphasis in original). While this Court ruled on other grounds in *Mocek*, it is worth noting that an airport security checkpoint is a non-public forum, whereas Plaintiff-Appellee Frasier in this case recorded the Denver police officers near where the incident was taking place in a parking lot, bordering a public sidewalk. SA at 68. *See also Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“the rights of the state to limit expressive activity are sharply circumscribed” in “quintessential public forums” such as streets and parks).

In *Western Watersheds Project*, this Court cited the leading cases where other appellate courts—the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits—have upheld a First Amendment right to record on-duty police officers. 869 F.3d at 1196.63

In *Glik v. Cunniffe*, where Glik used his cell phone camera to openly record several police officers arresting another man, the First Circuit held that the First Amendment protects the “right to videotape police carrying out their duties in public.” 655 F.3d at 82. Additionally, the First Circuit held that a bystander had a First Amendment right to record a police officer during a traffic stop. *Gericke v. Begin*, 753 F.3d 1, 10 (1st Cir. 2014). Recently, a district court within the First Circuit, citing both *Glik* and *Gericke*, held that the Massachusetts wiretap statute, an “all-party consent” audio recording law, violates the First Amendment to the extent it prohibits the secret audio recording of on-duty law enforcement or other government officials. *Martin v. Gross*, 340 F. Supp. 3d 87, 107 (D. Mass. 2018).

In *Fields v. City of Philadelphia*, where “Fields took a photograph across the street from where the police were breaking up a party [and] Geraci moved to a vantage point where she could record a protestor’s arrest,” the Third Circuit held

⁶³ In an unpublished opinion, the Second Circuit noted the plaintiff’s “exercise of his First Amendment right to video police activities.” *Higginbotham v. Sylvester*, 741 F. App’x 28, 31 (2d Cir. 2018).

that “under the First Amendment’s right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.” 862 F.3d at 360.

In *Turner v. Lieutenant Driver*, where Turner videotaped the Fort Worth Police Station from a public sidewalk, the Fifth Circuit held that the “First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions.” 848 F.3d at 688.

In *ACLU of Illinois v. Alvarez*, the Seventh Circuit granted a preliminary injunction against enforcement of the state wiretap statute as to the ACLU’s program of recording on-duty police officers. The court held, “Audio recording is entitled to First Amendment protection.” 679 F.3d at 597.

In *Fordyce v. City of Seattle*, where Fordyce attempted to videotape a public protest march, the Ninth Circuit held that the plaintiff had a “First Amendment right to film matters of public interest” and “to gather news.” 55 F.3d 436, 439, 442 (9th Cir. 1995). More recently, in *Askins v. U.S. Dept. of Homeland Sec.*, the plaintiffs while on government property took photographs of activities at ports of entry on the U.S.-Mexico border. 899 F.3d 1035, 1038 (9th Cir. 2018). They challenged a policy of U.S. Customs and Border Protection (CBP) stating that “members of the media must obtain advance permission from CBP to photograph, videotape, or film inside or outside of port of entry buildings.” *Id.* The Ninth

Circuit overturned the dismissal of the plaintiffs' complaint, *id.* at 1047, reiterating that “[t]he First Amendment protects the right to photograph and record matters of public interest,” and “[t]his includes the right to record law enforcement officers engaged in the exercise of their official duties in public places,” *id.* at 1044. The court also ordered further factual development to assist in the legal determination whether any CBP properties are public forums. *Id.* at 1045-47.

In *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000), the Eleventh Circuit held that there is “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.”

CONCLUSION

For all of these reasons, *Amicus Curiae* EFF respectfully asks this Court to hold that the First Amendment protects the right to record on-duty police officers, and to further hold that Plaintiff-Appellee Frasier was exercising that right.

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Respectfully submitted,

/s/ Sophia Cope

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Plaintiff-Appellee Levi Frasier complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,476 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, the word processing system used to prepare the brief, in 14-point font in Times New Roman font.

Dated: May 6, 2019

By: /s/ Sophia Cope
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus-scanning program, Bitdefender Virus Scanner Version 3.12 (3.12.10781), updated May 3, 2019, and according to the program are free of viruses.

Dated: May 6, 2019

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CERTIFICATE OF SERVICE

I certify that on this 6th day of May, 2019, I electronically filed the foregoing Brief of Amicus Curiae using the Court's CM/ECF system which will send notification of such filing to the following:

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