

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW STEPHEN AKINS – PETITIONER,

Vs.

DANIEL K. KNIGHT, STEVEN RAY BERRY, BRENT NELSON, KENNETH BURTON,
THE CITY OF COLUMBIA, BOONE COUNTY, ROB SANDERS, ROGER SCHLUDE,
MICHAEL PALMER
– RESPONDENTS.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

- I. Whether to resolve the split between the 8th Circuit and the First, Third, Fifth, Seventh, Ninth and Eleventh Circuits of the U.S. Court of Appeals, created by the 8th Circuit's affirmation of the Dist. Court's ruling the First Amendment does not grant Americans' a right to film a peaceably assembled citizen petitioning the government for a redress of grievances and/or film the police in a public lobby. In *Akins*, the Dist. Court held, "*Akins also argues that he was retaliated against when he was stopped from filming a citizen in the Police Department lobby in 2011 . . . Further, he has no constitutional right to videotape any public proceedings he wishes to. See Rice v. Kempker, 374 F.3d 675, 678 (8th Cir. 2004) "[N]either the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public."*(opinion p 34) A ruling contrary to 6 other federal circuit courts of appeal which have held that the First Amendment does grant citizens' the right to film the police in public especially those filing a misconduct complaint against police officers to comply with the First and Fourteenth Amendments to the United States Constitution.
- II. Whether to resolve a question of exceptional national importance created by the 8th Circuit's affirmation of the District Court's ruling the First Amendment does not grant Americans the right to uncensored access to the "Designated Public Forum" of the Columbia Police Facebook page where Akins had posted six CFJ reports during a debate over the oversight authority of the Citizens Police Review Board (CPRB) and those posts were censored and subsequently

all non-police approved posts were thereafter prohibited without notice or a hearing from this public forum. The District Court held: “*his links to the Citizens for Justice page were removed from the Police Department’s Facebook page in the summer of 2011; . . . links to the Police Department’s Facebook page were treated the same as everyone else’s and there is no constitutional right to unlimited posting.*” (p 34-5) establishing an internet censorship regime without requiring the government to provide a compelling justification for censorship or for changing an open designated public forum to a censored one if these acts are in violation of the First and Fourteenth Amendments to the United States Constitution.

- III. Whether to resolve a question of exceptional national importance as to the application of judicial disqualification and a federal statute requiring a verified motion citing “good cause” to be ruled on by an unrelated jurist due to 8th Circuit’s ruling that a Judicial disqualification under statute 28 U.S.C. §144 could be adjudicated under the standards laid out for a 28 U.S.C § 455 merits disqualification determination. 28 U.S.C. §144 required Judge Laughrey to assign the motion to disqualify for bias under 28 U.S.C. §144 to another judge for ruling. The Eighth Circuit’s ruling merged the 28 U.S.C. §144 and 28 U.S.C. §455 standards at the challenged judge’s discretion. In *Akins*’: 1. Case evidence related directly critical reporting about Judge Laughrey’s ruling on prior Columbia Police case; 2. Judge Laughrey’s husband held an office of trust with the City of Columbia during the case; 3. Akins’ attorney Stephen Wyse had previously filed a judicial misconduct complaint against Judge Laughrey and

had on-going conflict with the judge and her husband. Was the court's ruling on the verified motion to disqualify Judge Laughrey by Judge Laughrey a violation of 28 U.S.C. § 144. Further were sufficient grounds raised under 28 U.S.C. § 455 to disqualify Judge Laughrey based upon at least an appearance of impropriety if these acts are in violation of the above federal statutes and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition follows:

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THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 27, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United State Court of Appeals on the following date: August 30, 2017, and a copy of the order denying rehearing appears at Appendix E.

☐ An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) _____ (date) in Application No. ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1 provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . Section 5 – The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. §144 – Bias or prejudice of judge – provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455 Disqualification of a justice, judge, or magistrate judge- provides:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4)“financial interest” means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

STATEMENT OF THE CASE

Matthew Akins filed a suit under 42 U.S.C. § 1983 on 05/07/2015, and amended complaint on 05/28/2015, in the U.S. Court for the Western District of Mo. for violations of his 1st, 2nd, 4th, 5th and 14th Amendment Rights by Defendants Boone County and County Prosecutor Daniel Knight and his assistant prosecutors Steven Berry and Brent Nelson, and the City of Columbia and its Police Department (CPD) Chief Kenneth Burton, Officers Eric Hughes, Rob Sanders, Roger Schlude, Michael Palmer. Matt Akins alleged that the Defendants fabricated felony weapons charges against him and unlawfully seized and retained a pistol and knife belonging to him that were unrelated to any pending criminal charges and destroyed the knife in violation of Missouri's due process requirement and refused to return the firearm held from May 09, 2010, until April 15, 2013. A firearm legally possessed when seized and held after the dismissal of charges on November 06, 2010, the City continued the seizure without providing any sort of post-deprivation due-process hearing and that the Defendants took these action in retaliation for Akins reporting for Citizens For Justice (CFJ) a police accountability organization. Further that the City of Columbia and its Police harassed and retaliated against businesses that employed Akins and used legally protected information with false data to defame Akins in a "Wanted Poster" that targeted Akins for retaliation for his CFJ work

Akins, formed CITIZENS FOR JUSTICE (CFJ) to report on police conduct after he was stopped on May 09, 2010, at DWI checkpoint by CPD Officer Eric Hughes and arrested for unlawfully concealing a firearm in his car despite MO law permitting him to do same. Prosecutor Berry filed charges for that case on

05/09/2010, that case was dismissed on 11/16/2010. Akins' gun seized on 05/09/2010, was held by Columbia Police Dept. (CPD) until 04/15/2013.

On 06/19/2010, at 18:50 hours Akins with CFJ web-designer Arch Brooks and Ken Jones were stopped by CPD Sgt. Roger Schlude for an illegal turn made by Akins. Sgt. Schlude asked for Akins' license at 18:55 hours and then asked if there were any guns or drugs in the car. Akins told him there was a 10/22 rifle in the backseat floorboard at 19:02 Hours. Akins, Jones and Brooks were then removed from the car and handcuffed and ordered to sit on the curb and held until 19:26 hours while items were removed from the car and placed on the street. Akins told Sgt Schlude, "I informed him that I did not consent to the vehicle search" but the vehicle was searched by Sgt. Schlude and another CPD officer without consent. Upon finding no contraband they were released and Sgt. Schlude threatened Akins that a 10/22 rifle in the backseat of his car permits police to execute him. Sgt Schlude said, *"It depends on the officer. Some officers would see a gun in the back seat and pull their gun out and shoot you, Bam, you're dead ! And do you know what they would say in court ? Do you know what they would say in court ?! They would say 'Was there reason for the officer to fear for his life ? Well, there was a gun found in the car and it would be dismissed. Just like that !"*

City of Columbia established a designated public forum on CPD's Facebook page where citizens responded at will to CPD posts and made posts of their own using the *"Post by Others"* option on that page prior to the end of July 2011, when that option was eliminated. Matt Akins from May 2011 through July 2011, had posted his six CFJ Reports. The removal without notice from this designated public

forum of the CPD Facebook page of Akins' six video reports for CFJ violated his 1st and 14th Amendment rights. Akins had posted the following CFJ video reports on the CPD Facebook page: 1. This is How Officers Should React to you Video Taping them; 2. Another Spotlight Shined at CFJ Camera; 3. Officer Steve Wilmouth uses a TASER to Subdue a Man on Providence Road; 4. Careless and Imprudent Driving ? CPD Police Car Swerves Multiple Times in Front of CFJ Camera; 5. Police Standoff: CFJ's Camera Vs. a Patrol Cruiser Spotlight; 6. Officer Lori Simpson testifies why she turned off her body mic off during Derek Billups incident.

After July 2011, the City arbitrarily treated this designated public forum as if it were a non-public fora and censored/removed Akins' reports listed above and removed the option of "Posts by Others" and then only posted viewpoint approved comments supporting the police from end of July 2011, until present on the CPD Facebook Page.

Even though the City of Columbia was a named defendant. The District Court found that "*None of individual Defendants participated in these incidents, and as discussed above, the City cannot be liable under § 1983 on a respondeat superior theory.*" (App B 34) "*His links to the Police Department's Facebook page were treated the same as everyone else's and there is no constitutional right to unlimited posting.*" (App. B 34-35)

During the Summer of 2011, Akins was filming a report for CFJ. A report involving an activist against institutional racism Marlon Jordan who was filing a misconduct complaint against a CPD Officer in the CPD Lobby. The CPD Lobby was the location designated by the City of Columbia for filing a misconduct complaint(s)

or petitioning the government for a redress of grievances when involving a CPD Officer. During this filming a CPD employee acting pursuant to Chief Burton's policy that speech, assembly or expressive activity were not permitted in the public lobby ordered Akins to stop filming Jordan's filing of a complaint and Akins complied. The police department subjected the public lobby to continuous video recording. Police Chief Burton had declared the policy for 2011, that the CPD Lobby was not intended for "assembly and speech" and "the public was not allowed to use the lobby of the Columbia Police Department for assembly or speech" and "not open to public for expressive activity"

The District Court stated in regard to Akins filming of the filing of the misconduct complaint that, "*Neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public*" (App B 34). In addition, the CPD Lobby is open 24 hours a day and being the point designated for filing misconduct and criminal complaints. The CPD lobby contained informational handouts and beat map advising citizens what patrol area they lived within, it had media advisories as well as CPD's Media Book containing "24 Hour Arrest Reports" for the news media. Finally, CPD's Lobby contained a memorial to slain officer Molly Bowden to honor her sacrifice in the line of duty.

On 07/27/2011, Akins and Micheal Carter were filming CPD Officers for a CFJ report and they left to go home. In route contact was made with a CPD Patrol Car containing Officer Rob Sanders and his K-9 Partner Fano who changed direction and began following Akins' vehicle. Akins and Carter were concerned for their safety

decided to grab some food at the very public Taco Bell and began filming their police surveillance. They drove into the drive-thru lane and were followed by Sanders. After they made the order, Sanders pulled over to the front of the Taco Bell parking lot and waited. Akins decided a public place was a good place to eat and pulled to front curb of the Taco Bell parking lot adjacent to Providence. After which a 2d CPD Patrol Car containing two Officers and an additional K-9 pulled behind Akins' vehicle blocking his ability to back-up before exiting the lot. These Officers with their K-9 took-up posts behind Akins' vehicle. Officer Sanders left his door open so that K-9 Fano was at the ready and approached Akins' driver side window. Sanders asked Akins "You got a driver's license I could see?" Akins responded requesting to know Officer Sanders probable cause to demand his license. Sanders responded "I don't have to have probable cause!" Akins then asked if Sanders was conducting a traffic stop and Sanders replied "No, I'm not". Akins provided his driver's license to Sanders. After witnessing Akins' CFJ report on this incident, "How to Handle a Questionable Encounter with Police" Chief Burton filed an IA Complaint against Sanders. CPD IA found that this seizure was not a "Terry Stop" or other legal seizure and was in violation of Akins' Fourth Amendment Right. In a Columbia Tribune, Article from October 24, 2011, *"Chief Ken Burton told the Tribune previously officers should respect activists' questions. Burton said he understands that the conduct of the activists representing a group called Citizens for Justice might not be popular among officers, but they should still be respected."*

In the CPD briefing room throughout 2011, an area generally not open to the public, a "wanted poster" with Matt Akins picture which stated: "Matthew Stephen

Akins 09/22/1988” and “Akins runs the **cfjwebssos.us** website. He has arrests in our system for weapons violations, including carrying a pistol concealed on his person. He is currently driving a silver Grand Prix Pontiac MO DD9 H1T” This poster was revealed by a parent of school group student visiting CPD in October of 2011. The website address listed on this wanted poster was never public and when the website went public in April 2011, it had a different address. As of the Fall of 2011, the only weapons arrest Akins had in “our system” was for the 05/09/2010, false arrest described above by CPD Officer Hughes for unlawfully concealing a firearm in a motor vehicle. Akins filed an IA Complaint over the Poster and CPD was unwilling to disclose the identity of the poster creator and what authorization had been obtained to display this wanted poster in the Police Briefing Room. (App B 32-34)

Officer Eric Hughes in 10/14/2011, went to Salty’s Nightclub and threatened the owner Andrew Koerper that he would cite him with a fine of \$2,500,00 for Akins being on the premises after closing time despite Akins working there as a videographer. On 10/16/2011, a CPD Patrol Car shined its spotlight into the club through the windows and then spotlighted Matt Akins and his brother Nick as they left the premises. In a 12/15/2011, meeting with Chief Kenneth Burton, Deputy Chief Jill Schlude and CFJ reporters Travis Marshall and Matt Akins. CPD Chief Burton stated it was his goal to put CFJ “out of business.” Columbia officials threatened businesses employing Akins as a videographer with the loss of City business if they did not sever ties with Akins.

Matt Akins’ counsel filed the 1st motion to disqualify Judge Laughrey on 06/

23/2015, (App. C 1-10) instant counsel alleged that Judge Laughrey was biased for the City of Columbia and against instant counsel. Instant counsel had filed a judicial misconduct complaint (08-11-90060) against Judge Laughrey *in re the matter of Crystal Coates* (App C 4-6). After a three-day child murder case of *State v. Horace Johnson* that ended the day before the Coates pre-trial conference on 12/04/2009, for a matter set for jury trial on 12/14/2009. Judge Laughrey denied Wyse's motion for continuance for toxic publicity. Wyse had alleged that three days of sustained media coverage representing Horace Johnson in a child murder case had rendered him toxic to the potential jury pool and would deny his client a fair trial due to the animosity directed at him for representing a now convicted child murderer in such close proximity to the Coates trial. Judge Laughrey denied Wyse's motion to continue the case. Sua sponte Judge Laughrey moved the jury trial up four days from 12/14/2009, to 12/10/2009, when none of Crystal Coates witnesses were under subpoena for 12/10/2009. Wyse informed Judge Laughrey that he had a conflicting matter in state Court on that date and she instructed him to get it continued and if he was unable she would continue it for the state judge. Judge Laughrey then endorsed the defendants' settlement offer as an "excellent offer" and noted that Plaintiff Coates "*had issues*". Akins' 1st motion alleged bias for the City of Columbia in previous cases and that Judge Laughrey had previously worked as a Columbia municipal judge and Columbia was where her family resided. Judge Laughrey's husband Chris Kelly working as a utility (infrastructure) lobbyist was appointed by the mayor of Columbia to Chair an Infrastructure Task Force. Akins' 2d Motion to Disqualify Judge Laughrey, was verified pursuant to 28 U.S.C. § 144.

(App D 1-6) It further attested that case evidence in *Akins v Knight* would include a CFJ two-part video report, “*Columbia Police Falsely Arrest and Injure Men for Sitting in a Public Park.*” (App C 7-9, App. D3-4) Reporting on the case of two black men Josh Williams and Philip Porter v. Scott Decker and various CPD Officers. Part 2 was critical of Judge Laughrey’s finding the seizure at gun point, handcuffing, injury, destruction of property and detention for an hour after the police declared to Williams that he was “under arrest” was not an arrest. Judge Laughrey found it was merely a reasonable detention under a *Terry* and therefore no civil rights violation had occurred. Furthermore, that the Judge’s husband, Chris Kelly, was holding a position of trust with the Columbia as Chair of the Mayor’s Infrastructure Task Force during the pendency of Akins’ case. (App C 7-9, App. D 4-5) A conflict of interest that had drawn criticism from *Columbia Heartbeat*, a news outlet, alleging a conflict of interest by Judge Laughrey for presiding over the contemporaneous Opus development lawsuit against Columbia. On 09/24/15, Columbia Heart Beat reported:

“SMH in CoMo: Stormy Mayor, biased Judge this week’s leadership blunders, . . . Federal Judge Nanette Laughrey ruling for City Hall in the Opus Student apartment lawsuit; . . . My head is shaking over the Laughrey decision for a simple reason: her husband, Chris Kelly, chairs the Mayor’s Infrastructure Task Force, a job he landed after leading organized efforts to raise utility rates this year. On infrastructure, Kelly has become City Hall’s #1 cheerleader. That his wife is hearing Columbia’s most high-profile infrastructure legal case, maybe in history, seems like appallingly bad judgment.”

Chris Kelly and instant counsel had the year prior engaged in a disagreement over his criticism of local advocacy group circulating petition requesting the U.S.

Supreme Court review of Judge Laughrey's and the 8th Circuit's rulings in *Williams v Decker*. Judge Laughrey denied both motions to disqualify her from Akins' case.

Matt Akins' lawsuit was filed in the U.S. District Court for the W. D. of Missouri on 05/08/15. Motions to disqualify Judge Laughrey were denied on 07/09/15 (App C 1-10) and 01/11/16 (App D 1-6) On 08/02/2016, (App B 1-37) the Court granted Defendants summary judgment and denied judgment to Akins. Notice of Appeal was timely filed on 08/29/16. The Eighth Circuit affirmed the District Court orders on 07/25/2017 and a timely filed motion for panel and/or en banc rehearing was denied on 08/30/2017. From which this timely filed Petition for Writ of Certiorari is made.

REASONS FOR GRANTING THE PETITION

This Court instructed as to the vital nature of social media to evolving free speech considerations in *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (comparing social media to traditional public fora such as parks and streets). "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. In the instant matter the City of Columbia established a designated public forum on its Police Facebook page. A forum where Petitioner Akins had posted using the "Post by Others" option six video reports for Citizens For Justice (CFJ) of public interest to promote accountability and transparency from May to July 2011. The City in retaliation for this unfavorable speech engaged in forbidden viewpoint discrimination and removed these six CFJ reports and censored all future posts to this site. Censorship during a debate over the Citizens Police Review Board's oversight authority over the Columbia Police Department.

Viewpoint based censorship of a designated public forum is an anathema to the First Amendment.

The right of the people to peaceably assemble to petition the government for a redress of grievances is embodied within the text of the First Amendment. Petitioner Akins had peaceably assembled to video record a citizen exercise this right when he was ordered by a police official not to record this petitioning taking place in the CPD public lobby. This infringed upon his First Amendment right to record/obtain information for dissemination and his Fourteenth Amendment right to equal protection and the due process of law. The Eighth Circuit's affirmation of the District Court placed it in the minority position contrary to a unanimous six other federal circuits that upheld the right to record police officials in public. The District Court here stated, "*Neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public*". The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Finally, the Eighth Circuit found, when Congress in 28 U.S.C. § 144 requires a motion verified by affidavit citing "good faith" for the motion to disqualify a judge to be assigned to a different judge for ruling on the question of bias, that the language in § 144 permitting an evaluation of the affidavit citing "good faith" was interpreted by the Eighth Circuit to permit the challenged judge to now evaluate the merits of a bias determination

made against them under 28 U.S.C § 455 standards. That the statutory requirement for mandatory reassignment under 28 U.S.C. § 144, to another judge on the issue of bias was now somehow discretionary and permitted the challenged judge to determine the merits of the bias arguments made against themselves. Conflating the two types of bias motions against a judge with one that was filed solely under a 28 U.S.C. §455 merits determination standard. The Eighth’s holding stated, “*Taken as a whole, the plain text of § 144 mandates only that a district court judge ensure that another judge is assigned to any case in which a litigant has sufficiently alleged bias or prejudice, not that the recusal decision itself be rendered by a judge other than the judge to whom the motion is addressed.*” (App A 4)

Section 144, states: “*Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.*”

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.”

Akins had alleged in the motions that because Judge Laughrey’s utility lobbyist husband was serving as Chair of Columbia Mayor’s Infrastructure Task Force during the pendency of the litigation created at least an appearance of impropriety. That case evidence of a CFJ video report that related to Judge Laughrey’s reputation as a judge in

Williams v Decker and the conduct of CPD officers in that matter were relevant in Akins' case. *Columbia Heartbeat* had alleged bias for Columbia against Judge Laughrey for her involvement in a contemporaneous case to Akins. This bias for the City of Columbia alleged by the Columbia Heartbeat further relates to reasonable person standard as it related to at least an appearance of impropriety in the Akins bias determination.

FIRST & FOURTEENTH AMENDMENT RIGHTS

Point I - The Eight Circuit embraced a minority position when it affirmed its District Court ruling which stated, "Further, he has no constitutional right to videotape any public proceedings he wishes to. *See Rice v. Kempker*, 374 F.3d 675, 678 (8th Cir. 2004) "[N]either the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public." (App B 34) The Eighth Circuit is the only circuit to find that there is no First Amendment right to film the police in public. Six other circuits (1st, 3^d, 5th, 7th, 9th and 11th) that have ruled on this issue have all reached contrary holdings on this First Amendment right to film police officials in public. Until this holding for previous two decades, with unanimity, federal courts have recognized that the First Amendment protects the right to record police officers/officials performing their duties in public. Indeed, every other federal court of appeals to address the issue on the merits has acknowledged the existence of this First Amendment right until the 8th Circuit Court affirmed the District Court's contrary ruling making it the 8th Circuit's law a minority position. Most recent protection of the First Amendment was by the Third Circuit in *Fields v City of Philadelphia*, (3d Cir. (16-1650) on July 07, 2017) which found that the First Amendment protects the act of photographing or otherwise recording police officers

conducting their official duties in public. The Fifth Circuit in *Turner v Driver*, 848 F.3d 678 (5th Cir. 2017) Concluded that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions. Every other federal court of appeals to address the issue on the merits has found contrary to this Circuit and acknowledged the existence of this First Amendment right. See, e.g., *Bowens v Superintendent of Miami S. Beach Police Dept.*, 557 Fed. App'x 857, 863 (11th Cir 2014) (“Citizens have ‘a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.”(quoting *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000))); *Gericke v Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (“the Constitution protects the right of individuals to videotape police officers performing their duties in public”); *Adkins v. Limtiaco*, 527 Fed. App's 721, 722 (9th Cir. 2013) (holding that allegations that plaintiff was arrested in retaliation for taking photos of the police in public stated a claim for First Amendment retaliation); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599-600 (7th Cir. 2012) (holding that a statute that would prohibit recording of police officers with a cell phone violated the First Amendment); *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir 2011) (holding “unambiguous” the constitutional right to videotape police activity); *Iacobucci v. Boutler*, 193 F.3d 14, 25 (1st Cir. 1999) (holding that filming public officials in a public area “was done in the exercise of [Plaintiff's] First Amendment Rights:); *Fordyce v City of Seattle*, 55 F.3d 436m 439 (9th Cir 1995) (holding that recording police conduct fell within the “First Amendment right to film matters of public interest”); see also *Schnell v City of Chicago*, 407 F.2d 1084, 1085-86 (7th Cir 1969) (reversing dismissal of action by news photographers who covered demonstrations at the

1968 Democratic National Convention in Chicago against the police for “interfering with plaintiffs” constitutional right to . . . photograph news events”).

Point II - The Eight Circuit embraced a minority position when it affirmed its District Court ruling which stated, “*His links to the Police Department’s Facebook page were treated the same as everyone else’s and there is no constitutional right to unlimited posting. . . . that Defendants could, consistent with the First Amendment, prohibit political messages on the Downtown Tinley website and Facebook page to preserve their intended purpose*” (App B 34-35)

Government-owned and government-controlled channels of communication that are designed for expressive use and generally open to the public are public fora. In the early twentieth century, the Supreme Court recognized that the First Amendment requires the government to maintain certain types of government-owned and government controlled spaces as public fora, open to all for purposes of speech and assembly. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”). In *Perry Education Association v. Perry Local Educators’ Association*, the Court formalized a doctrinal structure for identifying those types of public spaces in which the government is limited in its ability to restrict First Amendment activity, dividing such spaces into “three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

“Traditional public fora are those places which ‘by long tradition . . . have been

devoted to assembly and debate.’ . . . Public streets and parks fall into this category.” *Id.* (quoting *Perry*, 460 U.S. at 45). “In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.” *Id.*

Although the government is neither “required to create” a designated forum “in the first place,” nor “required to indefinitely retain [its] open character . . . , as long as it does so it is bound by the same standards as apply in a traditional public forum.” *Perry*, 460 U.S. at 45–46. For both traditional and designated public fora, “[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.” *Id.* at 46. But the government is forbidden “to exercise viewpoint discrimination, even when the . . . forum is one of its own creation.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). In nonpublic fora—that is, “[p]ublic property which is not by tradition or designation a forum for public communication”—“the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Perry*, 460 U.S. at 46.

“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius*, 473 U.S. at 802. In order to discern the government’s intent, courts look to “the policy and practice of the government” with respect to its use of the

property, “the nature of the property,” and “its compatibility with expressive activity.” *Id.* Applying these principles, the Court has noted that a public forum is a venue that is “generally open to the public.” *Widmar v. Vincent*, 454 U.S. 263, 268 (1981). Moreover, a public space that is “designed for and dedicated to expressive activities,” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975), or that “has as a principal purpose . . . the free exchange of ideas,” *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee (ISKCON)*, 505 U.S. 672, 679 (1992) (quoting *Cornelius*, 473 U.S. at 800), presumptively qualifies as a public forum. More generally, government property that serves multiple functions may qualify as a public forum so long as “the open access and viewpoint neutrality commanded by the [forum] doctrine is ‘compatible with the intended purpose of the property.’” *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (quoting *Perry*, 460 U.S. at 49). By contrast, “where the principal function of the property would be disrupted by expressive activity,” courts will not find that the government has intended to create a public forum. *Cornelius*, 473 U.S. at 804.

Certain categories of government-owned and government-controlled property are not scrutinized under the forum doctrine. First, when the government engages in its own speech, it is entitled to “speak for itself” and to “select the views that it wants to express”; therefore, “the Free Speech Clause has no application,” and distinctions based on viewpoint are permitted. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (internal quotation marks omitted). In determining whether it is the government speaking, rather than private parties, courts have looked to factors such as whether the communication conveys a message from the government, whether the speech is “closely identified in the public mind” with the government, and whether the government

maintains “control over the messages conveyed.” *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248–49 (2015).

Additionally, because of their responsibility to curate content to fill scarce space, public broadcasters and public libraries generally fall outside the forum doctrine, allowing them to draw greater distinctions based on content and viewpoint. *See, e.g., Forbes*, 523 U.S. at 673 (“In the case of television broadcasting, . . . broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.”); *United States v. Am. Library Ass’n*, 539 U.S. 194, 204 (2003) (plurality op.) (“To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons.”).

This case, as will be shown below, involves neither of these exceptions to the public forum doctrine, which applies squarely to the Columbia Police Facebook page and consequently bars viewpoint discrimination there.

It is well established that the government is forbidden from engaging in viewpoint discrimination in a public forum. *See, e.g., Rosenberger*, 515 U.S. at 829. “[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.” *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

Social Media – Facebook - The Internet has wrought a transformative shift in American public life. Exchanges that once occurred on sidewalks and street corners have been channeled into social media and other tools of mass connectivity. Having dramatically lowered the barriers to public participation, the Internet has amplified the

voices of individual citizens and rendered elected officials instantly accountable. It has never been easier to hear from, speak to, or opine about local, state, and national policymakers and their policies.

Courts have appreciated the democratizing potential of cyberspace ever since their earliest encounters with the medium. Two decades ago, the Supreme Court described the Internet as “a vast platform from which to address and hear from a worldwide audience.” *Reno v. ACLU*, 521 U.S. 844, 853 (1997). In providing “relatively unlimited, low-cost capacity for communication of all kinds,” the Internet enables virtually anyone to “become a town crier with a voice that resonates farther than it could from any soapbox.” *Id.* at 870.

More recently, the Court identified the Internet—and “social media in particular”—as “the most important place[] . . . for the exchange of views” in contemporary life. *Packingham*, 137 S. Ct. at 1735. As an instrument for “speaking and listening in the modern public square,” social media affords “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Id.* at 1737; *see also Liverman v. City of Petersburg*, 844 F.3d 400, 407–08 (4th Cir. 2016) (“A social media platform amplifies the distribution of the speaker’s message . . .”). Users employ these tools to “engage in a wide array of protected First Amendment activity.” *Packingham*, 137 S. Ct. at 1735–36.

Accordingly, courts “must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.” *Id.* at 1736. The Supreme Court’s classification of cyberspace as “the modern public square” “embraces the social norm that assumes the openness and accessibility of that forum to

all comers.” *hiQ Labs, Inc. v. LinkedIn Corp.*, No. 17-cv-03301-EMC, 2017 WL 3473663, at *7 (N.D. Cal. Aug. 14, 2017), *appeal docketed*, No. 17-16783 (9th Cir. Sept. 6, 2017). Governmental restrictions on the use of social media—a “vital, developing forum”—cannot be excused simply because “alternative channels” exist to transmit and receive information. *Davison v. Loudoun County Bd. of Supervisors*, No. 1:16cv932, 2017 WL 3158389, at *12 (E.D. Va. July 25, 2017), *appeal docketed*, No. 17-2002 (4th Cir. Aug. 29, 2017).

Indeed, on similar facts, the Eastern District of Virginia recently applied forum analysis to hold that a local government official had acted unconstitutionally in blocking a constituent’s access to the official’s Facebook page because of the constituent’s critical comments about other local officials. See *Davison*, 2017 WL 3158389. In reaching this conclusion, the court recognized that, “[w]hen one creates a Facebook page, one generally opens a digital space for the exchange of ideas and information.” *Id.* at *10. Because the official had “allowed virtually unfettered discussion” on her Facebook page and had solicited comments from her constituents, the court concluded, the official’s actions qualified as a “governmental ‘designation of a place or channel of communication for use by the public’” that was “more than sufficient to create a forum for speech.”¹ *Id.* (quoting *Cornelius*, 473 U.S. at 802); *cf. Page v. Lexington County Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008) (suggesting that forum analysis would be appropriate if a government website included “a type of ‘chat room’ or ‘bulletin board’ in which private viewers could express opinions or post information”).

Facebook's Motto is "Give people the power to build community and bring the world closer together." the medium at issue in this case, exemplifies the civic dynamism of social networking tools. In many ways, Facebook, Twitter and other social media act as the modern, electronic equivalent of a public square. Its users converse openly with one another on urgent social and political issues, inviting real-time responses from interested contributors. These discussions increasingly involve policymakers themselves: Facebook, Twitter and other social media enable Americans to "petition their elected representatives and otherwise engage with them in a direct manner." *Packingham*, 137 S. Ct. at 1735. Indeed, because of the platform's prominence, Nearly every governor and almost every Member of Congress have set up accounts for this purpose. President Trump has even claimed, "without social media, I'm not sure that I'd be here today." Nolan D. McCaskill, *Trump Credits Social Media for His Election*, Politico, Oct. 20, 2017, <https://www.politico.com/story/2017/10/20/trump-social-media-election-244009>.

Indeed, on similar facts, the Eastern District of Virginia recently applied forum analysis to hold that a local government official had acted unconstitutionally in blocking a constituent's access to the official's Facebook page because of the constituent's critical comments about other local officials. *See Davison*, 2017 WL 3158389. In reaching this conclusion, the court recognized that, "[w]hen one creates a Facebook page, one generally opens a digital space for the exchange of ideas and information." *Id.* at *10. Because the official had "allowed virtually unfettered discussion" on her Facebook page and had solicited comments from her constituents, the court concluded, the official's actions qualified as a "governmental 'designation of a place or channel of communication for use

by the public” that was “more than sufficient to create a forum for speech.”² *Id.* (quoting *Cornelius*, 473 U.S. at 802); cf. *Page v. Lexington County Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008) (suggesting that forum analysis would be appropriate if a government website included “a type of ‘chat room’ or ‘bulletin board’ in which private viewers could express opinions or post information”).

In the *Akins* case neither the District Court nor the Eighth Circuit conducted any forum analysis to determine if strict scrutiny, heightened scrutiny or rational basis scrutiny applied to the First Amendment issues raised by Petitioner below.

Point III - The Eighth Circuit affirmed Judge Laughrey’s rulings on recusal and stated: “*Akins argues that the district court erred, both by not transferring his recusal motions to another judge and by her denying them herself. Motions to recuse may be based on either of two federal statutes, see 28 U.S.C. §§ 144, 455, but under either statute the standard is the same: ‘recusal is required if the judge bears a bias or prejudice that might call into question his or her impartiality,’ United States v. Gamboa, 439 F.3d 796, 817 (8th Cir. 2006).*” (App A 3) A ruling that ignored all the canons of statutory construction and precedent when it found that the requirement for transfer to different judge under 28 U.S.C. § 144 for the motion to disqualify Judge Laughrey was discretionary where the statute specifically commanded a motion to disqualify for bias verified by affidavit as to “good faith” and made pursuant to law be heard by a different judge than the trial judge against whom the motion was filed.

28 U.S.C. § 144: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending

has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge **shall be** assigned to hear such proceeding. . . . It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. **(emphasis added)**.

In addition, where Judge Laughrey's husband Chris Kelly held an office of trust with the City of Columbia as Chair of the Mayor's Infrastructure Task Force during the pendency of Akins' litigation. It specifically implicated the provisions of 28 U.S.C. §455(2)(b)(4) & (5)(i)(iii)(iv). As a utility lobbyist Judge Laughrey's husband's possible fiduciary interest in being the Chair the Columbia Mayor's Infrastructure Task Force with an important role in setting utility policy for the City of Columbia at least raises an appearance of impropriety.

Judge Laughrey's husband's position caused the *Columbia Heartbeat* a local news and opinion forum to contemporaneously allege, on 09/24/15, Columbia Heart Beat reported,

"SMH in CoMo: Stormy Mayor, biased Judge this week's leadership blunders. . . . Federal Judge Nanette Laughrey ruling for City Hall in the Opus Student apartment lawsuit: . . .
My head is shaking over the Laughrey decision for a simple reason: her husband, Chris Kelly, chairs the Mayor's Infrastructure Task Force, a job he landed after leading organized efforts to raise utility rates this year. On infrastructure, Kelly has become City Hall's #1 cheerleader. That his wife is hearing Columbia's most high-profile infrastructure legal case, maybe in history, seems like appallingly bad judgment."

Further, in Akins' case evidence of Citizen For Justice reporting by Akins related to Judge Laughrey's rulings in the *Williams* matter regarding the actions of the Columbia Police Department that was material to the case. Appellant submitted evidence that

would have impugned the Judge's reputation for fairness and impartiality before a jury creating an inherent conflict for the Court at trial and numerous other bias grounds as specified in Akins' motions to disqualify.

The Eighth Circuit cited *U.S. v Gamboa*, 439 U.S. 796, 817 (8th Cir. 2006) but that case is inapplicable since that question is in regard to a court's failure to sua sponte recuse itself, where no motion to disqualify was filed in *Gamboa*. In the *Akins* matter the 2nd Motion to Disqualify Judge Laughrey was filed pursuant to the provisions of 28 U.S.C. § 144 and required her to transfer that motion to a different judge for ruling on that motion to disqualify for bias. Which Judge Laughrey did not transfer and denied herself asserting not even an appearance of bias existed. The Eighth Circuit also cited a similar case to *Gamboa* of a sua sponte recusal issue, where no motion or request was filed before the trial judge in *U.S. v Larsen*, 439 U.S. 796, 817 (8th Cir. 2006) due to the judge's statements from the bench. Neither Larsen or Gamboa are applicable to the Akins fact situation and the specific commands of this federal law under 28 U.S.C. § 144.

CONCLUSION

The Eighth Circuit improvidently affirmed the U.S. District Court for the Western District of Missouri that there was no First Amendment right to film a citizen peaceably petitioning the government for a redress of grievances in the CPD Lobby. The point designated by the City of Columbia for filing misconduct complaints against police officers. Placing the Eighth Circuit at odds with all of the other six federal circuit courts of appeals to answer in the affirmative that there is a First Amendment right to film police officials in public. Recording subject to reasonable time, place and manner restrictions so that filming doesn't unreasonably interfere with police operations.

The Eighth Circuit improvidently affirmed the District Court holding that the censorship of a designated public forum Columbia Police Facebook page is permissible. A police Facebook page where Petitioner Akins had previously posted using the “post by others” option six of his Citizens For Justice video reports. Censorship occurring during a public debate over the City of Columbia’s Citizens Police Review Board’s oversight authority over the Columbia Police Department. The court incorrectly held this was not a First Amendment violation of Akins’ rights. That this removal/censorship without notice, was held to not be a First and Fourteenth Amendment violation of Akins’ rights was in error. Because it permits prohibited viewpoint discrimination, censorship and due process violations all contrary to the precedents of this Court.

The Eighth Circuit erred when in applied the disqualification standards of 28 U.S.C. § 455 to the statutory requirements of 28 U.S.C. § 144 for the transfer of judicial disqualification motion to a disinterested judge. Where a 28 U.S.C. § 144 affidavit that attested to the “good faith” of the movant and the motion was legally sufficient to mandate a transfer of the bias motion away from the challenged judge to another judge. This statutory interpretation by the Eighth Circuit violated every canon of statutory construction and subverts congressional intent to provide litigants with an assurance of a fair and impartial jurist to decide their case or controversy.

Petitioner prays that this Honorable Court grant his petition for a writ of certiorari and for such other and further relief as this Honorable Court deems reasonable and just.

Respectfully submitted,

/s/ Stephen Wyse

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Submitted: November 28, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify by my below signature that this petition for writ of certiorari is 36 pages and complies with the Court's 40 page limit. This document has been scanned for viruses and is virus free.

/s/ Stephen Wyse

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this writ petition, including appendix and the motion to proceed in forma pauperis were mailed to counsel for the Respondents City of Columbia, Burton, Sanders, Schlude, Hughes and Palmer via 1st Class U.S. Mail, postage prepaid, to Brad Letterman of the law firm of Schreiman, Rackers, Francka & Blunt, L.L.C. At 391 Wildwood Drive, Suite 201, Jefferson City, Missouri 65109 and counsel for Respondents Boone County, Daniel Knight, Steven Berry, Brent Nelson via 1st Class U.S. Mail, postage prepaid, to Elizabeth Weber at 303 Campusview Drive, Suite 204, Columbia, MO 65201 both on this 28th day of November 2017.

/s/ Stephen Wyse