No. _____

In The
Supreme Court of the United States

JAMES P. CROCKER,

Petitioner,

v.

DEPUTY SHERIFF STEVEN ERIC BEATTY, Martin County Sheriff's Office, in his individual capacity,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a First Amendment right to record police activities in public has been clearly established so as to preclude application of qualified immunity where an officer prevents an individual from recording police activity.

2. Whether after a circuit court of appeals has already held a citizen's First Amendment right to record official police activity is clearly established, the circuit court can disestablish and restrict the First Amendment right to record by applying a novel and discretionary *ad hoc* exception to the right.

PARTIES TO THE PROCEEDINGS

The petitioner, plaintiff below, is James Crocker.

The respondent, defendant below, is Steven Beatty.

Robert Crowder and William Snyder were also named as defendants in the district court. Petitioner voluntary dismissed Crowder. The district court granted Snyder summary judgment, and that judgment is not at issue in this petition.

RELATED PROCEEDINGS

Crocker v. Beatty, D.C. No. 2:16-cv-14162-RLR (S.D. Fla. 2020)

Crocker v. Beatty, No. 17-13526 (11th Cir. 2018)

Crocker v. Beatty, No. 18-14682 (11th Cir. 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner James Crocker respectfully seeks a writ of certiorari in this case to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 3a-70a) is published at 995 F.3d 1232. The relevant order of the district court (Pet. App. 71a-114a) is unpublished but available at 2017 WL 3219215.

JURISDICTION

The Court of Appeals entered its judgment on April 20, 2021. Petitioner requested rehearing, and that request was denied on June 28, 2021. On March 19, 2020, this Court entered an order that extends the time to file a petition for a writ of certiorari in this case to November 26, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law…abridging the freedom of speech, or of the press…."

42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…."

INTRODUCTION

This case presents a circuit conflict on an issue of highest importance: whether citizens have the First Amendment right to unobtrusively film police interactions without fear of *ad hoc* seizure and arrest by the police. In holding that a person lacks a First Amendment right to film a police encounter in a public place if that person is even arguably standing somewhere they lack a legal right to be—even if that place is *part of the public street*—the Eleventh Circuit vastly restricts the right to film police interactions, because many, if not most, such encounters, are filmed in exactly the circumstances of this case—while standing on a median or the street itself after it has been blocked off by the police.

The Eleventh Circuit, in *Smith v. Cumming*, 212 F.3d 1332 (11th Cir. 2000), clearly established a First Amendment right to record police activities. The majority opinion in this case thrusts the Eleventh Circuit into conflict with every other court that had previously followed the Eleventh Circuit's lead in *Smith*—including the First, Third, Fifth, Seventh, and Ninth Circuits. Additionally, the Eleventh Circuit's opinion not only eviscerates the right to record that was clearly established by its prior

decision in *Smith*, but it undoes its own prior decisions, and the decisions of its district courts, that relied on *Smith* for the proposition that the right to record was clearly established.

The Eleventh Circuit's opinion further unconstitutionally vests officers with the right to limit the time, place, and manner of recording police activities based solely on the *ad hoc* discretion of the officer. A grant of certiorari is thus warranted here.[1]

From the dawn of the Republic, and throughout its history, commentators have recognized the importance of a citizen's right to make an account of government's activities. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599-600 (7th Cir. 2012) (citing sources); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (arguing the First Amendment stands for "the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed").

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[1] The Court should solicit the view of the United States on the questions presented here, as the Civil Rights Division of the Justice Department is actively interested in this issue. *See* Letter from Jonathan M. Smith, Chief Special Litigation Section, U.S. Department of Justice Civil Rights Division, to Mark H. Grimes, Office of Legal Affairs, Baltimore Police Department, and Mary E. Borja, Wily Rein LLP (May 14, 2012), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf (discussing, *inter alia*, the right to "record police officers in the public discharge of their duties"); *Conduct of Law Enforcement Agencies*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/conduct-law-enforcement-agencies (last visited Nov. 21, 2021) (noting the Civil Rights Division has "addressed unlawful responses to individuals who observe, record, or object to police actions.").

As this Court has held, "the First Amendment goes beyond protection of the press and 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).

In *Smith,* the Eleventh Circuit recognized the "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." 212 F.3d at 1333. The court further acknowledged "[t]he 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." *Id.*

For 21 years, district courts, the Eleventh Circuit, and other circuit courts of appeal have relied on *Smith* as the foundational decision that clearly established the existence of the right to record official activity. *See, e.g.*, *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020); *Askins v. U.S. Dept. of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 687-88 & n.27 (5th Cir. 2017); *Glik v. Cunniffe*, 655 F.3d 78, 82-84 (1st Cir. 2011); *Toole v. City of Atlanta*, 798 F. App'x 381, 387-88 (11th Cir. 2019); *Bowens v. Superintendent of Miami South Beach Police Dept.*, 557 F. App'x 857, 863 (11th Cir. 2014); *Abella v. Simon*, 522 F. App'x 872, 874 (11th Cir. 2012); *Dyer v. Smith*, No. 3:19-cv-921, 2021 WL 694811, at *7-8 (E.D. Va. Feb. 23, 2021); *Johnson v. DeKalb Cty.*, 391 F. Supp. 3d 1224, 1234, 1250-51 & n.214 (N.D. Ga. 2019); *Charles v. City of New York*, No. 12-CV-6180

(SLT) (SMG), 2017 WL 530460, at *24 (E.D.N.Y. Feb. 8, 2017); *Bacon v. McKeithen*, No. 5:14-cv-37-RS-CJK, 2014 WL 12479640, at *3-4 (N.D. Fla. Aug. 28, 2014).

In the Eleventh Circuit, that right had been unimpeded until April 20, 2021, when a panel majority of the Eleventh Circuit in this case disestablished the right to record police activities, essentially overruling *Smith*. The majority did so by applying a grossly restrictive interpretation of this Court's qualified immunity precedents and adding a heretofore unknown totality of the circumstances caveat to the analysis of whether the First Amendment protects an individual's recording of government conduct. The majority below, incorrectly, stated Respondent was within his right to restrict Petitioner's First Amendment right because of a "rapidly evolving scene of a fatal crash"; in truth, Respondent retaliated against Petitioner and seized his recording device solely because Petitioner was recording the scene of an accident.

Invoking the limited time, place, and manner restrictions on the right to record, the Eleventh Circuit majority found that an officer could prohibit Petitioner from recording police activity at the scene of a motor vehicle accident, even though Petitioner was recording from a public place, at least fifty feet from the accident, and was doing so over thirty minutes after the accident occurred. More importantly, and as pointed out by the dissenting opinion below, there were no time, place, or manner prohibitions on Petitioner's activities in any statute or rule. Rather, the time, place, and manner restriction was established by the discretionary conclusions of

Respondent. And these discretionary conclusions were invoked as pretext to impede Petitioner's clearly established right.

Even if the Eleventh Circuit's description of a "rapidly evolving" scene is accurate, by basing its opinion on that description, the Eleventh Circuit has imbued police officers with the authority to completely curtail the First Amendment right to record by giving officers unconstrained discretion to limit that right based on the circumstances of a particular event when there are, in fact, no rules otherwise prohibiting the right to record. In most cases, the public is less interested in a scene that is settled or over than they are in reviewing the accident as it occurs, a riot as it happens, or a shooting before the smoke clears. Under the Eleventh Circuit's new rule here, an officer could prohibit recording all these events until after they are over, and could do so based on nothing more than the fact that the officer does not want the scene recorded. This is *precisely* what the First Amendment precludes.

After an extended discussion of the facts of the case, the Eleventh Circuit majority held, "*Smith*'s rule didn't apply with 'obvious clarity to the circumstances,'" so qualified immunity barred Petitioner's First Amendment claim. (Pet. App. 17a.) Again, this was based on the *ad hoc* discretion of the officer in determining that "time, place, and manner" allowed the curtailment of Petitioner's First Amendment right, a position without precedent.

Never before had the court so narrowly applied *Smith*'s holding, *see, e.g.*, *Toole*, 798 F. App'x at 387

(applying *Smith* to conclude a protestor's right to record police conduct was clearly established),[2] and for good reason. Now, rather than a seminal case standing for the comprehensive recognition of a critical right to record police conduct that citizens, police, and judges in the Eleventh Circuit had theretofore understood was clearly established, *Smith* is a paper tiger—a lofty, but ultimately impotent, pronouncement.

Now, the Eleventh Circuit is in conflict with the decisions of a majority of courts that have considered the issue and that were based on *Smith*. The significant consensus of those courts, none of which qualified the right to record with a similar discretionary, fact-based test as the Eleventh Circuit did here, itself clearly establishes a broad right to record official activity. The Eleventh Circuit's decision has not only undermined that consensus—which largely flows from *Smith*—but placed itself against it.

The Court should grant certiorari to address these disruptive effects on the understanding of a critical constitutional right.

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[2] It bears mentioning that the author of the majority opinion below was on the panel that decided *Toole*. *Toole* followed *Smith* and its reasoning is inconsistent with the majority's reasoning below.

STATEMENT OF THE CASE

A. Factual Background

On May 20, 2012, Petitioner James Crocker, a respected businessman who employs over 100 persons in Martin County, Florida, was traveling on I-95 when he noticed an SUV that had just lost control and flipped over several times. Petitioner pulled over and parked his car off the travel lanes of I-95 and proceeded to run to the SUV, joining a group of approximately 10 to 15 other "Good Samaritans" who were attempting to help an individual trapped in the SUV. When members of the Martin County Sheriff's Office and Florida Highway Patrol arrived at the scene, Petitioner and the others moved back to the opposite edge of the median, approximately 50 feet from the SUV, in order to allow the responders to conduct their duties. At no time did Petitioner or any of the other "Good Samaritans" interfere with law enforcement or other government officials.

While observing law enforcement and other officials, Petitioner began taking videos and photos of the event with his cell phone. At this point, the scene was relatively stable. All lanes of I-95 were blocked, the scene was approximately a half-hour old, and there had been over ten minutes of relative inactivity. Nevertheless, Respondent Officer Steven Beatty approached Petitioner, grabbed Petitioner's phone from Petitioner's hand, and told Petitioner to drive to a nearby weigh station and wait. Respondent admitted to Petitioner it was not "illegal to take pictures of the accident scene," but when Petitioner said he would leave if he received his phone back,

Respondent placed Petitioner under arrest for "resisting an officer"—in clear retaliation against Petitioner for simply filming the scene and in retaliation for his not leaving without his phone. Respondent's actions were entirely motivated by Petitioner's recording activity, as Respondent was not participating in, or assisting in, clearing the accident zone at all.

Respondent proceeded to place Petitioner in the back of his patrol car and turned off (or down to a minimum) the air conditioning. With the doors and windows of the patrol car shut, Petitioner began to have trouble breathing and sweated profusely in the South Florida heat. After Petitioner begged another officer for relief, Respondent returned and turned on the air conditioning. Petitioner was eventually taken to the Martin County Jail, and upon his release his phone was returned. An officer returning the phone to Petitioner apologized that it had been seized in the first place. All charges against Petitioner were dropped.

In sum, Petitioner's phone was seized, he was locked in a patrol car, transported to the police station and detained, all because he lawfully filmed the scene of an accident that Respondent did not want him to film.

B. Procedural History

Petitioner sued Respondent, as well as the Sheriff of Martin County, Florida, alleging violations of his rights under the United States Constitution—including his First Amendment right to record police

activity—and violations of Florida law.[3] The parties filed cross-motions for summary judgment, and the district court granted the defendants' motions on all counts except Petitioner's Fourth Amendment claim concerning Respondent's seizure of Petitioner's cell phone. Respondent appealed the denial of summary judgment on the Fourth Amendment claim, and the Eleventh Circuit affirmed. *See Crocker v. Beatty*, 886 F.3d 1332 (11th Cir. 2018). The Fourth Amendment claim proceeded to a jury trial, and Petitioner obtained a jury verdict of $1,000. The underlying case having reached a final judgment, Petitioner appealed the grant of summary judgment to Respondent on the other counts of the complaint, including the First Amendment claim at issue here.[4]

On April 20, 2021, a divided panel of the Eleventh Circuit affirmed the grant of summary judgment. (Pet. App. 11a-17a.) Relevant here, the panel majority held Respondent was entitled to qualified immunity on Petitioner's First Amendment claim that Respondent illegally prevented Petitioner from recording police conduct. The majority concluded the recognition of the right to record public officials in *Smith* did not give Respondent fair warning his conduct—forcing Petitioner to stop taking photos and video and illegally seizing his cell phone—violated the First Amendment. (Pet. App. 17a.) Critical to the majority's conclusion was its determination that

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[3] The district court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1367.

[4] The Eleventh Circuit had jurisdiction of the appeal under 28 U.S.C. § 1291.

Petitioner "was spectating on the median of a major highway at the rapidly evolving scene of a fatal crash." (Pet. App. 12a (internal quotation marks omitted).)[5] "In that *specific situation*," and based on purported time, place, and manner restrictions determined by the officer, the court held it would not "be obvious to every reasonable officer that *Smith* gave [Petitioner] the right to take pictures of the accident's aftermath." (Pet. App. 12a (internal quotation marks omitted).)

Judge Beverly Martin dissented. In line with the reasoning of several circuit courts, Judge Martin concluded *Smith*'s "broad pronouncement… underscores the right's general applicability." (Pet. App. 56a.) Noting the majority's opinion "parse[d] this critical right too narrowly," Judge Martin concluded Petitioner's "First Amendment right…was clearly established." (Pet. App. 59a.) Judge Martin further wrote that "[p]ermissible time, place, and manner restrictions are content-neutral restrictions on First Amendment conduct that are supported by a substantial government interest and do not unreasonably limit alternative avenues of communication. They are, by nature, rules, not discretionary enforcement decisions by individual police officers." (Pet. App. 58a (emphasis in original) (citations omitted).) Because there were no rules restricting Petitioner's recording, Respondent could not curtail Petitioner's clearly established First

[5] The majority borrowed the "rapidly evolving scene" language from the district court. (Pet. App. 85a.) As shown above, the scene was not "rapidly evolving," but had been stable for some time at the point Respondent approached Petitioner.

Amendment right through application of Respondent's caprice.

Petitioner filed a petition for rehearing and rehearing *en banc*, which was denied on June 28, 2021. (Pet. App. 1a-2a.)

REASONS FOR GRANTING THE WRIT

The right to record official conduct in public was clearly established, by *Smith* and numerous other cases, at the time Petitioner was wrongfully arrested. The Eleventh Circuit's decision in this case creates a circuit split on this important issue between the Eleventh Circuit and Tenth Circuits on the one hand and First, Third, Fifth, Seventh, and Ninth Circuits on the other. The decision further represents an unprecedented disestablishment of a previously clearly established First Amendment right.

The Eleventh Circuit's regressive interpretation and application of *Smith* now undermines the clear establishment of the right to record police conduct in the First, Third, Fifth, Seventh and Ninth Circuits, as those circuits had predicated their establishment of this First Amendment right on *Smith*. The opinion below reflects a discordant reinterpretation of qualified immunity jurisprudence that applies unwritten standards where once there was a clear rule governing the exercise of a foundational right.

In sum, the Eleventh Circuit's opinion destabilizes the law in both in its own circuit and throughout the country by undermining the

fundamental First Amendment right of citizens to record police conduct in public or arguably public places. It does so by granting unfettered, *ad hoc* discretion to officers to restrict a citizen's First Amendment right to record police activities based on nothing more than the officer's caprice.

The split between the circuits on this issue, along with the unprecedented narrowing of the First Amendment right by the Eleventh Circuit, warrants the grant of certiorari.

I. The Right to Record Official Activity in Public Is Clearly Established

This case presents the question of whether the First Amendment provides a citizen the right to record activities of public officials and whether that right was clearly established for purposes of qualified immunity at the time Respondent arrested Petitioner and seized his phone. The Eleventh Circuit's decision here creates a circuit split on this important issue warranting the grant of certiorari.

A. The Circuits Are Split on this Issue

The Eleventh Circuit's decision below exacerbates a split among the circuits concerning the establishment and scope of the First Amendment right to record official conduct. The First, Third, Fifth, Seventh, and Ninth Circuits have all recognized the establishment of the right. *See Askins*, 899 F.3d at 1045; *Fields*, 862 F.3d at 359; *Turner*, 848 F.3d at 688; *Alvarez*, 679 F.3d at 595; *Glik*, 655 F.3d at 85. The Sixth and Eighth Circuits have alluded to the right's

establishment, but have not expressly held as such. *See Clark v. Stone*, 998 F.3d 287, 302-04 (6th Cir. 2021) (holding the right to record, as recognized by other circuits, does not create a right to film interactions with social workers); *Chestnut*, 947 F.3d at 1090 (holding the plaintiff had a clearly established right "to watch police-citizen interactions at a distance and without interference"). The Fourth Circuit has yet to address the issue in a published opinion. *See Syzmecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (concluding the right to record was not clearly established at the time of the incident at issue). The Second Circuit has not addressed the issue. *See, e.g., Charles*, 2017 WL 530460 at *24. The Tenth Circuit has held the right to record was not clearly established. *Frasier v. Evans*, 992 F.3d 1003, 1022 (10th Cir. 2021).

Before the decision below, the Eleventh Circuit fit comfortably with the First, Third, Fifth, Seventh, and Ninth Circuits in recognizing a broad right to record official conduct in public. Indeed, each circuit that has affirmatively recognized the right to record has made reference to *Smith*. *See Askins* 899 F.3d at 1044; *Fields*, 862 F.3d at 356; *Turner*, 848 F.3d at 687 n.27; *Alvarez*, 679 F.3d at 601 n.10; *Glik*, 655 F.3d at 84. None of these circuits interpreted the right to record as a narrow, factually dependent inquiry, despite that each case before the circuit courts involved a different set of facts. *See, e.g.*, *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020) (recognizing the right to audio record officers in public spaces); *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020)

(recognizing the right to record during violent protests); *Askins*, 899 F.3d 1035 (recognizing the right to record at United States Ports of Entry); *Fields*, 862 F.3d 353 (recognizing the right to record police activity in public); *Turner*, 848 F.3d 678 (recognizing the right to photograph a police station); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014) (recognizing the right to record a traffic stop); *Alvarez*, 679 F.3d 583 (recognizing the right to record conversations that are in public and not in fact private); *Glik*, 655 F.3d 78 (recognizing the right to record an arrest on Boston Common). Rather, every circuit recognized the right to record broadly. *See Fields*, 862 F.3d 353 (consolidating two factually distinct cases, one involving a man photographing from the sidewalk, and the other involving a woman pinned to a pole by an officer at a protest).

Given these courts' reliance on *Smith*, allowing the Eleventh Circuit's decision below to remain in place will cause these decisions to be called into doubt. More problematically, the Eleventh Circuit's decision to walk back its broad conception of a right to record and replace it with a conception requiring *ad hoc*, fact-bound determinations places the Eleventh Circuit at odds with the decisions of these other circuits. The Eleventh Circuit's decision has thus contributed to a confused state of the law, whereby five circuits have established the right broadly, two circuits are sympathetic but uncommitted, one circuit has not addressed the question in a published opinion, one circuit has not addressed the question at all, one circuit says there is no clear right, and the Eleventh Circuit, standing alone, has established the right

subject to *ad hoc* factual review of each case. The Court should intervene to clearly acknowledge the existence of the right to record official conduct and define the scope of the First Amendment's protection of that right.

B. This Issue Is of Vital Importance

The right to record public officials performing their public duties is foundational to our republican form of government. The recording and dissemination of information are necessary prerequisites to the open debate and discussion upon which this nation depends for its vitality and legitimacy. *See Richmond Newspapers, Inc.*, 448 U.S. at 587 (Brennan, J., concurring) ("[T]he 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); *see also Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (discussing "the paramount public interest in a free flow of information to the people concerning public officials, their servants"); *Turner*, 848 F.3d at 689 ("Filming the police contributes to the public's ability to hold the police accountable….Filming the police also frequently helps officers; for example, a citizen's recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing."). The events of the summer of 2020 and the general "proliferation of bystander videos" powerfully show "[t]hat information is the wellspring of our debates." *Fields*, 862 F.3d at 359. Accordingly, the right to record is simply too important to allow the confusion currently persisting in the courts of appeals

and it is too important not to be uniformly available to all citizens. This Court should grant certiorari.

C. This Case Is an Excellent Vehicle for the Court to Address this Issue

This case presents pure issues relating to the First Amendment right to record and qualified immunity, and is therefore an excellent vehicle for this Court to address the intersection of those two principles.

Petitioner is aware this Court recently denied certiorari in *Frasier v. Evans*, No. 21-57, a case raising a question concerning the establishment of the right to record. This case, however, is materially different from *Frasier*. In *Frasier*, the respondents argued they had reasonable suspicion to detain the petitioner "based on articulable facts that [the petitioner] made a false report to the police." Brief in Opposition, *Frasier v. Evans*, No. 21-57, at 30. This case does not present any issue of whether Respondent had reasonable suspicion, probable cause, or any other reason for detaining Petitioner and preventing him from recording public officials carrying out their public duties. Indeed, in this case, Respondent admitted Petitioner was breaking no law in recording the activities at issue. Petitioner was recording the scene from a considerable distance, and Respondent seized his phone. The issue here is only whether that straightforward fact pattern constitutes a violation of the established First Amendment right to record. The Court should grant certiorari.

D. The Eleventh Circuit's Opinion Is Wrong

The Eleventh Circuit's conclusion that Petitioner did not have a clearly established right to record the activity of police officers and others at the accident scene is wrong. The foundational role the right to record plays in this country was acknowledged from the country's beginning. And the First, Seventh, Ninth, and Eleventh Circuits had all formally recognized that right at the time Petitioner was arrested in 2012. The consensus among those courts was sufficient to give Respondent "fair warning" that preventing Petitioner from recording was a violation of Petitioner's First Amendment right. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011) (noting it is necessary to have "controlling authority" *or* "a robust consensus of cases of persuasive authority"). Respondent's own words at the time of the arrest confirm this, as he expressly told Petitioner recording the scene was not illegal. Respondent was on notice his conduct would violate Petitioner's constitutional right to record, and he did it anyway. He is not entitled to qualified immunity.

II. The Eleventh Circuit's Decision Improperly Restricts the First Amendment Right to Record

A. This Issue Is Vitally Significant

Qualified immunity presents a "demanding standard." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The most challenging aspect of the qualified immunity analysis for a plaintiff seeking

redress for the violation of his constitutional rights is the requirement that "the unlawfulness of [an official's] conduct was 'clearly established at the time.'" *Id.* Generally, whether given conduct is "clearly" unlawful is anything but a simple inquiry. The law must be "sufficiently clear"; "settled law"; "dictated by 'controlling authority' or 'a robust "consensus of cases of persuasive authority"'"; and a clear prohibition of "the officer's conduct in the particular circumstances before him." *Id.* at 589-90.

In light of the difficulty of satisfying this standard, qualified immunity has been sharply criticized, including by members of this Court. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Court's "one-sided approach to qualified immunity"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting his "growing concern with [the Court's] qualified immunity jurisprudence"). In recent years, "a growing, cross-ideological chorus of jurists and scholars" has urged "recalibration of contemporary [qualified] immunity jurisprudence." *Zadeh v. Robinson*, 928 F.3d 457, 480 & nn. 61-62 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (footnotes omitted) (collecting examples of judicial and scholarly critiques).

This petition does not ask the Court to reevaluate the qualified immunity doctrine. Rather, it seeks to have the doctrine faithfully applied. Here, application of qualified immunity is improper when the Eleventh Circuit and other courts have clearly established the existence of the right to record police

conduct. The Eleventh Circuit may not disestablish the right by imposing heretofore unrecognized constraints on it.

As discussed above, for centuries commentators have recognized the preeminence of the right to record the conduct of public officials to the maintenance of a free society. *See Alvarez*, 679 F.3d at 599 (quoting *Silence Dogood No. 9*, THE NEW-ENGLAND COURANT (Boston), July 9, 1722, *reprinted in* 1 THE PAPERS OF BENJAMIN FRANKLIN 28 (Leonard W. Labaree et al. eds., 1959)) (quoting *Cato's Letter No. 15*) ("[T]o do public Mischief, without hearing of it, is only the Prerogative and Felicity of Tyranny" and "it is the Interest, and ought to be the Ambition, of all honest Magistrates, to have their Deeds openly examined, and publicly scann'd."); *id.* at 600 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 421-22 (1860)) ("The evils to be guarded against were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."). This Court has recognized the "practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also Bellotti*, 435 U.S. at 783 ("The First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."). And the courts of appeal have

followed this lead. *See, e.g.*, *Chestnut*, 947 F.3d at 1092 ("Though we agree with the dissent that 'qualified immunity is important to society as a whole,' so is the people's ability to monitor police activities to ensure that their duties are carried out responsibly."); *Glik*, 655 F.3d at 85 ("[A] citizen's right to film government officials…in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.").

The Eleventh Circuit's opinion below diverts from this understanding and imperils this preeminent right. Twenty-one years ago in *Smith* the Eleventh Circuit declared there is "a First Amendment right, subject to reasonable time, place and manner restrictions, to photograph or videotape police conduct." 212 F.3d at 1333. The Eleventh Circuit's current refusal to apply *Smith*'s declaration of the right to record in this case mistakes *Smith*'s brevity for ambiguity and ignores that "general statements of the law are not inherently incapable of giving fair and clear warning" that certain official conduct is unconstitutional. *United States v. Lanier*, 520 U.S. 259, 271 (1997); *see also Glik*, 655 F.3d at 85 ("This terseness [in the right to record cases] implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment's protections in this area.").

Consequently, the standard applied below, with its focus on the search for a precise case with similar facts, is overly narrow and risks a perpetuation of the "faulty premise" that qualified immunity will shield an officer's conduct if there is no

"identical" case. *See Kisela*, 138 S. Ct. at 1161. The right to record should not be subjected to the "Escherian Stairwell" of an excessively restrictive qualified immunity test. *See Zadeh*, 928 F.3d at 479-80 (describing how the requirement to show "factually analogous precedent" leads to "constitutional stagnation" and a "[h]eads government wins, tails plaintiff loses" situation). This is especially true where a newly recognized exception to the First Amendment right to record, warranting the defense of qualified immunity, is premised upon the situational discretion of a particular officer. In those instances, the right is consumed by the officer's discretion and may be violated with impunity because the officer could cite the exigence of a circumstance to justify the right's violation.

As this Court has held, and as pointed out by the dissent below, "[a] government regulation that allows arbitrary application is inherently inconsistent with valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cty. v. Nationalist Movement,* 505 U.S. 123, 130 (1992). There is simply no articulated rule that would have prevented Petitioner from recording the crash scene at issue, especially when Petitioner was in no way obstructing the conduct of the officer. Rather, the Eleventh Circuit's decision vests officers with discretion to determine whether and when the right should be restricted, and this permits officers to retaliate against citizens solely for recording police activity. This Court's precedents preclude this.

Neither should the right to record be subjected to *ad hoc*, totality of the circumstances determinations of whether it has been violated. Such a standard inherently invites courts to make "freewheeling policy choice[s]" that are not their prerogative to make. *Ziglar*, 137 S. Ct. at 1871 (alteration in original). But that is precisely the test the Eleventh Circuit has created for the right to record here, as shown by the court's recent decision in *Khoury v. Miami Dade School Board*, 4 F.4th 1118 (11th Cir. 2021). In *Khoury*, the court concluded the plaintiff's right to record the police was "clearly established" and distinguished its decision in *this* case on purely factual grounds. *See id.* at 1129 & n.8. The court repeated the demonstrably false assertion that Petitioner "was spectating on the median of a major highway at the rapidly evolving scene of a fatal crash and was arguably in violation of Florida law." *Id.* at 1129 n.8 (internal quotation marks omitted). It then contrasted that with the scenario before it, where the plaintiff "was not violating any laws or harming anyone while she was filming" and the arresting officer "knew [the plaintiff] had a First Amendment right to film the scene." *Id.* Taking out the false assertion that Petitioner was at a "rapidly evolving scene," the facts of the two cases are materially the same. Petitioner, like the plaintiff in *Khoury*, was not violating the law and was not harming anyone as he surveilled the scene from at least 50 feet away. And Respondent told Petitioner it was not illegal for him to record what was going on. The divergence of the outcomes in these two cases, despite the similarity of their facts, unavoidably suggests an arbitrariness in application of the

standard.[6] This Court should intervene to protect the right to record from the Eleventh Circuit's regressive, *ad hoc* standard, which is repugnant to our constitutional order.

B. This Case Is an Excellent Vehicle for the Court to Address this Issue

This case presents an excellent vehicle for the Court to step in and protect this integral right, as it presents the qualified immunity and First Amendment issues in a vacuum. This case does not involve contentions of "arguable probable cause" that could excuse the constitutional deprivation. *See, e.g.*, *Gates v. Khokhar*, 884 F.3d 1290, 1298 (11th Cir. 2018) ("[W]hen an officer has arguable probable cause to arrest, he is entitled to qualified immunity both from Fourth Amendment claims for false arrest and from First Amendment claims stemming from the arrest."). The sole issue before the Eleventh Circuit on Petitioner's First Amendment claim was whether the right to record was clearly established for the purposes of qualified immunity, and the Eleventh

[6] In addition to being susceptible to this sort of arbitrary application, the Eleventh Circuit's apparent willingness to restrict the right to certain circumstances is contrary to the purpose of the right in the first place. If the right is designed to protect the dissemination of information concerning newsworthy events, it must protect the right of the people to record those events. And newsworthy events are often likely to be "rapidly evolving" or otherwise present scenarios where public officials might prefer not be under observation. But whether an individual has a right cannot be dependent on whether it is more convenient for a government actor for the individual not to exercise it.

Circuit's treatment of that question is all that is at issue here.

Furthermore, this case does not require or request the wholesale reevaluation of the qualified immunity doctrine to address the question presented. Rather, the question concerns whether a court of appeals can undermine the qualified immunity doctrine by retrogressing in its treatment of rights and imposing a discretionary exception to the exercise of a right. The Court should grant certiorari.

C. The Eleventh Circuit's Opinion Is Wrong

Finally, the Eleventh Circuit's opinion is simply incorrect. While the opinion below acknowledges that *Smith* held there is a right to record public officials in public places, it states the failure of the *Smith* opinion to provide detail as to the specific factual contours of that right means it does not "clearly establish[ ] the law." (Pet. App. 13a-14a.) But, as noted, the lack of detail is common in decisions addressing this bedrock First Amendment right. *See Glik*, 655 F.3d at 84-85. And this Court has never required absolute—or even any—factual similarity between precedent establishing a right and a case at bar. Rather, the sole requirement is that a rule "apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Lanier*, 520 U.S. at 271 (alteration in original). "General statements of the law," such as that found in *Smith*, "are not inherently incapable of giving fair and clear warning." *Id.* The Eleventh Circuit's discretionary

gloss ignores that admonition and adds a layer of analysis of the facts the precedents of this Court do not require. Rather than determining solely whether a given right exists and whether the officer was on notice, the Eleventh Circuit has determined it must also delve into the facts in a way that is more appropriate for a jury than a judge.[7]

More importantly, the Eleventh Circuit invokes time, place, and manner restrictions to avoid the conclusion that the right to record was clearly established in this case. But the Eleventh Circuit points to no articulated rule limiting the right. Rather, the Eleventh Circuit says that Respondent was permitted to exercise his discretion in denying Petitioner's right to record, and because there was no published case mirroring Respondent's exercise of discretion here, he was entitled to qualified immunity. This is a classic Catch-22 wherein the right can exist, but it can never be established and it can be continually violated.[8]

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[7] Even if such a fact-based inquiry was necessary, the facts in this case do not suggest Petitioner should not have been allowed to record. Petitioner was standing a great distance from the accident scene, at the opposite edge of the median, the accident had occurred approximately a half-hour earlier, and there had been over ten minutes of relative inactivity at the site before Respondent arrested Petitioner. There was no reason to curtail Petitioner's right to record.

[8] The Eleventh Circuit majority also contends Respondent was entitled to qualified immunity because Petitioner violated Florida law by being in a non-public space, e.g. the "median" of the highway, and the First Amendment right recognized in *Smith* applies only to public spaces. (Pet. App. 14a-

In sum, *Smith* clearly established Petitioner's right to record Respondent at the scene of the motor vehicle accident at issue. The Eleventh Circuit majority improperly granted Respondent qualified immunity, however, based on a novel theory that Respondent could discretionarily determine that Petitioner's right could be deprived based on Respondent's conclusion of exigency and despite his

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17a). First, Respondent never made this argument below regarding the First Amendment claim. Second, this conclusion is wrong and the Eleventh Circuit majority cites no law supporting it. The law it does cite shows that a person is prohibited from parking a vehicle on the shoulder of the interstate, *see* Fla. Stat. Ann. § 316.003 (35) (defining "Limited access facility"); *id.* at § 316.1945(1)(a)(11) (making it unlawful to "[s]top, stand or park a vehicle…[o]n the roadway or shoulder of a limited access facility"), and it also prohibits walking on the interstate. *See id.* at § 316.130(18). But it does not prohibit *walking* on the shoulder of the interstate, which is where Petitioner was *standing*. *See* Fla. Stat. Ann. § 316.130(4) (specifically providing for pedestrians to walk on the shoulder of highways). It is important to note again that Respondent arrested Petitioner solely on the baseless ground of "obstruction" and has not argued "arguable probable cause." Even more importantly, the place where Petitioner was standing was public, as Judge Martin notes. *See* (Pet. App. at 57a n.2). And contrary to the majority's statement below, the First Amendment applies in both public and nonpublic fora. *See, e.g., Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1885 (2018). The only distinction between public and nonpublic fora is the level of scrutiny applied to the restriction. *See Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992). The level of scrutiny addresses the restriction, not the right. But here there was no actual restriction at all, though the Eleventh Circuit majority permitted Respondent to impose such a restriction based upon his caprice.

acknowledgment that Petitioner had a right to record the scene. This holding undermines 21 years of clearly established precedent, sows confusion into the law, and creates out of whole cloth an exception to the First Amendment right to record public officials that does tremendous violence to the right itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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