No. 23-276

IN THE
Supreme Court of the United States

DIJON SHARPE,

Petitioner,

v.

WINTERVILLE POLICE DEPARTMENT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

DAN M. HARTZOG JR.
Counsel of Record
KATHERINE BARBER-JONES
RACHEL G. POSEY
HARTZOG LAW GROUP LLP
2626 Glenwood Avenue
Suite 305
Raleigh, North Carolina 27608
Telephone: (919) 670-0338
dhartzogjr@hartzoglawgroup.com
Counsel for Respondents

QUESTION PRESENTED

While several circuits had ruled on whether the First Amendment allowed officers to restrict citizen recording of police activity before October 2018, the Fourth Circuit was not among them. Moreover, no circuit had yet addressed whether the same protections would apply to livestreaming, or real-time video broadcasting and interaction with a social media audience, as opposed to recording for later distribution, or how the status of the person livestreaming as a subject of a *Terry* stop of a vehicle, rather than a bystander, would affect the analysis.

The question presented is:

Was the Fourth Circuit correct in holding that the law was not clearly established in October 2018 on the issue of whether law enforcement officers who directed a passenger in a stopped vehicle to cease livestreaming the stop, while reassuring the passenger that he could continue to record their interaction, were unconstitutionally restricting the passenger's First Amendment protected speech?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 8

I. Petitioner Seeks Review of a Question Not Presented by this Case. 10

II. The Fourth Circuit's application of settled qualified immunity principles to this case does not warrant review. 18

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Amer. Civil Liberties Union of Ill. v. Alvarez,
679 F.3d 583 (7th Cir. 2012) 11, 24

Anaya v. Crossroads Managed Care Sys., Inc.,
195 F.3d 584 (10th Cir. 1999) 23

Anderson v. Creighton,
483 U.S. 635 (1987) 25

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011) 19

Arizona v. Johnson,
555 U.S. 323 (2009) 16

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 20

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 14

Blackston v. Alabama,
30 F.3d 117 (11th Cir.1994) 23

Booker v. S.C. Dep't of Corr.,
855 F.3d 533 (4th Cir. 2017) 20

Brendlin v. California,
551 U.S. 249 (2007) 16

City of Escondido, Cal. v. Emmons,
139 S. Ct. 500 (2019) 19

Delaware v. Prouse,
440 U.S. 648 (1979) 16

Dist. of Columbia v. Wesby,
583 U.S. 48 (2018) 4, 10

Fields v. City of Philadelphia,
862 F.3d 353 (3d Cir. 2017) 11, 22, 24
Florida v. Bostick,
501 U.S. 429 (1991)..... 17
Fordyce v. City of Seattle,
55 F.3d 436 (9th Cir. 1995)..... 11, 22
Frazier v. Evans,
992 F.3d 1003 (10th Cir. 2021)..... 22
Gericke v. Begin,
753 F.3d 1 (1st Cir. 2014) 11, 14, 24
Glik v. Cunniffe,
655 F.3d 78 (1st Cir. 2011) 11, 21, 24
Harlow v. Fitzgerald,
457 U.S. 800 (1982)..... 18
Iacobucci v. Boulter,
193 F.3d 14 (1st Cir. 1999) 21, 23
Irizarry v. Yehia,
38 F.4th 1282 (10th Cir. 2022) 11, 14, 15, 22
Kisela v. Hughes,
138 S. Ct. 1148 (2018)..... 19
Maryland v. Wilson,
519 U.S. 408 (1997)..... 16
Michigan v. Long,
463 U.S. 1032 (1983)..... 16
Michigan v. Summers,
452 U.S. 692 (1981)..... 16
Molina v. City of St. Louis,
59 F.4th 334 (8th Cir. 2023) 22
Monell v. Dep't of Soc. Servs.,
436 U.S. 658 (1978)..... 5

Mullenix v. Luna,
577 U.S. 7 (2015) 10, 19
Pearson v. Callahan,
555 U.S. 223 (2009) 18, 21
Pennsylvania v. Mimms,
434 U.S. 106 (1977) 16
Plumhoff v. Rickard,
572 U.S. 765 (2014) 4
Ray v. Roane,
948 F.3d 222 (4th Cir. 2020) 4
Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) 19
Saucier v. Katz,
533 U.S. 194 (2001) 19
Smith v. City of Cumming,
212 F.3d 1332 (11th Cir. 2000) 11, 23
Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) 19
Szymecki v. Houck,
353 Fed. App'x 852 (4th Cir. 2009) 21, 24
Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 14
Turner v. Driver,
848 F.3d 678 (5th Cir. 2017) 11, 24
Ullery v. Bradley,
949 F.3d 1282 (10th Cir. 2020) 23
White v. Pauly,
580 U.S. 73 (2017) 4, 19
Wilson v. Layne,
141 F.3d 111 (4th Cir. 1998) 20

Wilson v. Layne,
526 U.S. 603 (1999) 26

Statutes

42 U.S.C. § 1983 ..... 3, 6

Other Authorities

Hassan Kamu, "Livestreaming police is protected, says 4th Circuit, but with limits shielding cops," Commentary: Justice Matters (Feb. 24, 2023) 13

John C. Williams, Note, Qualifying Qualified Immunity, 65 VAND. L. REV. 1295, 1333-35 (2012) 20

Rachel Weiner, "Live-streaming traffic stop is free speech, but protecting it is a challenge," The Washington Post (Feb. 7, 2023)..... 13

Tyler Finn, Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity, 119 COLUMBIA L. REV. 445 (2019) ... 20, 25

Constitutional Provisions

U.S. Const. amend. I 3, 5, 6, 7, 8, 9, 10, 13, 14, 15, 17, 18, 19, 22, 23, 24

U.S. Const. amend. IV 7, 8, 15, 16

STATEMENT OF THE CASE

1. On October 9, 2018, Dijon Sharpe ("Sharpe" or "petitioner") was a passenger in a vehicle driven by Juankesta Staton ("Staton" or the "driver") that was pulled over by Officer Ellis and Officer Helms of the Town of Winterville Police Department. Pet. App. 68a, 74a. While waiting for the officers to approach, Sharpe began livestreaming—broadcasting in real time—via Facebook Live to his Facebook account. Pet. App. 74a-95a.[1] After Officer Ellis took Staton's name and date of birth and went back to his vehicle, Staton called a woman and described their location to her, exclaiming that following "your directions" caused the problem. Pet. App. 75a-77a. Officer Helms asked a few questions of Sharpe – for his name, identification, and what Sharpe meant by "business" when Sharpe told Officer Ellis that he and Staton were in Winterville "handling business" – but did not repeat questions or insist on answers. Pet. App. 77a-81a. While they waited, Sharpe began addressing viewers, who were already making "Realtime Comments" to Sharpe, while Staton continued his conversation. *See* Pet. App. 81a-88a.

Upon returning to the vehicle, Officer Helms saw and confirmed that Sharpe was livestreaming over Facebook Live. Officer Helms said, "What have we got? Facebook Live, cous[in]?" Pet. App. 69a, 88a. When Sharpe responded, "Yeah," Officer Helms

---

[1] Sharpe's complaint attaches a transcript of the livestream and incorporates the Facebook Live video by reference at https://www.facebook.com/d.r.sharpe/videos/2251012878304654.

explained, "We ain't gonna do Facebook Live, because that's an officer safety issue." Pet. App. 88a.

When Sharpe refused to cease livestreaming, Officer Helms reached into the vehicle toward Sharpe's phone. Sharpe yelled at Officer Helms to "get off my phone" and to someone (Staton, viewers, or both), to "[l]ook at your boy!" Pet App. 88a. After Sharpe leaned into the car, Officer Helms grabbed and quickly released Sharpe's seatbelt, which Sharpe was not wearing, "in a further attempt to seize the phone." Pet. App. 69a, 76a.[2] Both Sharpe and the driver began arguing with Officer Helms. Pet. App. 88a-89a.

At the driver's side window, Officer Ellis redirected Staton's attention to him, saying "Look at me. You got three citations." Pet App. 89a. After explaining the citations, Officer Ellis asked if Staton had any questions for him, then began to explain "In the future, guys, this Facebook Live stuff, if you recording…", but was interrupted by Staton and Sharpe. Pet App. 89a-90a. After some back-and-forth, Officer Ellis confirmed that "I'm talking to you [Sharpe]." Pet. App. 90a.

Officer Ellis proceeded to explain that "Facebook Live… we're not gonna have, okay, because that lets everybody y'all follow on Facebook that we're out here There might be just one me next time… It lets

---

[2] Officer Helms' attempt to grab Sharpe's phone and grab of his seatbelt can be viewed at 11:42-11:48. Plaintiff alleges that Officer Helms also grabbed at Sharpe's shirt, which cannot be seen on the footage. *Id.* The court below summarized the acts as "attempting to take Sharpe's phone." Pet. App. 4a.

everybody know where y'all are at. We're not gonna have that." Pet App. 90a-91a. Officer Ellis continued, distinguishing recording from livestreaming, "If you were recording, that is just fine … We record, too. So in the future, if you're on Facebook Live, your phone is gonna be taken from you." Pet. App. 91a. Later, Officer Ellis repeated, "[Y]ou can record on your phone … but Facebook Live is not gonna happen." Pet. App. 92a. Officer Ellis verbally confirmed that Sharpe and Staton heard him and then ended the encounter. Pet. App. 92a.

2. Sharpe filed suit against Officers Helms and Ellis and the Winterville Police Department in November 2019, alleging causes of action under 42 U.S.C. § 1983 for violations of his rights under the First Amendment to the United States Constitution. Pet App. 73a. Sharpe sought, inter alia, nominal damages for infringement of his First Amendment rights and a declaration that "Plaintiff has the right, protected by the First Amendment to the Constitution of the United States, to both (a) record police officers in the public performance of their duties and (b) broadcast such recording in real-time." Pet. App. 73a.[3]

3. In granting Officer Helms' motion to dismiss the individual capacity claims against him on the basis of qualified immunity, the district court held that Helms

---

[3] The complaint does not use the word "retaliation" or any derivative of it. *See* Pet. App. 64a-73a. Sharpe also did not allege that Officer Helms intended to punish him for exercising his rights. *Id.* Rather, the complaint alleged that Officer Helms' physical motions were attempts to seize the phone, not a "retaliatory assault" as described by petitioner. *See* Petition at 6.

was entitled to qualified immunity because the "right of a passenger in a stopped vehicle during a traffic stop to record police, but also to real-time broadcast such a recording during the traffic stop" was not clearly established by "this Court, the Fourth Circuit, or the North Carolina Supreme Court prior to October 9, 2018. Pet App. 52a. In so holding, the district court acknowledged the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuit's prior decisions recognizing "the right to record police in performing their public duties." Pet. App. 51a-52.

However, in reviewing the facts and circumstances facing Officer Helms, the district court drew the key distinction that "no circuit court has addressed the right of a passenger in a stopped vehicle during a traffic stop to record and real-time broadcast police in performing their public duties." Pet. App. 52a. While "controlling authority holding identical conduct unlawful" is not required to clearly establish a right, the district court relied on this Court's extensive precedent stating that "'clearly established law' should not be defined 'at a high level of generality.'" Pet. App. 52a (citing *White v. Pauly*, 580 U.S. 73, 79 (2017); *Dist. of Columbia v. Wesby*, 583 U.S. 48, 63-64 (2018); *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014); *Ray v. Roane*, 948 F.3d 222, 229 (4th Cir. 2020)). The district court "assumed without deciding" that Sharpe adequately pled a claim for violation of his First Amendment rights. Pet. App. 51a.

In rejecting Sharpe's arguments that "general constitutional principles or a consensus of persuasive authority" clearly established his right to livestream

in October 2018, the district court outlined the various activities, not only recording, implicated by a Facebook Live broadcast. Pet. App. 53a. These were: "(1) recording; (2) recording and real-time broadcasting; (3) recording and real-time broadcasting with geo-location information; (4) recording and real-time broadcasting with the ability to interact via messaging applications in real-time with those watching; and (5) recording and real-time broadcasting with geolocation information and the ability to interact via messaging applications in real-time with those watching." Pet. App. 53a. The district court noted that none of the additional activities were addressed under the authorities cited by Sharpe, remarking that "…[a] consensus of persuasive authority cannot form on an issue the courts did not address." Pet. App. 53a. The district court also noted that only one of the other circuits' decisions cited as precedent addressed a traffic stop, and none involved recording by a passenger in a stopped car. Pet. App. 54a.

In addition, the district court analyzed the potential claims against the official-capacity defendants and Winterville Police under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), indicating that the district court did not believe Sharpe's allegations were sufficient to allege municipal liability. Pet. App. 60a.

4. The district court granted a later motion for judgment on the pleadings and dismissed the remaining claims based on Plaintiff's allegations that his First Amendment rights were violated by an

alleged Winterville policy or custom prohibiting use of Facebook Live during traffic stops. Pet. App. 25a. The district court granted the motion, holding that "assuming without deciding that the First Amendment entitled Sharpe to record the traffic stop from inside the car during the traffic stop, the First Amendment did not entitle Sharpe to livestream the traffic stop from inside the car during the traffic stop." Pet. App. 26a.[4]

5. The Fourth Circuit affirmed the district court's decision to dismiss Officer Helms based upon qualified immunity, but vacated and remanded the district court's dismissal of the Section 1983 claims against Winterville for municipal liability based on an alleged custom or "policy prohibiting a vehicle's occupant from livestreaming their traffic stop." Pet. App. 5a. The court below reasoned that "[i]f that policy exists, it reaches protected speech," and that Winterville must justify the alleged policy "by proving it is tailored to weighty enough interests." Pet. App. 5a-6a.[5] The majority held that "livestreaming a police traffic stop is speech protected by the First Amendment." Pet. App. 9a.

However, the court below declined to determine what level of First Amendment scrutiny should be

---

[4] The district court did not describe or analyze the policy as "against filming police officers." *Compare* Petition at 8 *with* Pet. App. 25a-40a.

[5] The court below did not use a retaliation framework; rather, it described the elements of the putative First Amendment violation as "livestreaming one's own traffic stop must be protected speech, and barring it must impermissibly abridge that speech." Pet. App. 9a.

applied. *See* Pet. App. 10a. In fact, the panel divided on the fundamental question of whether the First Amendment or Fourth Amendment should apply, with a concurring opinion declaring that the restriction on use of Sharpe's phone to communicate with others through livestreaming should be reviewed under a Fourth Amendment reasonableness test as an aspect of the seizure of the vehicle and its passengers, because the intrusion on his rights was part of a lawful Fourth Amendment seizure. Pet. App. 17a-18a.[6]

In affirming the district court's decision to grant Officer Helms qualified immunity, the court below "define[d] the right at issue with specificity" and examined whether a controlling authority in the Fourth Circuit or a consensus of persuasive authority from other jurisdictions made it "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Pet. App. 13a. The Fourth Circuit defined the First Amendment interest as "a passenger's alleged right to livestream their own traffic stop." Pet. App. 14a. Based upon that definition, the court below found no "controlling authority" in the array of First Amendment cases from other contexts decided prior to October 2018 by the Fourth Circuit, distinguishing in several respects the right at issue from the right defined in authorities cited from other jurisdictions. Pet. App. 14a. Specifically, the court below found that "two

[6] Respondents have asked this Court to address these important and urgent issues in their own Petition for Writ of Certiorari, filed at Docket No. 23-272.

distinctions make all the difference" in the out-of-circuit authorities: they addressed video recordings, not livestreaming, and people recording who were bystanders, not the subjects of the stop itself. Pet. App. 14a-15a. As such, the court below held that the district court was correct to dismiss the individual-capacity claims against Officer Helms based on qualified immunity. Pet. App. 15a-16a.

6. After the Fourth Circuit denied their petitions for rehearing, petitioner and respondents filed timely petitions for certiorari. Pet. App. 62a-63a; *see also* Docket No. 23-272.

REASONS FOR DENYING THE PETITION

Petitioner renews his argument, correctly rejected by the court below, that the right at issue in this case was the First Amendment right to record police in the performance of their public duties and was clearly established in October 2018. In arguing that this Court should accept the issue for review, petitioner ignores the distinctions relied upon by the court below in defining the right at issue. While petitioner argues that a right to record police carrying out their duties in public was clearly established by a consensus of persuasive authorities in October 2018, those precedents never addressed the question presented to the court below: whether a passenger in a stopped vehicle, subject to a Fourth Amendment seizure, can livestream his own traffic stop.

Respondents agree that other issues in this case present substantial and important questions. However, whether existing law clearly established that Officer Helms' attempts to prevent petitioner

from livestreaming his traffic stop violated the First Amendment is the least controversial aspect of this case. Ignoring the distinction between recording and livestreaming recognized by the both the district court and the Fourth Circuit, petitioner insists to the highest court in the land that this case is about recording or filming the police while carrying out their duties in public, when this framing was expressly rejected by the district court and the court below and is unsupported by the record.

There is no circuit split. In fact, the district court and the court below both assumed without deciding that recording police in the performance of their public duties is First Amendment protected activity. Likely, if the Fourth Circuit was presented with the issue of the right to record police as presented to its sister circuits, it would agree. However, the right to record or film police was not the issue presented to the court below, nor would this case be an acceptable vehicle for reviewing it.

Rather, the court below correctly applied settled principles of qualified immunity to the facts and circumstances facing Officer Helms, which involved livestreaming, not just recording, by a passenger in a stopped vehicle. The persuasive authorities from other circuits were considered and distinguished, rightly so. Defining the right in question as proposed by petitioner would obviate the doctrine that it must be clear to a reasonable law enforcement officer that the legal principle "prohibit[ed his] conduct in the particular circumstances before him," which "requires

a high degree of specificity." *See Wesby*, 583 U.S. at 63 (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015)).

Because the question presented by petitioner was not under review by the court below, there is no circuit split, and because well-established principles of qualified immunity were correctly applied to Officer Helms' dismissal, this Court should deny the petition.

I. PETITIONER SEEKS REVIEW OF A QUESTION NOT PRESENTED BY THIS CASE.

1. The petition should be denied because the court below explicitly did not decide that the First Amendment right to record or film police carrying out their duties in public was not clearly established in October 2018. Rather, the court below rejected petitioner's framing of the right at issue. It described petitioner's position as: "Sharpe's attempt to broadly define the right as "a First Amendment right to film police in the discharge of their duties in public" that "ha[s] no blanket carve-out for vehicle passengers and no special exception for live broadcasting." Pet. App. 15a. Petitioner fails to address the distinctions relied on by the court below: the live, real-time broadcasting and status of the person recording as subject to a lawful vehicle stop. These distinctions are also unaddressed by petitioner's cited authorities.

None of the cases that petitioner gestures to as clearly establishing the right at issue in this case involved live broadcasting at the same time as recording or filming by a passenger in a traffic stop. *See Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995) (videographer filming sidewalk bystanders

against their wishes during a public protest event); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.), *cert. denied*, 531 U.S. 978 (2000) (citizen involved in lawsuit against police department following patrol officers to videotape them and traffic stops, if conducted); *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011)) (bystander on Boston Common filming an arrest from 10 feet away); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012) (pre-enforcement action by "police accountability program" seeking to make audiovisual recordings of police officers when performing their duties in public places and speaking at a volume audible to bystanders); *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014) (bystander filming roadside traffic stop from other side of fence in adjacent parking lot at least 30 feet away); *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017) (legal observer filming police arrest of anti-fracking protester and college student searched, arrested, and charged for taking photographs of house party arrests from across the street); *Turner v. Driver*, 848 F.3d 678, 683 (5th Cir. 2017) (bystander filming a police station from across a public street); *Irizarry v. Yehia*, 38 F.4th 1282, 1292-93 (10th Cir. 2022) (bystanders filming D.U.I. stop harassed by officer not involved in stop). These cases are inapposite to the specific facts and circumstances facing Officer Helms and, as such, do not provide "a consensus of persuasive authority" on the qualified immunity analysis in this case.

2. Importantly, Petitioner was not restricted from recording the traffic stop and was reassured that he

could do so. Tellingly, the fact that petitioner was explicitly told that he could record the stop, just not livestream on Facebook Live, goes unacknowledged in petitioner's statement of the case and argument. *See* Pet. 5-6, Pet. App. 70a, 91a. As alleged in the complaint and shown in the video and transcript incorporated by reference in the complaint, Officer Ellis explained to Sharpe, "If you were recording, that is just fine… We record, too." Pet. App. 70a, 91a.

As recognized by the court below, there is a significant distinction between recording a law enforcement encounter and posting it online after the fact, which Sharpe was informed was permissible, and livestreaming in real time, which can disclose the officers' present location and involve back-and-forth communications with an unknown audience of viewers. Furthermore, depending on the frequency and intensity of the passenger's interaction with online viewers in lieu of paying attention to the officers conducting the stop, a passenger's livestreaming of a traffic stop may interfere with the purpose of the stop: to investigate reasonably suspected violations of the law.

Before this case, the "right to livestream" had never been addressed by a federal court of appeals. News outlets hailed the lower court's decision as a development in the law. The decision was described by petitioner himself to the Washington Post as "a 'great win' for the court to recognize the First Amendment right to live-stream…." Rachel Weiner, "Live-streaming traffic stop is free speech, but protecting it is a challenge," The Washington Post

(Feb. 7, 2023), https://wapo.st/3tJndxP. In an opinion column published by Reuters, the author announced "[a] U.S. appeals court established for the first time that livestreaming police encounters is free speech protected by the U.S. Constitution…." Hassan Kamu, "Livestreaming police is protected, says 4th Circuit, but with limits shielding cops," Commentary: Justice Matters (Feb. 24, 2023), https://reut.rs/46y0eEH. Neither party, nor the court below, could find an authority, in or out-of-jurisdiction, establishing the law on recording and simultaneous Internet broadcasting, aka, livestreaming. Pet. App. 14a, 34a. As such, because this case presented a matter of first impression, it would be especially inappropriate to declare that the contours of petitioner's First Amendment rights were defined by clearly established law in October 2018.

3. The claim made in this case is that petitioner's First Amendment rights were impermissibly restricted, not that Officer Helms retaliated against petitioner for exercising them. The First Amendment retaliation framework urged by petitioner was not advanced as an argument against the motion to dismiss by petitioner in the district court and not considered by the court below. *See* Pl.'s Memo. in Opp. to Defs.' Partial Mot. to Dismiss, ECF No. 19, No. 4:19-cv-00157 (E.D.N.C. Feb. 24, 2020), https://bit.ly/45Bm7Sf. Because that cause of action was not pled by Sharpe, the court below correctly reviewed whether Officer Helms' attempt to stop Sharpe from livestreaming impermissibly restricted his speech, not whether Officer Helms impermissibly

retaliated against Sharpe for engaging in First Amendment-protected activity. *See* Pet. App. 9a.

While petitioner characterizes Officer Helms' brief attempt at contact with Sharpe's phone and seatbelt as an "assault" of Sharpe, neither the district court nor the court below were required to take this legal conclusion as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, with the Facebook Live video footage and transcript incorporated into the complaint by reference, the courts had a clear depiction of the interaction and its context. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Finally, as alleged in the complaint, Officer Helms' "grabbing" was directed to reaching Sharpe's phone, not Sharpe himself. Pet. App. 69a.

This distinguishes the events at issue from cases involving officers alleged to have assaulted, arrested, or prosecuted persons for recording them. Other circuits considering the right to record police activities have similarly distinguished retaliation claims from claims alleging impermissible restriction of First Amendment protected activities. For example, in *Gericke*, the First Circuit analyzed separately whether the bystander's right to film the traffic stop was restricted in violation of the First Amendment and whether officers' arrest of the bystander after the traffic stop for violation of a wiretapping statute, allegedly in retaliation for her filming, was a violation of the First Amendment. 753 F.3d at 21. In *Irizarry*, an officer not involved in the police activity being filmed harassed the filming bystanders by shining a bright flashlight directly into

their cameras and "directed violence towards Mr. Irizarry by driving his police cruiser "right at" him and by "gunn[ing]" it at his nearby colleague." 38 F. 4th at 1292-93. The plaintiffs in *Irizarry* alleged that the officer only came to the scene because they were recording the encounter and intended to "punish" them for recording. 38 F.4th at 1287, n. 7.

Directing violence toward filming bystanders or arresting them without probable cause constitutes intimidation and punitive acts that have nothing to do with the facts alleged here, where Officer Helms attempted to grab for Sharpe's phone, then stopped when Sharpe held it away. Not only was a punitive motive not alleged in this case, but it was specifically alleged that Officer Helms' acts were directed at Sharpe's livestreaming, not recording.

4. The division among the panel regarding whether First Amendment or Fourth Amendment analysis applied further highlights how the law in this case was not clearly established. *See* Pet. App. 17a-24a. When Officer Helms' acts are considered in light of a Fourth Amendment reasonableness analysis, rather than a "free-standing First Amendment analysis," certain restrictions on petitioner's freedoms are already sanctioned by clearly established law. *See* Pet. App. 21a-23a.

At a traffic stop, clearly established law provides that "everyone in the vehicle" is seized for Fourth Amendment purposes, "'even though the purpose of the stop is limited and the resulting detention quite brief.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653

(1979)). In the Fourth Amendment analysis of restrictions placed on a seized individual during a traffic stop, the touchstone is "reasonableness." *Maryland v. Wilson*, 519 U.S. 408, 411 (1997); *see also* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable… seizures, shall not be violated…."). Traffic stops are "especially fraught with danger to police officers." *Michigan v. Long*, 463 U.S. 1032, 1047 (1983); *see also Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (recognizing the "inordinate risk confronting an officer as he approaches a person seated in an automobile"). For this reason, established authority allows officers to "routinely exercise unquestioned command of the situation." *Wilson*, 519 U.S. at 414 (emphasis added) (quoting *Michigan v. Summers*, 452 U.S. 692, 703 (1981)); *see also Arizona v. Johnson*, 555 U.S. 323, 330 (2009).

Under precedent established by this Court, passengers may be asked to exit the vehicle pending completion of the stop "as a matter of course." *Wilson*, 519 U.S. at 410, 412, 415 (citations omitted); *see also Johnson*, 555 U.S. at 331-32. During the stop, any occupant reasonably suspected to be armed may be frisked. *Id.* at 327. Officers may also ask questions of passengers, ask to see their identification, and ask consent to search their belongings, so long as they do not prolong the duration of the stop or suggest that answering the questions is required. *See Florida v. Bostick*, 501 U.S. 429, 434-35 (1991). The encounter between Officer Helms and petitioner shows careful

attention to the contours of petitioner's clearly established Fourth Amendment rights. When petitioner declined to give his name or answer questions, Officer Helms did not insist or otherwise suggest that petitioner was required to answer the questions. Likely, using a Fourth Amendment reasonableness analysis, when petitioner moved his phone out of reach and leaned away after Officer Helms told him not to use Facebook Live and reached for his phone, Officer Helms did not escalate his attempts to stop the livestreaming activity any further, such as by going hands-on to try to take the phone and stop the Facebook Live stream. It is evident from the full facts and circumstances of the encounter that Officer Helms was obeying the Fourth Amendment rules already established and using reasonableness to handle the encounter to the extent the law was not clear. With regard to petitioner's use of Facebook Live, the law was not clear.

5. Because this case involved a "right to livestream" and presented a question of first impression, and because even the court below was divided on which amendment governed the resolution of petitioner's claim, there is no conflict among the circuits on the question actually presented in this case. As petitioner notes, all circuits that have considered the question of a "right to record" have found that First Amendment protected activity includes a right to record the activities of police in public spaces. Because the Fourth Circuit assumed without deciding that petitioner had a right to record the activities of police in public spaces, and even went

further than that to establish for the first time that First Amendment protected activity included livestreaming police activities, the decision of the court below did not conflict with the prior decisions of the First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits on the issue of recording.

II. THE FOURTH CIRCUIT'S APPLICATION OF SETTLED QUALIFIED IMMUNITY PRINCIPLES TO THIS CASE DOES NOT WARRANT REVIEW.

The decision below on qualified immunity was correct and does not warrant review. Applying the settled qualified immunity precedent that requires the court to define the contours of a constitutional right with specificity before determining whether the law on that right is clearly established, the Fourth Circuit correctly determined that Officer Helms' attempted restriction of petitioner's livestreaming of the traffic stop on Facebook Live from inside the vehicle did not violate clearly established law.

1. When a government official is sued in their individual capacity, qualified immunity protects them "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To obtain a clearly established right from previously decided cases, the right at issue must be defined in those cases with specificity, because a reasonable officer will be unable to "determine how the relevant legal doctrine… will apply to the factual situation" if the circumstances differ too much from prior cases. *See*

Mullenix, 577 U.S. at 12 (2015) (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).

Only general guidance on petitioner's First Amendment right to livestream was available from controlling precedent in October 2018. To begin with, the First Amendment provides that "Congress shall make no law… abridging the freedom of speech, or of the press." U.S. Const. amend. I. Among other activities, First Amendment speech protections safeguard "generating and disseminating information." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). Petitioner also cited precedent relating to election law, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and access to the courts, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

However, something more than general guidance is required. When determining whether a right is clearly established in the qualified immunity context, it has been settled by this Court's precedent, as the court below explained, that courts must "avoid defining the right at too high a level of generality." *See* Pet. App. 15a (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)); *see also White v. Pauly*, 580 U.S. 73, 79-80 (2017); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019).

As discussed extensively in Part I *supra*, this was no simple "right to record" case. Under the circumstances presented, it would not have been clear "beyond debate" to Officer Helms, in the Fourth Circuit, at the time of the October 2018 stop that a

passenger in a lawfully stopped vehicle had an unrestricted right to record and livestream the stop.

2. The court below did not fail to heed a "robust 'consensus of cases of persuasive authority.'" *See al-Kidd*, 563 U.S. at 741. The court below had previously held that unpublished cases and cases from other circuits cannot clearly establish law in the Fourth Circuit. *See Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 542-43 (4th Cir. 2017); *Wilson v. Layne,* 141 F.3d 111, 114 (4th Cir. 1998). Some scholars have suggested that this Court has not set forth exactly which sources of authority should be relied upon for finding clearly established law. *See*, *e.g.*, *See* Tyler Finn, Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity, 119 COLUMBIA L. REV. 445, 448-53 (2019) (*hereinafter*, "Qualified Immunity Formalism"); John C. Williams, Note, Qualifying Qualified Immunity, 65 VAND. L. REV. 1295 (2012). Nonetheless, this Court has previously held that "existing precedent should place the constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741 (emphasis added); *see also Kisela*, 138 S. Ct. at 1152 (quoting *White*, 580 U.S. at 79). Absent "controlling authority," a "consensus of cases of persuasive authority" must be "robust." *See id.* No such consensus applied to the use of Facebook Live by petitioner during the traffic stop in this case.

While the Fourth Circuit had previously addressed the question of whether a bystander had the right to record police activity, that panel decided in an unpublished opinion that the law was not clearly established in June 2007 and declined to rule

whether the officer's conduct was lawful or unlawful. *See Szymecki v. Houck*, 353 Fed. App'x 852, 852-53 (4th Cir. 2009) (citing *Pearson*, 555 U.S. at 231). Even if this case was not so inapposite to the general facts and circumstances of a bystander right to film case, the court below correctly followed this Court's and its own precedent on what sources of law may be considered for determining whether an act is clearly established as lawful or unlawful.

3. As noted by petitioner, circuits have differed on whether the law was clearly established in their circuit at the time of the events in the right to record cases. However, these differing outcomes heavily depended upon the circumstances and timing of the events in those cases and the precedent established within the relevant circuit and state, not a gaping jurisprudential divide that must be bridged by this Court.

The First Circuit, in holding that the right to record police activities in public places was clearly established, had its own circuit precedent much closer to the circumstances to follow. In deciding *Glik*, the First Circuit held that the illegality of the officers' attempts to prevent the bystander from recording them was established by *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999), a case where a local journalist was arrested in the course of filming public officials in the hallway outside a public meeting. 655 F.3d at 83.

The Ninth Circuit, in deciding *Fordyce*, was addressing a clearly over-the-top, violent assault of a videographer: "his camera was deliberately and violently smashed into his face by Officer Elster while

Fordyce was publicly gathering information with it during the demonstration." 55 F.3d at 439.

Several decisions addressing events from the mid-2010s have held, absent other supporting precedent, that the right to record was not clearly established prior to the events. In *Fields*, the Third Circuit explained that "we cannot say that the state of the law at the time of our cases (2012 and 2013) gave fair warning so that every reasonable officer knew that, absent some sort of expressive intent, recording public police activity was constitutionally protected." 862 F.3d at 362 (emphasis added). And in *Molina v. City of St. Louis*, 59 F.4th 334 (8th Cir. 2023), the Eighth Circuit held that the right of a bystander to record police activity was not clearly established there in August 2015.

When the Tenth Circuit first faced the issue in *Frazier v. Evans*, 992 F.3d 1003 (10th Cir. 2021), it held that the officers had qualified immunity because the right to record was not established at the time officers allegedly deleted a bystander recording of them, but declined to decide whether the plaintiff actually had a First Amendment right to record the police performing their official duties in public spaces. 992 F.3d at 1019-1020, n.4.

By the time the Tenth Circuit held in *Irizarry* that a consensus of persuasive authority clearly established the right of a bystander to record police activity in public, that court was following its own precedent and a consensus of persuasive authority, which the Tenth Circuit had previously determined could clearly establish the law in its jurisdiction.

Irizarry, 38 F.4th at 1294 (citing *Ullery v. Bradley*, 949 F.3d 1282, 1291-92 (10th Cir. 2020) (law was clearly established based on the consensus of persuasive authority from six other circuits); *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 595 (10th Cir. 1999) (same)).

Finally, the Eleventh Circuit, in *Smith*, did not need to reach the question of whether a right was clearly established at the time of events, because the court found that the officers had not violated the right. 212 F.3d at 1333. Additionally, the court had its own close precedent similar to the First Circuit's decision in *Iacobucci*: *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir.1994), where the court found that plaintiffs' interest in filming public meetings was protected by the First Amendment. *Id.*

The differences among circuits in deciding whether the law was clearly established in each of the right to record police cases presented by petitioner is grounded in the timing and circumstances of those cases, as well as existing precedent in those circuits. As such, there is no split in legal reasoning evidenced by the differing outcomes that must be resolved by this Court.

4. Even among the authorities discussed by petitioner, the right to record police may be subject to reasonable time, place, and manner restrictions. *See Smith*, 212 F.3d at 1333 (11th Cir.) (recognizing a "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"); *accord Turner*, 848 F .3d

at 690; *Fields*, 862 F.3d at 353; *Gericke*, 753 F.3d at 9; *Alvarez*, 679 F.3d at 605; *Glik*, 655 F.3d at 84.

As noted by the district court and the court below, "…even the federal circuit courts that have recognized a right to record the police performing their public duties have explicitly declined to address 'the limits of this constitutional right.'" Pet. App. 34a, 55a (citing *Fields*, 862 F.3d at 360; *Turner*, 848 F.3d at 690; *Gericke*, 753 F.3d at 7-9). Some Circuits have speculated, in dicta, but this would not suffice to put even officers in those Circuits "on notice" of the contours of this right. For example, the Third Circuit opined that an activity "interfer[ing] with polic[e] activity" such that the recording "put[s] a life at stake" might not be protected. *Fields*, 862 F.3d at 360. Nevertheless, this case arose in the Fourth Circuit, where, as discussed *supra*, the right to record a traffic stop had not been held to be clearly established. *Cf. Szymecki*, 353 Fed. App'x at 852-53 (holding in unpublished per curiam opinion that right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct). Certainly, the potential broader "limits of this constitutional right" – such as the right of a passenger to record, real-time broadcast, and communicate with his social messaging network from inside a stopped car during a traffic stop – was nowhere near established in the Fourth Circuit or elsewhere.

The requirement of specificity is "grounded in the principle of fair warning" that underlies the doctrine of qualified immunity. *See* Finn, Qualified Immunity

Formalism at 451. This Court's precedent has forcefully opposed defining rights at level of generality urged by petitioners. *See Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) ("A passably clever plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated…"). Law enforcement officers, who often must guess in gray areas when carrying out their duties, should be able to know with certainty whether conduct is unlawful before being held liable for it.

Accepting review of this case for the purpose of holding Officer Helms liable for trying to prevent a lawfully seized passenger from livestreaming his traffic stop would contravene the principle of fair warning inherent to qualified immunity. Existing precedent in the Fourth Circuit was nowhere near the level of specificity that would have allowed Officer Helms or any reasonable officer to understand that preventing Sharpe from livestreaming him and Officer Ellis during the stop would violate Sharpe's First Amendment rights.

5. Among the district court and court below, experienced jurists disagree regarding the contours of the right at issue and even which amendment governs the activity. This Court has previously explained that "if judges… disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). In this case, the learned judges of the court below could not even agree on what constitutional amendment should apply. It would be

unfair to subject Officer Helms to liability for not figuring it out on the spot, during the traffic stop, immediately after he found out that petitioner was livestreaming him on Facebook Live.

If this Court accepts this case for review, it should be to guide law enforcement across the county on those important questions of how to balance First Amendment freedoms with Fourth Amendment jurisprudence, including officer safety and efficacy, not to overturn established precedent requiring fair warning and "bright lines" to hold officers liable for violations of constitutional rights.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court deny the petition.

Respectfully submitted,

DAN M. HARTZOG JR.
Counsel of Record
KATHERINE BARBER-JONES
RACHEL G. POSEY
HARTZOG LAW GROUP LLP
2626 Glenwood Avenue
Suite 305
Raleigh, North Carolina 27608
Telephone: (919) 670-0338
dhartzogjr@hartzoglawgroup.com
Counsel for Respondents

OCTOBER 2023