No. 23-227

IN THE
Supreme Court of the United States

SARAH K. MOLINA and CHRISTINA VOGEL,
*Petitioners*,
v.

DANIEL BOOK, ET AL.,
*Respondents*.

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

# BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE[1]

Amicus the Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect the newsgathering and publication rights of journalists around the country.

As an organization dedicated to protecting the First Amendment rights of journalists and news organizations, amicus has a strong interest in ensuring that the right to observe and document law enforcement officers performing their duties in public is appropriately recognized and protected.

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[1] Pursuant to Supreme Court Rule 37, counsel for amicus curiae states that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the amicus curiae, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and counsel of record for all parties were given timely notice of the intent to file this brief.

## SUMMARY OF THE ARGUMENT

The right to observe and document police conduct has been "clear" for the better part of a century. *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972). Once a right exercised principally by the press as "surrogates for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), it is now routinely a function undertaken by bystanders with a smartphone as well. And whether a given watchdog is press or not, for decades courts have recognized that individuals "have a right to be in public places and on public property to gather information," so long as the work of watching public business does not cause "unreasonable interference with official investigation . . . or the carrying out of other duties." *Channel 10*, 337 F. Supp. at 638; *see also, e.g.*, *Dayton Newspapers, Inc. v. Starick*, 345 F.2d 677, 679 (6th Cir. 1965). In other words, "routine newspaper reporting techniques" are entitled to as much protection as any other First Amendment activity, *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979), subject—like any other First Amendment activity—to reasonable "time, place, and manner restrictions" but not to whim, caprice, or animus, *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

Those basic principles are of central importance to a free press, and court after court has reaffirmed them.[2] They should have sufficed to resolve this case,

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[2] The issue arises most frequently in cases involving video recording of the police. *See Irizarry v. Yehia*, 38 F.4th 1282, 1290–92 (10th Cir. 2022) (collecting cases). But for equally routine exercises of the underlying right to gather information, see, for instance, *CBS, Inc. v. Lieberman*, 439 F. Supp. 862, 866

which deals not with the validity of any generally applicable restriction on information gathering but rather with allegations of targeted retaliation. Still, the Eighth Circuit reached the conclusion that reasonable officials could think they were entitled to punish individuals *because* they chose to observe and document official conduct in a public forum. *See* Pet. App. 65a. The Eighth Circuit's analysis was characteristic of a broader dysfunction in the way lower courts approach the qualified-immunity analysis when the right to gather information is at stake. Absent this Court's intervention, that dysfunction risks chilling the kind of "reporting on the criminal justice system" that is "at the core of First Amendment values." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

Amicus offers two arguments in support of Petitioners. *First*, the right the Eighth Circuit declined to recognize is of exceptional importance to the press and the public, and its exercise depends on the deterrent effect of a meaningful damages remedy. *Second*, the circuits are in clear need of guidance about the proper approach to the qualified-immunity analysis when the right to gather information—as opposed to the right to speak or publish that information—is at issue. The gravity of the Eighth Circuit's error, together with the chilling effect that disarray continues to have on the exercise of basic First Amendment rights, warrants review.

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(N.D. Ill. 1976) (right to take notes); *United States v. CBS, Inc.*, 497 F.2d 102, 106–07 (5th Cir. 1974) (right to take sketches); *Dorfman v. Meiszner*, 430 F.2d 558, 562–63 (7th Cir. 1970) (right to take photographs).

Amicus also agrees with Petitioners that the first question presented, whether an individual's appearance and presence at an event must communicate a "particularized message" for the First Amendment to protect their decision to document the occasion, Pet. 3, is worthy of review. That rule poses an obvious hazard to journalists—who attend protests not to express support or opposition but to cover events of clear public concern—and the Eighth Circuit's outlier approach would lead to the absurd conclusion that a law enforcement officer who intentionally retaliates against an individual for wearing clothing that reads "PRESS" has not retaliated against First Amendment activity if the reporter did not verbalize a pro- or anti-protest perspective.

As this Court recognized in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), it would be "intolerable" to defer resolution of "an important question of freedom of the press" where, as here, "an uneasy and unsettled constitutional posture . . . could only further harm the operation of a free press," *id.* at 247 n.6. Amicus respectfully urges that the petition for certiorari be granted.

## ARGUMENT

### I. The right to observe and document policing is of critical public importance.

First-hand accounts of police conduct are essential to the public conversation about police accountability. The demonstrations sparked by George Floyd's murder offer an especially stark

example; as the Ninth Circuit stressed in upholding reporters' right to cover such protests without threat of violence or arrest, "the public became aware of the circumstances surrounding George Floyd's death" in the first instance "because citizens standing on a sidewalk exercised their First Amendment rights." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020). And as the Pulitzer Prize Board recognized in honoring bystander Darnella Frazier with a special citation "[f]or courageously recording" the events of that day, contemporaneous accounts of police conduct have long played a "crucial role . . . in journalists' quest for truth and justice." *Special Awards and Citations: Darnella Frazier*, The Pulitzer Prizes (2021), https://perma.cc/JVH8-FABW.

At the time those events unfolded—and in the lion's share of jurisdictions, *see Irizarry*, 38 F.4th at 1290–92—the actions of individuals like Ms. Frazier were backstopped by the "clearly established right" to monitor how police interact with the public, *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020). But under Eighth Circuit law as it stands today, no remedy would have been available if Officer Derek Chauvin baselessly threatened Ms. Frazier to prevent that footage from airing—as it eventually did—on news programs around the country. That disparity is "intolerable," *Tornillo*, 418 U.S. at 247 n.6, and this Court should remedy it.

### a. The right to observe and document policing is essential to self-rule and equality under the law.

"[T]here is practically universal agreement" that the First Amendment exists "to protect the free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966), and "information relating to alleged governmental misconduct" in particular "has traditionally been recognized as lying at the core" of that purpose, *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). In just that spirit, first-hand accounts of police conduct—whether first captured by members of the media or later broadcast by them—have long played an indispensable role in the public conversation about law enforcement accountability.

Before Ms. Frazier, for instance, there was George Holliday, whose video of the 1991 police beating of Rodney King sparked public outrage and a drive to reform the Los Angeles Police Department. *See* Paul Pringle & Andrew Blankstein, *King Case Led to Major LAPD Reforms*, L.A. Times (June 17, 2012), https://perma.cc/EWF9-GPQD. After LAPD officials rejected Mr. Holliday's attempts to provide them with his footage, he took his tape to local news station KTLA. KTLA aired the footage the following night, setting in motion a sequence of events that resulted in the video being seen by millions. *See* Report of the Independent Commission on the Los Angeles Police Department 11 (1991). As an independent commission later concluded, without Mr. Holliday's footage and its distribution by the press, there may never have been an investigation of the assault

because "the report of the involved officers was falsified." *Id.* at ii.

The same dynamic has unfolded again and again since the advent of handheld recording devices. Routinely, journalists and other individuals on the scene of a newsworthy event capture evidence that the official account was misleading or incomplete. *See* Alex Horton, *In Violent Protest Incidents, a Theme Emerges: Videos Contradict Police Accounts*, Wash. Post (June 6, 2020), https://perma.cc/UTU8-5VX7; *cf. Richmond Newspapers*, 448 U.S. at 569 (noting that press coverage of public business discourages "misconduct" as well as "decisions based on secret bias or partiality"). And, sometimes, the reverse is true—documentary evidence also can demonstrate that allegations of officer misconduct were unfounded. *See, e.g.*, Justin Zaremba, *Dashcam Proves Woman Lied About Cop Aiming Gun at Her*, NJ.com (Dec. 2, 2015), https://perma.cc/3JUT-JH8S. Whether the evidence corroborates or refutes an official account, the right to observe and document what police do in public advances "the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

In addition to promoting justice in individual cases, those first-hand accounts lay before lawmakers and the public the information necessary to consider systemic reform. *Cf. Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of

government generally."). The wave of legislation enacted after Mr. Floyd's murder, for example, may not have passed if not for Ms. Frazier's video and the media coverage that followed. *See generally* Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, Brennan Ctr. for Justice (May 21, 2021), https://perma.cc/3E9V-3SXG.

The right to observe and document policing is by now so deeply embedded in modern newsgathering that it is difficult to imagine the news without audio-video evidence, nor should we want to. As Justice Brennan observed, "The adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute." *Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part). So too with bystander video and other forms of personal observation or documentation. Those accounts have the capacity to inform and elucidate in a way less direct forms of information may not. Even in 2015, when the events at issue in the Petition unfolded, such footage played an indispensable role in news coverage of matters of obvious public concern. *See* Claire Wardle et al., Tow Ctr. for Digital Journalism, Amateur Footage: A Global Study of User-Generated Content in TV and Online News Output 21 (2014); *see also* Pete Brown, Eyewitness Media Hub, A Global Study of Eyewitness Media in Online Newspaper Sites 2 (2015). And without a recognized right to observe and document law enforcement, many of those stories never could have run at all.

### b. The right to observe and document policing depends on an enforceable remedy for damages.

The right to observe and document law enforcement activity is jeopardized absent an effective and enforceable remedy to deter police overreach. First Amendment freedoms, while "supremely precious," can also be "delicate and vulnerable." *NAACP v. Button*, 371 U.S. 415, 433 (1963). A retaliatory detention or use of force has an "immediate and irreversible" impact on the right to gather the news, as much so as any classic prior restraint. *Neb. Press Ass'n*, 427 U.S. at 559. After all, a journalist or citizen driven from the scene of a newsworthy event "is irrevocably prevented from capturing a unique set of images that might otherwise hold officials accountable." John S. Clayton, Note, *Policing the Press: Retaliatory Arrests of Newsgatherers After* Nieves v. Bartlett, 120 Colum. L. Rev. 2275, 2289 (2020). And if "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (citation omitted), more troubling still is government action that *permanently* "limit[s] the stock of information from which members of the public may draw," *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978). To put it bluntly: If an official's goal is to muzzle the press, retaliatory arrests or uses of force work. The right to observe and document policing depends critically, then, on the existence of an adequate deterrent to those abuses.

That reality is hardly lost on law enforcement. Too often, officers policing newsworthy events take a "catch-and-release" approach to deterring press coverage—arresting journalists for offenses that will never stand up to scrutiny, but with confidence that detention will shut down reporting in the meantime. PEN America, Press Freedom Under Fire in Ferguson 10 (2014). As the Department of Justice has warned, in those instances where officials would rather not let the facts of their conduct be reported, the fig-leaf cover of vague public-order offenses is "all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights." Statement of Interest of the United States at 1–2, *Garcia v. Montgomery Cnty.*, No. 8:12-cv-03592 (D. Md. Mar. 4, 2013), https://perma.cc/V4CC-G8BB. And, indeed, this Court has recognized that "some police officers may exploit the arrest power as a means of suppressing speech." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018).

The experience of journalists documenting the protests of George Floyd's murder reflects as much: While a staggering number of reporters were detained in connection with their coverage, vanishingly few of those arrests resulted in criminal charges. *See* Sarah Matthews et al., Reporters Comm. for Freedom of the Press, Press Freedoms in the United States 2020, at 12 (2021), https://perma.cc/KE9J-LWXH. Fewer still proceeded to trial, to say nothing of actual conviction. *See, e.g.*, Concepción de León, *D.A. Won't Prosecute Reporter Arrested While Covering Shooting of Deputies*, N.Y. Times (Sept. 24, 2020), https://perma.cc/RG8A-44CG; *Iowa Jury Finds Des Moines Register Reporter Andrea Sahouri Not Guilty*

*on All Charges*, Reporters Comm. for Freedom of the Press (Mar. 2, 2021), https://perma.cc/44C3-LCN3. But acquittal is cold comfort, because each arrest prevented a journalist from bringing the public the news that day.

For the right to observe and document police to be meaningful, then, a sufficient deterrent must be in place to ensure that right is not infringed in the first instance. An injunction cannot restore footage that a reporter never had the chance to take, and other remedial avenues are often closed as well. For one, officers who retaliate against press coverage—even through the use of unwarranted force—virtually never face prosecution for doing so, and internal discipline, too, is regrettably rare. *See, e.g.*, Marty Schladen, *More than a Year Later, No Discipline for Cop Who Pepper-Sprayed Journalists*, Ohio Cap. J. (July 12, 2021), https://perma.cc/3JG7-ENTM.

That leaves one line of defense for the right to report on policing: suits seeking damages from the officers who violate it. If immunity bars that path to accountability, then the right exists in name only.

## II. The right to observe and document policing follows "with obvious clarity" from the broader right to gather the news in public places.

Under the Court's existing First Amendment jurisprudence, qualified immunity should have posed no barrier to suit against the officers for their conduct here. The complaint alleged the officers engaged in "intentional police retaliation" due to Petitioners'

First Amendment activity. Pet. App. 65a. The Eighth Circuit divided not on whether using force against Petitioners was *justified*, only on whether doing so on a retaliatory basis violates the First Amendment. The only question, in other words, was whether an individual's decision to observe and record law enforcement officers in a public place implicates the Constitution at all. And this Court has spoken clearly to that issue: "Whether government" is seeking to regulate the "creating, distributing, or consuming" of speech "makes no difference" to the constitutional analysis. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011). Put another way, whether law enforcement may retaliate against an individual who attends a march to speak, and whether law enforcement may punish an individual who watches and documents that march for the evening news are identical constitutional questions. *See Quraishi v. St. Charles Cnty.*, 986 F.3d 831, 839 (8th Cir. 2021). If one right is clearly established for purposes of qualified immunity, so too, with "obvious clarity," is the other. *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam) (citation omitted). In amicus's view, the error below on that point is clear enough that summary reversal would be appropriate.

Still, because the Eighth Circuit's error is characteristic of a broader dysfunction in the lower courts' approach to the immunity analysis, this Court's plenary review is warranted. That the right to observe and document law enforcement activity in public has marched so slowly through the circuit courts, despite the lack of any serious disagreement about its existence, reflects a deeper reluctance to extend full First Amendment protection to the right to

gather information. That hesitance finds no basis in precedent; "[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011), and this Court has already rejected the "suggest[ion] that news gathering does not qualify for First Amendment protection," *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Still, where the posture is qualified immunity, courts have drawn absurdly fine distinctions between equally "routine" approaches to gathering the news, *Daily Mail*, 443 U.S. at 103—distinctions that would never be countenanced in a suit over speech—and rendered the right practically unenforceable in some jurisdictions. To avoid seeing the freedom of the press "eviscerated" on that basis, *Branzburg*, 408 U.S. at 681, this Court should intervene to provide clarity.

**a. Ordinary standards—including the right to be free from retaliation—apply to the right to gather news.**

As this Court has repeatedly explained, when an activity comes within the sweep of the First Amendment, certain protections necessarily follow because "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *accord Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Ent. Merchs. Ass'n*, 564 U.S. at 790. That insight applies with equal force to efforts to distinguish different media, *see Ent. Merchs. Ass'n*, 564 U.S. at 790, and to distinctions between "stages of the speech process," *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). Just as no

reasonable official could think prior restraints permissible in theater but not film, *see Se. Promotions*, 420 U.S. at 558, no one could think viewpoint discrimination permissible if the state opts to regulate writing rather than publishing, *see Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116–18 (1991).[3]

The rule against retaliation is one of those universal invariants. As this Court has explained, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected activity. *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). For purposes of qualified immunity, then, the right against retaliation is "not an abstract principle but an irrefutable precept." *Tobey v. Jones*, 706 F.3d 379, 391–92 n.6 (4th Cir. 2013). It does not change faces from context to context any more than the Fourth Amendment right against baseless arrests turns on *which* "facially innocent act," from photography to dog-walking, an individual was engaged in when detained without suspicion. *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995) (denying qualified immunity on a Fourth Amendment claim where arrest was based on nothing more than "[t]aking photographs at a public event").

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[3] Similarly, because the "right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media," the professional identity of the party asserting a First Amendment right is irrelevant to the question whether the right in fact exists. *Glik*, 655 F.3d at 83.

As a result, a law enforcement officer could think it constitutional to retaliate against an exercise of the right to observe and document policing only if film as a medium or newsgathering as a stage of the communicative process were entirely "unprotected by the First Amendment—or subject to a totally different standard from that applied to" other First Amendment activities. *Se. Promotions*, 420 U.S. at 557. But, of course, both are subject to ordinary First Amendment standards, and those questions have been firmly settled for decades. *See Burstyn*, 343 U.S. at 503; *Branzburg*, 408 U.S. at 681; *id.* at 707. Subject to the usual disputes regarding whether a retaliatory motive in fact caused a particular action, then, *see Nieves*, 139 S. Ct. at 1722–24, there was no serious question in 2015 that retaliation against information gathering, whatever the medium, offends the First Amendment.

To be sure, those basic principles—without more—will not resolve every tension between the rights of journalists and the powers of government. To say the right to observe and record is subject to reasonable time, place, and manner restrictions, *see generally Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), does not settle which content-neutral restrictions are reasonable. To say that the right is subject to laws of "general applicability," *Branzburg*, 408 U.S. at 682; *see also Zemel v. Rusk*, 381 U.S. 1, 16 (1965), does not settle which laws are generally applicable, *see Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). But none of those potential complexities is at issue here. If adequately alleged and proven, *see Nieves*, 139 S. Ct. at 1722–24, retaliation against protected activity

like newsgathering is impermissible. There is no other step in the legal analysis, and no reasonable official could have thought otherwise.

**b. Lower courts have failed to apply ordinary standards to the right to gather news.**

Despite the clarity of those principles, lower courts have struggled to apply them when an official claims qualified immunity. In that posture, there is a clear divide between those circuits in which the right to gather information is treated as an ordinary right—with all the First Amendment protections that entails—and those in which newsgathering claims prompt unwarranted confusion.

The divide is visible even within the Eighth Circuit's own precedent. Characteristic of the appropriate analysis is *Quraishi*, a recent decision from the Eighth Circuit that the panel below failed to confront. There, a deputy of the St. Charles County police department argued that he was entitled to immunity for allegedly "deploying a tear-gas canister at law-abiding reporters" because no previous case addressed retaliation against reporters in particular. *Quraishi*, 986 F.3d at 839. The panel candidly acknowledged that the circuit did not have on-point precedent "where reporters are arrested while peacefully filming a protest." *Id.* at 838. But that was irrelevant, the court noted, because the "right to exercise First Amendment freedoms without facing retaliation from government officials is clearly established," *id.* (citation omitted), and "[r]eporting is a First Amendment activity," *id.* (citing *Branzburg*,

408 U.S. at 681). Axiomatically, then, police can no more punish reporters for reporting than they could Edward Hopper for painting or Aaron Copland for composing. The "brevity of the First Amendment discussion" required to settle the question makes clear the answer should be "virtually self-evident" to any reasonable official. *Glik*, 655 F.3d at 85.

But the panel below introduced needless complications to the analysis, as the Petition describes, and other courts have likewise gone astray. For instance, it is difficult to imagine a court concluding that the right to criticize firefighters is different in scope than the right to criticize the police, *see City of Houston v. Hill*, 482 U.S. 451, 461 (1987), but apparently a reasonable officer might think the right to record admits of such distinctions, *see Crocker v. Beatty*, 995 F.3d 1232, 1243 n.8 (11th Cir. 2021). Similarly, the law is clearly established that "nondisruptive speech . . . is still protected speech even in a nonpublic forum" like an airport, *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987), but courts have expressed confusion whether airport officials may retaliate against nondisruptive recording, *see Mocek v. City of Albuquerque*, 813 F.3d 912, 930 (10th Cir. 2015) (maybe).

Or consider the circuits' divided treatment of traffic stops. As the First Circuit has observed, a person who films a traffic stop is exercising the same right as someone who films a pat-down in a park, even if the change of scenery bears on which *restrictions* on the right may be reasonable. *See Gericke v. Begin*, 753 F.3d 1, 7–8 (1st Cir. 2014). As a result, the distinction

is irrelevant to the qualified-immunity analysis where the underlying claim is retaliation as opposed to, say, a dispute over the tailoring of a move-on order. *Cf. Colten v. Kentucky*, 407 U.S. 104, 108–09 (1972) (upholding an order to disperse where defendant had "no bona fide intent to exercise a constitutional right" and interference with traffic stop presented the "risk of accident" (citation omitted)). The Third Circuit, by comparison, approached the same question as if the "right to record matters of public concern" and the "right to videotape police officers during a traffic stop" were entirely different things, apparently holding open the possibility that the latter might not implicate the First Amendment at all. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 261–62 (3d Cir. 2010).

These distinctions make no sense from a first-principles perspective, but these are only a small sample of the ways in which the divide has defeated efforts to enforce the newsgathering right. For instance, in addition to conflating the existence (or not) of the right with the validity (or not) of particular restrictions on its exercise, courts have confused the right to gather information with the right to obtain *access to places* where information might be found. *See Kelly*, 622 F.3d at 262 (granting qualified immunity in part because "cases addressing the right of access to information . . . do not provide a clear rule regarding First Amendment rights to obtain information by videotaping"). The result is a muddle. *Compare, e.g.*, *Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017) (approaching observation of buffalo herding as an information-gathering claim and applying ordinary tailoring), *with S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 560 (6th

Cir. 2007) (approaching observation of deer cull as an access claim and suggesting this Court has provided no "clearly defined framework" for it). And it should be no surprise, of course, that courts looking to the wrong line of precedent do not find a clear rule of decision.

The predictable effect is to undercut the right to gather information. Of course, the right of access is itself a vital one, as this Court has repeatedly reaffirmed. *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion). But the right to gather the news *beyond* the walls of government places and proceedings is a distinct and indispensable one, because "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Daily Mail*, 443 U.S. at 104. Approaching the immunity analysis as if a reasonable official would conflate the two needlessly exaggerates the difficulty of the task confronting officers. All the Constitution requires is that they approach the right to gather information under the shelter of ordinary First Amendment standards—including the right against retaliation for exercising that right.

Taken together, these confusions have exacted a heavy toll on members of the press and public exercising the right to record. It should be scandalous that a court could conclude that law enforcement *might* be entitled to retaliate against a member of the press or public solely because the person observed and recorded what police officers did in public. But the lingering uncertainty that characterizes the right to observe and document policing will continue to have a

chilling effect on its exercise, while emboldening those who would suppress it further. *See, e.g.*, Joseph Ojo & Michelle Solomon, *Proposed Bill Could Make Cell Phone Video of Police Illegal in Some Cases*, Local 10 (July 21, 2021), https://perma.cc/8G9M-XHKK. Too many journalists and bystanders, like Petitioners, have already been punished for the exercise of their fundamental rights to gather news and information. This Court should intervene to ensure those abuses go no further.

## CONCLUSION

For these reasons, amicus curiae respectfully urges the Court to grant Petitioners' writ of certiorari and summarily reverse the Eighth Circuit.

Respectfully submitted,

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