No. 23-276

In the Supreme Court of the United States

DIJON SHARPE, PETITIONER,

v.

WINTERVILLE POLICE DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The parties agree that the Court should grant at least one of the pending petitions for certiorari. The parties agree that this case presents an important question with nationwide impact. The parties agree that deciding the questions presented in one or both of the pending petitions would provide critical guidance to individuals, journalists, and police officers about the rules that govern an individual's ability to film a law enforcement encounter. And the parties agree that this case is an ideal vehicle to decide the questions presented.

Amici supporting the petitions also agree this case warrants the Court's review. The Institute for Justice, one of the Nation's leading civil rights organizations committed to securing individual liberty, in its *amicus* brief supporting this petition (No. 23-276), explains that "the Court should hear this case and resolve the circuit split so there is clarity on this important constitutional issue." IJ Amicus at 2. The right to film police, IJ writes, is a "massively recurring issue" that "reaches every corner of America every single day." *Id.* at 16. It "affects every police encounter across the United States and has divided the circuits." *Id.* at 3. IJ emphasizes that "[t]his case gives the Court the chance to articulate a clean rule at the proper level of generalization." *Id.* at 5. "By taking

this case, the Court can once and for all establish an individual's First Amendment right to record the police in public. This would empower citizens, like Petitioner, to record police encounters, holding officers responsible for when they retaliate against the exercise of that fundamental right." *Id.* at 18.

The National Fraternal Order of Police, the voice of over 374,000 police officers, in its *amicus* brief supporting the cross-petition (No. 23-272), is equally adamant that this Court should take this case. NFOP Amicus at 2-3. NFOP explains that it is "imperative" for the Court to grant review to clarify "the proper analysis for an officer restricting a lawfully detained individual's rights." *Id.* at 9. "Officers," NFOP writes, "deserve clear guidelines for the evaluation of their actions." *Id.*; *see also id.* at 4-5, 21-22. NFOP agrees that "this Court must clarify that policies can be constitutional even if it limits an individual's protected right." *Id.* at 21.

This case checks every box for the Court's review.

The case implicates a square circuit conflict between the Fourth Circuit and seven others as to whether it was clear that filming police was First Amendment protected activity at the time of the events in this case, October 2018.

The questions presented by the petitions are questions of tremendous importance. In light of the raw power and sheer impact that citizen videos can have on national debate about public issues, it is hard to imagine a question of greater significance than the question of whether and under what circumstances citizens can film. A variant of the fact pattern in this case—a citizen filming a police encounter that the officers involved clearly do not want the citizen to film—happens every day somewhere in the United States.

The stakes of this case are staggering given what is potentially lost every time a would-be speaker is chilled

from filming a police encounter out of fear that she might be punished for it. *See* IJ Amicus at 7. The citizen video that captured the murder of George Floyd sparked protests across the United States. The video that captured the beating of Rodney King stoked a backlash that fundamentally changed policing. This Court rarely encounters cases that involve issues more significant than those presented here.

This Court's review of the question presented is urgent and long overdue. The issue has percolated for decades in the lower courts and yet still has not reached a uniform nationwide consensus. Nearly 30 years after *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), parties are still arguing over the threshold question whether the First Amendment *even applies* to the filming of a traffic stop on a public street. *See* Opp. 7 (respondent describing this case as involving an "*alleged* right to livestream" (emphasis added)). This issue is ready for the Court's review. Three decades of percolation is enough.

I. THIS IS A "RIGHT TO FILM" CASE

The question presented is whether it would have been clear to any reasonable officer in 2018 that unobtrusively filming police officers is First Amendment protected activity. Respondents argue that that is the wrong question because petitioner was "livestreaming," not recording, and was a passenger in a vehicle involved in a traffic stop, not a true bystander. Opp. 10-18.

But those distinctions are immaterial to whether it would have been clear to a reasonable police officer in 2018 that when petitioner held up his cell phone, opened the Facebook Live app, and hit the button to record, he was engaged in First Amendment protected activity. If a bystander on the sidewalk told a police officer engaged in a traffic stop, "I'm filming this," or "I'm recording," no one would be surprised to later learn he was in fact streaming it on the Facebook Live app. Nor would anyone think that

the expressive aspects of filming the encounter—the things about filming that make it First Amendment protected activity—were diminished in any way by the fact that it was being livestreamed rather than recorded. The same goes for the supposed difference between a bystander on the curb and a passenger in the stopped car: the things about filming that make it First Amendment protected activity are not diminished in any way by the fact that the person filming is in the car rather than outside it. Filming is filming no less when it is performed by the subject of a traffic stop rather than someone who happens to be walking by.

Respondents argue that the qualified immunity question should be whether Officer Helms reasonably could have thought it was lawful to restrict petitioner's filming, not whether petitioner's filming was First Amendment protected activity.[1] Opp. 13-14. But this is a retaliation case; the question is not whether a reasonable officer might have thought a restriction on filming would have been permissible, but whether Officer Helms retaliated for conduct that was First Amendment protected. The fact that Officer Helms decided to assault petitioner in an effort to grab his phone from him, rather than simply order petitioner to turn it off, is powerful evidence that this is not really a case where Officer Helms thought he was reasonably restricting filming in the interests of officer safety. The fact that Officer Helms never actually issued a clear command to stop filming is further evidence that this is really a retaliation case, not a restriction case. The fact that Officer Helms expressed no concern that the driver was engaged in a telephone conversation throughout the entirety of the traffic stop,

[1] The cross-petition, No. 23-272, squarely presents the question of when restrictions on the right to film are permissible and the standard that should be used to assess such restrictions. Petitioner has filed a brief in support of certiorari in No. 23-272.

one in which he recounted the details of and location of the stop to an unknown third party in real time, shows this is a retaliation-for-filming case, not a reasonable-restriction case. The fact that neither officer ever tried to prevent either vehicle occupant from sending text messages or emails during the traffic stop is even more evidence that this is a retaliation case, not a restriction case.

The district court specifically analyzed petitioner's claim as a retaliation claim, noting that "Sharpe alleges that Helms retaliated against him in violation of the First Amendment by attempting to prevent the recording and real-time broadcasting of their encounter." Pet. App. 49a. The district court then went on to analyze it as a retaliation claim over the course of several pages. Pet. App. 49a-51a. And petitioner briefed this as a retaliation case on appeal, writing in petitioner's opening brief that "Officers Helms and Ellis violated clearly established law by retaliating against Mr. Sharpe for livestreaming the traffic stop," C.A. Br. 38, and writing over-and-over again in the reply brief that the issue in this case was that Officer Helms "retaliat[ed] against" petitioner, C.A. Reply Br. 1, 7-11. The reply brief emphasized the relevant analysis, explaining, "[i]n a retaliation case, the objective question is (1) whether the person was engaged in a First Amendment protected activity, and, if so, (2) whether the officer's actions would chill a person of ordinary firmness from engaging in the protected activity." C.A. Reply Br. 9. Because this is a retaliation case, the only issue is whether it was clearly established that petitioner's filming was First Amendment protected conduct.

Correctly framed as the question whether petitioner was engaged in First Amendment protected activity, the answer is clear: he obviously was. He obviously was because it has been clear since 2018 that filming police is First Amendment protected activity. That petitioner was livestreaming the stop, rather than recording it for

posterity, is irrelevant to whether what he was doing was First Amendment protected activity. And the fact that petitioner was a passenger in the stopped vehicle, rather than a bystander, is equally irrelevant to whether what he was doing was First Amendment protected activity. These considerations might have mattered if the question were whether Officer Helms had reasonably sought to restrict petitioner's filming. But he did not do that; he retaliated against petitioner for filming.[2]

Respondents' criticism of the supposed inappropriate framing of the question presented is unwarranted. This case is about whether it would have been clear to a reasonable officer in 2018 that holding up a cell phone and filming a police encounter is First Amendment protected activity. And that is the question presented in this case.

II. THE RIGHT AT ISSUE WAS SPECIFIC ENOUGH TO PRECLUDE QUALIFIED IMMUNITY HERE

Respondents argue that the Fourth Circuit correctly applied "settled" qualified immunity principles. Opp. 18-26. That is incorrect.

Respondents claim that "[o]nly general guidance on petitioner's First Amendment right to livestream was available from controlling precedent in October 2018." Opp. 19. But that "general guidance"—especially when coupled with the consensus of persuasive circuit authority—was more than enough to make it obvious beyond any reasonable debate by October 2018 that

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[2] Respondents point to the extensive reporting about the opinion below, much of which described the opinion as establishing a "right to livestream," as proof that the case is really about a right to livestream and not the more basic right to film. *See* Opp. 12-13. The extensive reporting about the case is certainly further evidence of the widespread public importance of the questions presented and why this Court's review is critical. But the popular press is not always a reliable way of learning the legal issues in a case.

livestreaming a traffic stop is First Amendment activity. There is no relevant distinction between recording and livestreaming or between bystanders and vehicle passengers. Officers are expected to be capable of "drawing logical inferences, reasoning by analogy, [and] exercising common sense." *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019); *see also* Pet. 23-24. The law need only "be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). The Officers were on clear notice, in light of the law as it had been expressed by this Court and seven other circuits, that petitioner was engaged in First Amendment protected conduct here.[3]

* * * * *

This case is an optimal vehicle to decide the question presented. And this Court's review is overdue. All parties and all *amici* believe that a decision from this Court in this case would offer essential guidance to citizens, journalists, and law enforcement alike about the contours and scope of the right to film police. That guidance is essential to ensuring that citizens understand the rules in the innumerable police-citizen interactions that occur every day all over the United States.

[3] Respondents further argue that Officer Helms was entitled to qualified immunity because, "[e]ven among the authorities discussed by petitioner, the right to record police may be subject to reasonable time, place, and manner restrictions." Opp. 23-24. But that is just a repackaging of respondents' argument that this is a First Amendment restriction case rather than a First Amendment retaliation case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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