

No. 21-57

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In The  
**Supreme Court of the United States**

—◆—  
LEVI FRASIER,

*Petitioner,*

v.

CHRISTOPHER L. EVANS et al.,

*Respondents.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Tenth Circuit**

—◆—  
**BRIEF OF AMICI CURIAE FIRST AMENDMENT  
SCHOLARS IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

—◆—  
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**INTEREST OF *AMICI CURIAE***<sup>1</sup>

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of the intent to file this amicus brief. Petitioner Levi Frasier filed a blanket consent to the filing of all amicus briefs in support of certiorari on July 21, 2021. All respondents have provided written consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

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*Amici* present this brief to analyze the doctrinal and theoretical underpinnings of the clearly established First Amendment right to record public officials performing public duties in public locations—the so-called “public-cubed” pattern presented by this case—and to impress upon the Court the importance of granting certiorari and establishing a uniform rule protecting that right nationwide.

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## SUMMARY OF ARGUMENT

This Court should grant certiorari and clarify that the First Amendment protects the rights of individuals

to record police officers performing public duties in public spaces.

The First Amendment's core purpose is to protect and promote the unfettered dissemination and discussion of ideas to bring about social, political, and legal changes desired by the people. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (citing cases). In recent years, recording public officials performing public duties in public spaces has been the vehicle through which citizens have promoted this core reform purpose. For example, citizens' recordings of police misconduct and other events of national importance involving law enforcement (*i.e.*, the recording of the homicide of George Floyd, social justice protests, and the January 6, 2021 U.S. Capitol riot), have pushed governments across the country to make significant changes in their policies and laws, including banning the police from using chokeholds, *see* Ken Stone, *SDPD Chief Announces Immediate Ban on Chokeholds; Move Called 'Historic'*, *TIMES OF SAN DIEGO* (June 1, 2020), <https://timesofsan-diego.com/crime/2020/06/01/sdpd-chief-tells-immediate-ban-on-chokeholds-move-called-historic/>; reforming policing practices, *see* Michael Levenson & Bryan Pietsch, *Maryland Passes Sweeping Police Reform Legislation*, *N.Y. TIMES* (Apr. 10, 2021), <https://www.nytimes.com/2021/04/10/us/maryland-police-reform.html>; and eliminating qualified immunity for police officers sued in their individual capacities in state courts for violating civil rights, Saja Hindi, *Here's What Colorado's Police Reform Bill Does*, *DENVER POST* (June 13, 2020),

<https://www.denverpost.com/2020/06/13/colorado-police-accountability-reform-bill/>. These recordings have also served as key evidence in investigating those suspected of unlawful behavior, whether it be in cases of law enforcement accused of misconduct or instances in which police officers lawfully perform their duties and protect their communities. *See, e.g., Cheryl Corley, How Using Videos At Chauvin Trial and Others Impacts Criminal Justice*, NPR (May 7, 2021, 10:28 AM ET) <https://www.npr.org/2021/05/07/994507257/how-using-videos-at-chauvin-trial-and-others-impacts-criminal-justice> (“the protests and court proceedings after [George Floyd’s] murder in Minneapolis might never have happened without a bystander’s video”); Rachel Treisman, *Man Charged With Assault On Officer, As Seen In Viral Video From Capitol Riot*, NPR (Jan. 20, 2021, 5:30 PM ET), <https://www.npr.org/2021/01/20/958896072/rioter-charged-with-assaulting-officer-in-incident-captured-on-viral-video> (“A Connecticut man has been charged with assaulting an officer during the breach of the U.S. Capitol in an incident captured on video and shared widely on social media.”).

Today, millions of Americans—roughly 85%—have smartphones with the ability to make audiovisual recordings. *See Mobile Fact Sheet*, PEW RESEARCH CENTER (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/>. Given the omnipresence of smartphones and online streaming platforms, there are countless ways for citizens to utilize recording devices and contribute to public discourse on moral, political, and social issues. *See Craft v. Billingslea*, 459

F. Supp. 3d 890, 910 (E.D. Mich. 2020) (“Cell phone use, especially to document everyday encounters, has become ubiquitous in the twenty-first century . . . and citizens increasingly choose to record interactions they witness or experience with the police.”).

That is why it is imperative that this Court clarify that the right to record in public-cubed settings, which serves a critical democratic function, is protected by the First Amendment.

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## ARGUMENT

Public-cubed recordings can be viewed through three lenses: as an inherently expressive activity, *see* part I.A; as part of the speech-creation process, *see* part I.B.; or as necessary to exercise the First Amendment-protected right of newsgathering, *see* part I.C. Under any of these lenses, recording is protected by long-established First Amendment caselaw. This case is an ideal vehicle to address this issue, as the public-cubed setting does not pose any line-drawing problems between the right to privacy and the First Amendment. *See* part II. And it is untenable that the right to record, so critical to our modern democratic process, differs based on the jurisdiction within which the recording was performed. *See* part III. Accordingly, certiorari is warranted.



## **I. The First Amendment Protects The Right To Record Police Officers Performing Public Duties In Public Locations.**

Recording in public-cubed settings is protected by the First Amendment as: (a) expression itself, (b) a step in the process of creating speech, and (c) a newsgathering function. See Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1570 (2016) (noting the “general consensus” among First Amendment scholars “that to record an official in public implicates the First Amendment because it is either expressive conduct itself or conduct that is essentially preparatory to speech”); Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 177 (2017) (discussing the doctrinal, theoretical, and practical reasons why “[r]ecording should be protected under the First Amendment”).<sup>3</sup>

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<sup>3</sup> That is why, as the petition rightly points out, the circuit courts that have addressed the issue (other than the Tenth Circuit in the present case) have agreed that the First Amendment protects the right to record in the public-cubed setting. Pet. at 23-25, 27 & n.6; see, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1, 7-8 (1st Cir. 2014); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

### **A. Public-Cubed Recordings Are A Form of Expression And Protected As Speech.**

The act of recording police officers performing public duties in public locations is an expressive activity, rather than mere conduct. Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1013-15 (2016). Some scholarship regards recording in public-cubed circumstances as silent, dissenting expression. Simonson, 104 GEO. L.J. at 1573 (“[L]ike cursing, the protection of open recording is supported by First Amendment values in part because it is a provocative form of expression—it allows civilians to challenge government authority on their own terms.”); Scott Skinner-Thompson, *Recording as Heckling*, 108 GEO. L.J. 125, 140 (2019) (“The act of recording operates as an assertion of the recorder’s agency toward the object being filmed—often the government—establishing the recorder’s independence through the communicative act of recording *qua* resisting.”); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse and the Right to Record*, 159 U. PA. L. REV. 335, 339 (2011) (“In today’s world, personal image capture is part of a medium of expression entitled to First Amendment cognizance.”).

Although the First Amendment protects the freedom of “speech,” the Court has long applied the First Amendment’s protections to nontraditional forms of expression and conduct. *See, e.g., Spence v. Washington*, 418 U.S. 405, 406 (1974) (placing peace signs made of black tape on an American flag and displaying it publicly was “speech”); *Tinker v. Des Moines Indep. Cmty.*

*Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (wearing black armbands to protest the Government’s policy in Vietnam “was closely akin to ‘pure speech’ which, [the Court has] repeatedly held, is entitled to comprehensive protection under the First Amendment.”).

In deciding whether certain conduct “possesses sufficient communicative elements to bring the First Amendment into play,” *Texas v. Johnson*, 491 U.S. 397, 404 (1989), the Court has typically, but not always, focused on whether the actor’s non-verbal conduct has “[a]n intent to convey a particularized message[.]” *Spence*, 418 U.S. at 410-11; see also *Johnson*, 491 U.S. at 404. “[T]he requirement of identifying a ‘message conveyed’ is generally applied by the Court only to conduct that is not considered ‘inherently expressive.’” Kreimer, 159 U. PA. L. REV. at 372 (citing *Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47 (2006)); see also *Barnes v. Glen Theatre*, 501 U.S. 560, 577 n.4 (1991) (“inherently expressive” conduct is “conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else.”).

Public-cubed recordings are “inherently expressive” conduct protected by the First Amendment; however, even if the Court were to apply the “message conveyed” test to public-cubed recordings, they would still be protected First Amendment speech. For example, citizen recordings of police officers can serve “as an in-the-moment form of expressive resistance to government officials—communicating a message of critique, influencing official behavior, and reclaiming public

space for the people.” Skinner-Thompson, 108 GEO. L.J. at 127 (footnotes omitted); *see also* Simonson, 104 GEO. L.J. at 1573 (“Pointing a smartphone at a police officer in public is a statement to that officer; it can serve as a symbol of quiet defiance.”). Such recordings are inherently expressive even if no one else is present to view the act of recording. The officers are the intended audience and the Court has protected the First Amendment right to speak to law enforcement officers. *See City of Houston v. Hill*, 482 U.S. 451, 461-62 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 131-32 (1974). Officers understand recordings to be expressive conduct, which is why officers sometimes have negative reactions to being recorded. *See* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 440 (2016) (“As much as police departments are starting to realize the importance of respecting cameras, incidents of bad reactions to filming police continue. . . .”).

In the context of Darnella Frazier’s recording of George Floyd’s death at the hands of former police officer Derek Chauvin,<sup>4</sup> and others’ recordings of the Black Lives Matter movement,<sup>5</sup> social commentators

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<sup>4</sup> *See The 2021 Pulitzer Prize Winner in Special Citations and Awards—Darnella Frazier*, PULITZER PRIZES, <https://www.pulitzer.org/winners/darnella-frazier> (last visited July 26, 2021).

<sup>5</sup> *See* Jake Steiner, *Streaming Revolution: Protestors Make Point with Viral Clips*, ASSOCIATED PRESS (June 15, 2020), <https://apnews.com/article/new-york-ny-state-wire-nyc-wire-rodney-king-social-media-1819708dc4fbfc920e1874b4517a66c4> (“[T]he ubiquity of smart phones during nationwide protests in recent weeks has provided a window into protesters’ interactions with officers unimaginable to past generations of Americans.”).

have recognized the importance of recording police officers performing public duties in public locations. In addressing video recordings that document police killings of citizens, one commenter opined that “Black people pick up their cell phones to do two things, . . . to say to the person who is dying, ‘I will not let you die alone’, and ‘I will carry the message forward to your family—because I know that nobody would believe what happened to you here today.’” Reha Kansara, *Black Lives Matter: Can Viral Videos Stop Police Brutality?*, BBC (July 6, 2020), <https://www.bbc.com/news/blogs-trending-53239123> (quoting Allissa Richardson, author of BEARING WITNESS WHILE BLACK: AFRICAN AMERICANS, SMARTPHONES, AND THE NEW PROTEST #JOURNALISM (Oxford Univ. Press 2020)).

Protecting the right to record the police advances both the autonomy of individuals who express themselves by choosing to openly film police officers in the course of duty, and the autonomy of viewers and listeners who wish to receive and consider those recordings. See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 74 (2014); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 371 (1991). The First Amendment protects against government interference with individuals’ rational, autonomous, and reflective choices as democratic agents. See C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 251 (2011). Allowing

civilians to record police officers performing their public duties in public locations serves these values. To interfere with the right to record police officers, and thus the eventual receipt of those recordings, is to interfere with the ability of citizens to exercise their autonomy to receive and analyze their own chosen body of information.

Just as writing words on a page, applying paint to canvas, or wearing a black armband are recognizably protected speech, recording video is fully protected expression, rather than mere conduct. *See, e.g.*, Marceau & Chen, 116 COLUM. L. REV. at 1013-15; Kreimer, 159 U. PA. L. REV. at 376-77.

### **B. Public-Cubed Recordings Are Critical To The Speech-Creation Process.**

The act of making a public-cubed recording is a critical component of the speech-creation process. If courts limit protections only to the end product (*i.e.* a publicly-disseminated video recording), the government could “simply proceed upstream and dam the source” by targeting other links in the production chain (the information gathering necessary for that end product, for example). *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015). Thus, courts have recognized the necessity to protect other links in the production and distribution chain to ensure that core First Amendment rights are meaningfully protected. *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (noting that the peripheral rights “to distribute . . . to

receive . . . to read” as well as “freedom of inquiry [and] freedom of thought” were all “necessary in making the express guarantees [of the First Amendment] fully meaningful” (citations omitted); *see also Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) (“Constitutional rights thus implicitly protect those closely related acts necessary to their exercise.”).

Unlike an oral speech, in which the acts of creation and dissemination occur simultaneously, recordings typically have temporally distinct phases of creation and dissemination.<sup>6</sup> Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1033 (2015). Take, for example, Ms. Frazier’s recording of Mr. Floyd’s murder. She disseminated the recording for public viewing a day after she recorded it. *See* Joanna Stern, *They Used Smartphone Cameras to Record Police Brutality—and Change History*, WALL ST. J. (June 13, 2020, 12:01 AM), <https://www.wsj.com/articles/they-used-smartphone-cameras-to-record-police-brutalityand-change-history-11592020827>. But the distinct phases of recording and posting should not detract from the importance of protecting that recording as speech.

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<sup>6</sup> Dissemination arguably is not necessary for a recording or other work to be protected under the First Amendment. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (explaining that unpublished drafts are protected by the First Amendment). Speech need not have an external audience to be protected; a right to record protects freedom of thought, which requires no audience. Bambauer, 66 STAN. L. REV. at 82-83; Kreimer, 159 U. PA. L. REV. at 377-380; *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 993 (1978).

To fully protect end-product movies or recordings such as Ms. Frazier’s video, the upstream acts of recording and gathering information must be protected as well, even though they are sometimes temporally distinct from dissemination. Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 717 (2000) (“If the state were to prohibit the use of [film] projectors without a license, First Amendment coverage would undoubtedly be triggered. This is not because projectors constitute speech acts, but because they are integral to the forms of interaction that comprise the genre of the cinema.”); Kreimer, 159 U. PA. L. REV. at 382; *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (“[T]he process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds.”).

Consistent with this reasoning, courts have recognized that “[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee . . . as a corollary of the right to disseminate the resulting recording.” *Alvarez*, 679 F.3d at 595. As with other forms of expression, “the right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected.” *Id.* “[B]anning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the



right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.” *Id.* at 595-96.

Like putting pen to paper, audiovisual recordings are part and parcel of the speech-creation process. Marceau & Chen, 116 COLUM. L. REV. at 1018; *see also* Bambauer, 66 STAN. L. REV. at 70 (“[T]he collection of data is a necessary precursor to having and sharing it.”); Marc Jonathan Blitz, *The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information-Gathering in the Age of Google Earth*, 14 COLUM. SCI. & TECH. L. REV. 115, 154-55 (2013) (“It is hard to see how such peripheral rights could fail to include the right to have access to the media and tools that make speech possible.”). The act of recording is therefore protected under the First Amendment.

### **C. Public-Cubed Recordings Are Vital To Exercising The First Amendment-Protected Newsgathering Right.**

Relatedly, recording can be an access right—that is, a newsgathering right—necessary for the proper functioning of a democracy. Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. REV. DISCOURSE 230, 252 (2016) (“Citizens armed with smartphones play a vital watchdog role today. . . .”); Clay Calvert,

*The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131, 155 (2015) (“In journalistic terms, . . . ‘using an iPhone to snap a photograph of one’s surroundings is, in many respects, simply a modern form of note taking.’” (quoting Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 76 (2013))); *see also Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 585-87 (1980) (Brennan, J., concurring) (identifying “the correlative freedom of access to information”).

Specifically, recording police officers performing their public duties increases the amount of information available in the marketplace of ideas, thereby “serv[ing] significant societal interests’ wholly apart from the speaker’s interest in self-expression[ b]y protecting . . . the public’s interest in receiving information.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (citation omitted); *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Like displaying a sign in a yard, image capture is “an unusually cheap and convenient form of communication,” *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994), and allows for widespread distribution of information.

“[W]ithout some protection for seeking out the news, freedom of the press,” and other First Amendment freedoms, “could be eviscerated.” *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972). The government

could merely prohibit the process of creating the body of information (*i.e.* the recording process) underlying the press's stories. See Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 256, 273 (2004).

This newsgathering right plays a crucial part in the First Amendment's role in ensuring the structural soundness of democracy. See *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring). "Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed." *Id.* (quoting *N.Y. Times Co.*, 376 U.S. at 270); see also *id.* at 584 (Stevens, J., concurring) ("[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government[.]").

The First Amendment's newsgathering right also forms the core of numerous decisions providing access to judicial proceedings, which implicate the ability of ordinary citizens to hold their public officials accountable and monitor the proper functioning of government. See, e.g., *id.* at 583-84; *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (finding a public right of access to pretrial hearings in criminal cases); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) (finding a public right of access to jury selection in criminal trials); *Globe Newspaper Co. v.*

*Superior Court*, 457 U.S. 596, 604 (1982) (striking down state statute excluding the public during cases involving minors and sex crimes). These newsgathering/access decisions are based on two principles: first, that there was a historic “tradition of accessibility” in those forums and second, that “access to a particular government process is important in terms of that very process.” *Richmond Newspapers*, 448 U.S. at 589.

Recording a police officer performing public duties in a public location is well within this newsgathering/access right and meets both elements of the *Richmond Newspapers* test. Because the recordings occur in public, there is no question that they occur in a location in which there is a tradition of accessibility. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (noting that public fora have historically been open to the public “time out of mind”). And, as in the cases concerning access to the justice system, recording a police officer serving his or her public function is crucial for improving that government function. See *Skinner-Thompson*, 108 GEO. L.J. at 134-35; see also *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 833 (1st Cir. 2020) (“[R]ecording can itself serve ‘a cardinal First Amendment interest in protecting and promoting “the free discussion of governmental affairs,” and ‘not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally.’” (quoting *Glik*, 655 F.3d at 82-83 and *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966))); see also *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987) (“The freedom of individuals verbally to

oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>7</sup>

Audiovisual recordings of police officers performing public duties in public locations foster a better system of self-governance by allowing citizens to hold police officers accountable for potential misconduct. The purpose of the First Amendment is “[t]o give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.” Alexander Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88 (1948). Collecting information about police interactions with the

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<sup>7</sup> Notably, and consistent with the newsgathering/access right recognized by the courts, some state legislatures have identified the importance of balancing citizens’ right to record police activity with the general prohibition on interfering with police activity by expressly identifying public-cubed recordings as activity that does not constitute unlawful interference. *See* Haw. Rev. Stat. § 710-1010(2)(c) (2021) (statute prohibiting obstructing government operations creates exemption for “[a] person who is making a video or audio recording . . . of a law enforcement officer while the officer is in the performance of the officer’s duties in a public place”); N.Y. Civ. Rights Law § 79-p(2) (2021) (“A person not under arrest or in the custody of a law enforcement official has the right to record law enforcement activity and to maintain custody and control of that recording and of any property or instruments used by that person to record law enforcement activities . . .”); Utah Code § 76-8-305(2) (2021) (“Recording the actions of a law enforcement officer with a camera, mobile phone, or other photographic device, while the officer is performing official duties in plain view, does not by itself constitute . . . interference with the officer. . .”).

public fuels important policy discussions about public safety, including the consideration of information the public would not otherwise know, and thereby facilitates review of police conduct by laypeople and legal professionals alike. *See* Marceau & Chen, 116 COLUM. L. REV at 1007, 1031; *Hill*, 482 U.S. at 463 n.12 (1987) (“The strongest case for allowing challenge [to the police] is simply the imponderable risk of abuse . . . that lies in the state in which no challenge is allowed.” (citation omitted)).

Indeed, and as noted above, recordings of police officers performing their public duties have had significant real-world impacts, “sparking outrage and dialogue about police practices throughout the nation.” Simonson, 104 CALIF. L. REV. at 408. In recent years, smartphone recordings of police officers have been widely publicized by the media and have “ma[de] the world witness police brutality toward African-Americans that was all too easy to ignore in the past.” *See* Stern, *They Used Smartphone Cameras to Record Police Brutality—and Change History* (chronicling a decade of cell phone videos capturing police brutality against people of color). Moreover, the video recording of Mr. Floyd’s death has been lauded as “play[ing] a major role in igniting a global protest movement against police violence. . . .” Joe Hernandez, *Darnella Frazier, Teen Who Filmed George Floyd’s Murder, Wins Pulitzer Prize*, NPR (June 11, 2021, 4:05 PM ET), <https://www.npr.org/2021/06/11/1005601724/darnella-frazier-teen-who-filmed-george-floyds-murder-wins-pulitzer-prize-citati>.

In theory, contemporaneous video recordings can also serve to deter police misconduct in real time, promote respectful policing and accountability, and improve the functioning of a governmental institution in the process. Simonson, 104 CALIF. L. REV. at 413-16 (“studies show that police behave differently when they know they are being recorded”); Kreimer, 159 U. PA. L. REV. at 347 (“the prospect of private image capture provides a deterrent to official actions that would evoke liability or condemnation”).<sup>8</sup> Whether misconduct is ultimately deterred, however, does not change the fact that recording the police in public serves the core purpose of the newsgathering/access right: that is, holding our government institutions accountable and structurally improving them. Kreimer, 159 U. PA. L. REV. at 350; *see also* Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES at A1 (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> (“Absent the video, many in the Police Department would have gone on believing [Eric Garner’s] death to

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<sup>8</sup> *But see* Richard Pérez-Peña & Timothy Williams, *Glare of Video is Shifting Public’s View of Police*, N.Y. TIMES (July 30, 2015), <https://www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html> (“Experts say that cameras probably change for the better how the police and the public treat each other, but . . . the fact that one viral video after another surfaces, showing officers treating civilians harshly, demonstrates the limits of that change.”); *cf.* Reha Kansara, *Black Lives Matter: Can Viral Videos Stop Police Brutality?* (“[T]he video [of George Floyd’s murder] transfixed people because of the callous nature of the killing coupled with the brazen nature of the police, who knew they were being filmed and still did it anyway.” (quoting Allissa Richardson)).

have been solely caused by his health problems. . . .”); Stern, *They Used Smartphone Cameras to Record Police Brutality—and Change History* (crediting Feidin Santana’s cell phone recording of former officer Michael Slager shooting Walter Scott five times and killing him as he tried to run as key evidence in a jury convicting Slager of second degree murder).

Lastly, public cubed recordings can serve as key evidence in investigating and prosecuting those suspected of unlawful behavior. Recently, federal prosecutors relied on cell phone videos to better understand the January 6, 2021 riots in the U.S. Capitol and charge rioters for various crimes. *See* NBC Washington (@nbcwashington), TWITTER (Jan. 15, 2021, 4:30 PM), <https://twitter.com/nbcwashington/status/1350223773270736899> (viral video of D.C. police officer Daniel Hodges being crushed by door during U.S. Capitol riot); Craig Timberg, Drew Harwell & Spencer S. Hsu, *Police Let Most Capitol Rioters Walk Away. But Cell-phone Data And Videos Could Now Lead To More Arrests.*, WASH. POST (Jan. 8, 2021, 5:37 PM), <https://www.washingtonpost.com/technology/2021/01/08/trump-mob-tech-arrests/>. Without these recordings, identifying, charging, and prosecuting culpable parties would be far more difficult.

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In sum, the First Amendment protects the right to record law enforcement officers performing public duties in public locations because these recordings are (a) a form of inherently expressive activity or protected



speech, rather than mere conduct; (b) part of the speech-creation process; and (c) necessary to the exercise of the First Amendment-protected newsgathering right.

**II. This Case Avoids Privacy Concerns And, Thus, Is Ideal For Clarifying That There Is A Right To Record In Public-Cubed Settings.**

Although some cases require courts to balance recording rights against privacy concerns, this case does not present that challenge. Like most First Amendment rights, the right to record is not absolute. *See, e.g.*, Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 393-407 (2008). As addressed above, recording can constitute direct speech or serve as a critical tool to enable future speech. At the same time, recording can potentially impinge on others' privacy, both in public and private spaces. Depending on the context, that intrusion on privacy can justify restricting another's right to free speech. *See, e.g.*, Kaminski, 97 B.U. L. REV. at 171; Skinner-Thompson, 108 GEO. L.J. at 130-31. Courts typically weigh these competing First Amendment interests in right to record cases. *See Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (noting that privacy and speech "are important interests to be considered on *both* sides of the constitutional calculus" (emphasis in original)). Sometimes privacy interests can and do outweigh speech interests in recording private individuals engaged in private activities in private spaces. *See Marceau & Chen*, 116 COLUM. L. REV. at 1044 ("There

may also be times when a recording of intimate, private details . . . invades privacy concerns so fundamental as to exceed First Amendment protection.”). This balancing inquiry is necessarily fact-specific, and thus resistant to bright-line rules.

But in a case such as this one, the First Amendment interests in public-cubed recordings of police officers will almost always outweigh the minimal privacy interests of the police, as the circuits considering a public-cubed scenario have held. *See, e.g., Fields*, 862 F.3d at 356; *Turner*, 848 F.3d at 688; *Gericke*, 753 F.3d at 8; *Alvarez*, 679 F.3d at 595; *Glik*, 655 F.3d at 82-83; *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439. Accordingly, the Court need not grapple with the various circumstances that may require the weighing of privacy interests.

### **III. The Court Should Grant Certiorari To Safeguard Public-Cubed Recordings In All Jurisdictions.**

It is constitutionally unacceptable for the First Amendment right to record police officers performing public duties in public locations to be protected only in certain jurisdictions across the country. Yet only “[s]ixty-one percent of the U.S. population lives in states where federal appeals courts have recognized a First Amendment right to record police officers performing their official duties in public.” *See* FIRST AMENDMENT WATCH, A CITIZEN’S GUIDE TO RECORDING THE POLICE 2 (N.Y. Univ. 2020), <https://firstamendmentwatch.org/wp-content/>

uploads/2020/06/Citizens-Guide-to-Recording-the-Police-2.pdf.

Under the Tenth Circuit’s decision, this clearly established right may be violated within the Tenth Circuit without recourse while it is simultaneously safeguarded by the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits, *see Fields*, 862 F.3d at 356; *Turner*, 848 F.3d at 688; *Gericke*, 753 F.3d at 8; *Alvarez*, 679 F.3d at 595; *Glik*, 655 F.3d at 82-83; *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439, and by some district courts in circuits that have yet to address the issue, *see* Pet. at 27, n.6; *see also, e.g., Dyer v. Smith*, Civil Action No. 3:19-cv-921, 2021 U.S. Dist. LEXIS 34090, at \*18 (E.D. Va. Feb. 23, 2021) (“Although neither the Supreme Court nor the Fourth Circuit has recognized a right to record government officials performing their duties, both the general constitutional rule and a consensus of cases clearly establish this right.”); *Hulbert v. Pope*, No. SAG-18-00461, 2021 U.S. Dist. LEXIS 77897, at \*32-33 (D. Md. Apr. 22, 2021) (“This case presents a similar issue, where every circuit considering the question has found the First Amendment right to record police exists. . . . Therefore, the Court agrees with Plaintiffs that the right to record police officers . . . was clearly established at the time of the incident.”).

Indeed, just months after the Tenth Circuit issued its decision, a federal district court in Colorado held that sheriff’s deputies were entitled to qualified immunity against citizens’ claims that deputies violated their First Amendment right to record the public areas

of a jail in 2018, relying, in part, on the holding in this case—that is, that the right to record law enforcement performing public duties in public was not clearly established by the Tenth Circuit in 2014, and that the Tenth Circuit “*declined to state whether such a right has been clearly established since that time.*” *Kerr v. City of Boulder*, Civil Action No. 19-cv-01724-KLM, 2021 U.S. Dist. LEXIS 114207, at \*29 (D. Colo. June 18, 2021) (emphasis added). In the absence of a clearly established right, there is no meaningful deterrent against police officers physically preventing bystanders from recording them, or motivation for local jurisdictions to instruct officers to not interfere with recordings.

*Amici* therefore urge the Court to grant certiorari and ensure that citizens across the United States, not just in certain circuits and districts, have a clearly established First Amendment right to record in the public-cubed setting. Recognition of such a right protects individual autonomy, increases the body of knowledge informing the debate over some of the most controversial aspects of our society, and protects the values upon which our democracy depends. Recent events surrounding police accountability are central to the functioning of our democracy and to the autonomy of its citizens. Recording police officers performing public duties in public is exactly the type of activity that the First Amendment should, and does, protect.



**CONCLUSION**

*Amici* respectfully request that this Court grant Mr. Levi Frasier's petition for writ of certiorari.

Respectfully submitted,

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