No.

In the Supreme Court of the United States

DIJON SHARPE, PETITIONER,

v.

WINTERVILLE POLICE DEPARTMENT, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a stark circuit conflict over a nationally important First Amendment question. By 2011, this Court had definitively held that generating and disseminating information is speech safeguarded by the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). The Court had also unequivocally recognized that "'a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)).

Applying these and other of the Court's established precedents seven circuits—the First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh—had expressly recognized by the time of the incident in this case that the act of filming police officers in public is undoubtedly First Amendment protected activity.

Notwithstanding the Court's precedents, and the consensus of authority from these other circuits, the Fourth Circuit below held that a reasonable police officer could have concluded at the time of the events in this case, October 2018, that filming police carrying out their duties in public is not First Amendment protected activity. The court thus granted qualified immunity to respondent police officer Myers Parker Helms IV for assaulting petitioner in retaliation for filming him during a routine traffic stop.

The question presented is:

Whether the Court should hold that it was clearly established by October 2018 that filming police officers in public is First Amendment protected activity, or at least clearly establish that it is First Amendment protected activity going forward.

PARTIES TO THE PROCEEDING

Petitioner is Dijon Sharpe.

Respondents are Winterville Police Department; William Blake Ellis, in his official capacity only; Myers Parker Helms, IV, in his individual and official capacity.

RELATED PROCEEDINGS

United States District Court (E.D. N.C.):

Sharpe v. Winterville Police Department, 4:19-cv-00157-D (July 9, 2021)

United States Court of Appeals (4th Cir.):

Sharpe v. Winterville Police Department, 21-01827 (Apr. 21, 2023)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 59 F.4th 674. The opinion of the district court granting judgment on the pleadings on the *Monell* count, Count II in the Complaint (Pet. App. 25a-40a), is unreported but available at 2021 WL 2907883. The opinion of the district court dismissing the individual capacity count, Count I in the Complaint (Pet. App. 41a-61a), is reported at 480 F. Supp. 3d 689.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2023. Pet. App. 2a. The court of appeals denied timely petitions for rehearing en banc on April 21, 2023. Pet. App. 62a-63a. 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, in relevant part: "Congress shall make no law … abridging the freedom of speech …." U.S. Const. amend. I.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case presents a square conflict over a substantial First Amendment question: whether filming police officers in the discharge of their duties in public is First Amendment protected activity.

In the proceedings below, the Fourth Circuit granted qualified immunity to respondent police officer, Myers Parker Helms IV, for assaulting petitioner in retaliation for filming him during a traffic stop, Pet. App. 13a-15a, affirming the district court's dismissal of petitioner's $1.00 damages claim for the infringement of his First Amendment rights. Pet. App. 72a. The court recognized, in the course of its opinion, that livestreaming police officers during a routine traffic stop is protected by the First Amendment but held that it was not clearly established at the time of the events in this case, October 2018. Pet. App. 6a, 9a.

The Fourth Circuit's decision conflicts with the law in the First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. In all of those circuits the right to film police officers in public was clearly established by October 2018. Had this case arisen in any of those circuits, qualified immunity would have been no defense against petitioner's nominal damages claim.

The criteria for this Court's review are plainly met in this case. The conflict is clear. Seven circuits recognize that the right to film police was clearly established by 2018. The Fourth Circuit held the opposite below: that the right to film police was *not* clearly established by 2018. Further percolation on this question is useless: the arguments regarding whether filming police is First Amendment protected activity have been thoroughly vetted. No circuit has ever held that filming police is not First Amendment protected activity. The only dispute between the Fourth Circuit and the other circuits is whether it was clearly established by 2018. It was. Only this Court's intervention can rectify this conflict by recognizing that it was clearly established by 2018 that filming police in public is First Amendment protected activity. There are no conceivable obstacles to resolving that question in this Court.

The question presented is significant, and its correct disposition is critical to citizens and law enforcement alike.[1] Citizens film police activity every day in the United States in widely varying circumstances as a form of expression, as a way to document police activity, and

[1] As evidenced by the number of briefs, memoranda, and reports the United States has filed in which the United States has expressed the view that the First Amendment clearly protects the right of citizens to film police, *see infra* pp. 24-25, the United States likely has a substantial interest in the correct resolution of the question presented.

as a means of ensuring the accountability and safety of those involved in police-citizen interactions. Yet, as evidenced by the sheer number of cases that have arisen and continue to arise every year in which the right to film police is questioned, and in which the parameters of that right are fiercely contested, this is a recurrent nationally important issue. This case presents the Court an opportunity to settle this issue nationally so that police officers, citizens, and journalists understand the rules when it comes to the First Amendment rights of citizens to film police in the discharge of their duties in public. Because this case presents an optimal vehicle for resolving this important question of federal law, the petition should be granted.

1. On October 9, 2018, Winterville Police Officers William Blake Ellis and Myers Parker Helms IV stopped a vehicle in which petitioner was a passenger. Pet. App. 4a, 26a, 68a-69a. Like thousands of Americans who are involved in police interactions each year, petitioner took out his cellphone and started filming. *Id.* He used Facebook Live, a Facebook feature that allows users to record and post videos to Facebook in real time.[2] *Id.*

For petitioner, the decision to record the stop was deeply personal: He had been the victim of a brutal beating at the hands of police officers in the nearby town of Greenville ten months earlier. Pet. App. 68a. That incident also involved a traffic stop of a vehicle in which petitioner was a passenger. *Id.* During the Greenville traffic stop, the officers involved forced petitioner to exit the vehicle, whereupon they tased, choked, and severely beat him. *Id.* Petitioner was then charged with two counts of violating N.C. Gen. Stat. § 14-223 (misdemeanor resisting a public officer) and one count of

[2] The full recording is available on Facebook. *See* https://bit.ly/3pb5FGF.

violating N.C. Gen. Stat. § 14-34.7(C)(1) (felony assault inflicting physical injury on a law enforcement officer). *Id.* The District Attorney ultimately dropped all charges against petitioner relating to the Greenville incident. *Id.* Petitioner's experience during that incident spurred him to become a civic activist promoting greater accountability for law enforcement. *Id.* Petitioner also took precautions to ensure that any future interactions he had with law enforcement would be recorded for protection. *Id.*

At the outset of the October 2018 stop, while the driver and petitioner waited for the officers to approach the vehicle, petitioner began recording via Facebook Live. Pet. App. 74a-95a (video transcript). At the beginning of the recording, the driver can be heard speaking on his cellphone, describing the location of the traffic stop. Pet. App. 76a-77a (at 1:37-2:54). As Officer Ellis ran the driver's license, the driver continued his cellphone conversation, explaining that the police officers had been following the car for some time and that he believed that he and petitioner had been racially profiled. Pet. App. 82a (at 5:27-6:10). Officer Helms asked for petitioner's name and then returned to the patrol vehicle. Pet. App. 80a-81a (at 4:44-4:52). As petitioner and the driver waited for the officers, petitioner assured viewers that he and the driver were fine and encouraged them to regularly record their interactions with police. Pet. App. 85a (at 8:52-8:57).

When Officer Helms returned to the vehicle, he addressed petitioner specifically: "What have we got? Facebook Live cous?" Pet. App. 88a (at 11:42). As soon as petitioner responded affirmatively, Officer Helms abruptly assaulted petitioner, thrusting his arm through the passenger window in an attempt to seize petitioner's cellphone, pulling on petitioner's seatbelt and t-shirt in the process. Pet. App. 26a-27a, 69a. As he grabbed at

petitioner, Officer Helms told him: "We ain't gonna do Facebook Live, because that's an officer safety issue." Pet. App. 26a, 69a, 88a (at 11:44).

Directly following the altercation, Officer Ellis returned to the vehicle to issue citations to the driver. Pet. App. 69a. As he did so, he stated: "Facebook Live … we're not gonna have, okay, because that lets everybody y'all follow on Facebook [know] that we're out here. There might just be one me next time …. It lets everybody know where y'all are at. We're not gonna have, okay …." Pet. App. 69a-70a; *see also* Pet. App. 90a (at 12:40-12:41). He continued: "[I]f you're on Facebook Live, your phone is gonna be taken from you.… And if you don't want to give up your phone, you'll go to jail." Pet. App. 91a (at 12:55-12:58).

Petitioner asked Officer Ellis: "Is that a law?" *Id.* Officer Ellis replied that it was "an officer safety issue" and "the RDO"—an apparent reference to N.C. Gen. Stat. Ann. § 14-223, which makes it a Class 2 misdemeanor for any person to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge an official duty." Pet. App. 91a (at 13:02-13:03); *see also* Pet. App. 5a n.1. Officer Helms said nothing to correct or amend any of Officer Ellis's statements during this interaction. Pet. App. 88a-92a.

2. Petitioner brought suit against Officer Helms in his individual capacity for his retaliatory assault and threat, alleging that Officer Helms physically attacked petitioner in retaliation for exercising his First Amendment right to film police and threatened to further deprive Petitioner of that right if he attempted to livestream police encounters in the future. Pet. App. 64a-73a (complaint); *see also* Pet. App. 72a. He also sued Officers Helms and Ellis in their official capacities and the Winterville Police Department under 42 U.S.C. § 1983, alleging that the Department had an

unconstitutional policy prohibiting citizens from recording and livestreaming law enforcement in the public performance of their duties. Pet. App. 71a. Petitioner sought one dollar in nominal damages and a declaratory judgment that citizens have a First Amendment right "to both (a) record police officers in the public performance of their duties and (b) broadcast such recording in real-time." Pet. App. 72a-73a.

3. In August 2020, the district court granted defendants' partial motion to dismiss as it related to the Winterville Police Department and Officer Helms in his individual capacity. Pet. App. 41a-61a. As to the Department, the district court found no statute or caselaw authorizing suit against a North Carolina police department. Pet. App. 45a-47a. The district court then dismissed the claim against Officer Helms in his individual capacity on qualified-immunity grounds. Pet. App. 47a-56a. Applying the familiar retaliation test, the district court assumed without deciding that petitioner's recording was constitutionally protected speech, that Officer Helms's actions adversely affected that activity, and that there was a clear causal relationship between petitioner's protected activity and Officer Helms's conduct. Pet. App. 49a-51a (quotation marks omitted). Ultimately, however, the district court dismissed petitioner's claim against Officer Helms in his individual capacity because petitioner's First Amendment right to record and real-time broadcast the traffic stop was not clearly established at the time of the incident. Pet. App. 56a. In reaching this holding, the district court distinguished caselaw from other circuits as involving the rights of bystanders (not passengers) to record (not livestream). Pet. App. 51a-56a.

4. In July 2021, the district court disposed of petitioner's remaining Section 1983 claims against Officers Ellis and Helms in their official capacities,

finding that the alleged policy against filming police officers did not violate the First Amendment. Pet. App. 25a-40a.

5. The Fourth Circuit affirmed in part and vacated in part. Pet. App. 1a-24a. The panel first held that petitioner plausibly alleged that the Town had a policy prohibiting citizens from livestreaming traffic stops and that such a policy "reaches protected speech" and may be unconstitutional. Pet. App. 5a-6a. In particular, the panel found that the Town did not meet its burden of justifying this intrusion on protected speech by proving that the policy "furthers or is tailored to" the Town's interest in officer safety. Pet. App. 11a-12a.

The panel further held, however, that qualified immunity barred petitioner's claim against Officer Helms because "[i]t was not clearly established that Officer Helms's actions violated [Petitioner's] First Amendment rights." Pet. App. 16a. Departing sharply from the traditional retaliation framework and the district court's retaliation analysis, *see* Pet. App. 49a-56a, the panel analyzed petitioner's retaliation claim through an unlawful prior restraint lens, asking only whether a reasonable officer in Officer Helms's position would understand that his "actions" violated a constitutional right. Pet. App. 16a. The panel held that such an officer would not, as "no precedent in [the Fourth Circuit] nor consensus of authority from the other Circuits established that Officer Helms's actions were unconstitutional." Pet. App. 15a. In reaching this holding, the panel distinguished caselaw from other circuits holding that bystanders have the right to record police encounters, finding that the distinctions between passenger and bystander, and between recording and livestreaming, "make all the difference." Pet. App. 14a-15a. The panel acknowledged the tension between allowing petitioner's official-capacity claim to proceed, on

the basis that the policy violates the First Amendment, while not allowing petitioner's claim against Officer Helms to proceed, on the basis that it was not clearly established that his actions were unconstitutional. Pet. App. 15a-16a. Nonetheless, the panel affirmed the district court's dismissal of the § 1983 claim against Officer Helms. *Id.*

Judge Niemeyer concurred in the judgment. Judge Niemeyer agreed that qualified immunity barred petitioner's claims against Officer Helms and that remand was appropriate to determine the existence and constitutionality of the Town's livestreaming policy. Pet. App. 17a. He wrote separately to explain that, because "the issues in this case arose in the context of a lawful Fourth Amendment seizure," the prohibition on livestreaming was a part of the seizure, and therefore may have been a reasonable intrusion of liberty interests under a Fourth Amendment analysis. Pet. App. 17a–24a.

6. The Fourth Circuit denied timely petitions by both parties for rehearing en banc. Pet. App. 62a-63a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A STARK AND IMPORTANT CONFLICT OVER A SUBSTANTIAL QUESTION

The decision below creates a circuit conflict over whether it was clearly established at the time of the incident in this case, in October 2018, that filming police in public is First Amendment protected activity. By October 2018, it was clearly established in seven circuits that filming police in the discharge of their duties in public is First Amendment protected activity. No circuit had ever suggested a contrary position.

Continued uncertainty over this fundamental First Amendment question is untenable. The ubiquity of cellphones means that nearly every person has a camera in her pocket. And the now ever-present capacity to film

police encounters has fundamentally transformed the national conversations about policing and criminal justice. The Court should recognize that the right to film police carrying out their duties in public has been clearly established since 2018, or at least clearly establish the right going forward. Definitive guidance over this recurring question is overdue and critically important. The circuit conflict is undeniable, and it should be resolved by this Court in this case.

1.a. The decision below conflicts with settled law in the Ninth Circuit. In *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), the Ninth Circuit held that as of August 1990 it was clearly established that a police officer who assaults a citizen "in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest" violates that person's First Amendment rights. 55 F.3d at 438-39.

In *Fordyce*, the plaintiff, who apparently considered himself part of a protest, had volunteered to videotape the demonstration. *Id.* at 438. He alleged that, in retaliation for filming the protest, a Seattle police officer "deliberately and violently smashed" his camera into his face. *Id.* at 438-39. Following the assault, the plaintiff sued the City of Seattle and eight Seattle police officers "pursuant to 42 U.S.C. § 1983 for interfering with his First Amendment right to gather news." *Id.* at 438. The district court granted the officers summary judgment on the basis of qualified immunity. *Id.* at 438-39. The Ninth Circuit reversed. *Id.* at 439. The court held that there was "a genuine issue of material fact … regarding whether Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest." *Id.* "Thus, as to Officer Elster, the matter did not merit a grant of summary judgment with respect … to the First

Amendment claims under 42 U.S.C. § 1983." *Id.* That claim, the Ninth Circuit held, "merit[s] a trial." *Id.*

For more than three decades and across dozens of cases, courts in the Ninth Circuit have recognized that *Fordyce* clearly established that there is a right to film matters of public interest, a right that includes the right to film police officers in the public discharge of their duties.[3] *See Bernal v. Sacramento Cnty. Sheriff's Dep't*, 73 F.4th 678, 699 (9th Cir. 2023) ("[W]e held in *Fordyce* that the First Amendment protects the right to film matters of public interest."); *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) ("The First Amendment protects the right to photograph and record matters of public interest …. This includes the right to record law enforcement officers engaged in the exercise of their official duties in public places."). Had this case arisen in the Ninth Circuit, qualified immunity would have been no defense to petitioner's nominal damages claim.

b. The decision below also conflicts with settled law in the Eleventh Circuit. In *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000), the Eleventh Circuit held that citizens have "a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." 212 F.3d at

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[3] *See, e.g.*, *Smith v. Cnty. of Orange*, No. 8:21-CV-00265-SPG-KES, 2023 WL 4680798, at *11 (C.D. Cal. June 23, 2023); *Baca v. Anderson*, No. 22-cv-02461-WHO, 2022 WL 7094267, at *5 (N.D. Cal. Oct. 12, 2022) ("It has been clear in this circuit since at least 1995 that the First Amendment protects a 'right to film matters of public interest.'"); *Barich v. City of Cotati*, No. 15-CV-00350-VC, 2015 WL 6157488, at *1 (N.D. Cal. Oct. 20, 2015) (same); *Patterson v. Fonbuena*, No. 2:18-CV-518 JCM (GWF), 2019 WL 11638952, at *3 (D. Nev. Aug. 2, 2019) ("The Ninth Circuit has firmly established the right to film matters of public concern, including police activity.").

1333. In *Smith*, the plaintiffs alleged that the City of Cumming, Georgia, and its police chief had, among other things, prevented one of the plaintiffs "from videotaping police actions in violation of [his] First Amendment rights." *Id.* at 1332.

The Eleventh Circuit held that the right in question was clearly established. In support, the court reasoned that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Id.* The court also pointed to earlier cases holding that there is a right to film matters of public interest generally, and to film government officials specifically, including *Fordyce*, 55 F.3d at 439. *Smith*, 212 F.3d at 1333. The court nonetheless held that the plaintiffs had failed to establish that the right had been violated under the facts adduced at summary judgment. *See id.* at 1332-33.

Courts in the Eleventh Circuit have long recognized that *Smith* clearly established the right to film police officers in the discharge of their duties in public.[4] *See Khoury v. Miami-Dade Cnty. Sch. Bd.*, 4 F.4th 1118, 1129 (11th Cir. 2021) (filming of police officer was clearly protected by the First Amendment under *Smith*); *Toole v. City of Atlanta*, 798 F. App'x 381, 388 (11th Cir. 2019)

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[4] *See Bacon v. McKeithen*, No. 5:14-cv-37-rs-cjk, 2014 WL 12479640, at *4 (N.D. Fla. Aug. 28, 2014) (denying Police Officer Defendant's qualified immunity defense for Plaintiff's First Amendment claim of videotaping a traffic stop given that this right is clearly established in the Eleventh Circuit); *Dunn v. City of Fort Valley*, 464 F. Supp. 3d 1347, 1366 (M.D. Ga. 2020) (affirming the holding from *City of Cumming* and noting that Plaintiff's conduct of recording police officers as they carry out their duties in public is a valid exercise of Plaintiff's "First Amendment right … and accepting that as true, Defendants lacked the authority to stop him").

(similar). Had this case arisen in the Eleventh Circuit, respondent would not have been granted qualified immunity against petitioner's nominal damages claim.

c. The decision below is also squarely at odds with settled law in the First Circuit. In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), the First Circuit held that it was clearly established by October 2007 that citizens have a "right to film government officials, including law enforcement officers, in the discharge of their duties in a public space," calling it "a basic, vital, and well-established liberty safeguarded by the First Amendment." 655 F.3d at 79, 85.

In *Glik*, police arrested a bystander, Simon Glik, after he used his cellphone's video camera to film police officers using excessive force in the course of arresting a young man on the Boston Common. *Id.* at 79-80. After placing the man in handcuffs, one of the officers turned to Glik and said, "I think you have taken enough pictures." Glik replied, "I am recording this. I saw you punch him." An officer then approached Glik and asked if Glik's cellphone recorded audio." *Id.* at 80. "When Glik affirmed that he was recording audio, the officer placed him in handcuffs, arresting him for, *inter alia*, unlawful audio recording in violation of Massachusetts's wiretap statute." *Id.* The Boston Municipal Court eventually disposed of the wiretap charge, explaining that the fact that the "officers were unhappy they were being recorded during an arrest … does not make a lawful exercise of a First Amendment right a crime." *Id.*

"In February 2010, Glik filed a civil rights action against the officers and the City of Boston." *Id.* As relevant here, "[t]he complaint included claims under 42 U.S.C. § 1983 for violations of" Glik's First Amendment rights. *Id.* The district court denied the officer's motion to dismiss on qualified immunity grounds, concluding that "this First Amendment right publicly to record the

activities of police officers on public business is established." *Id.* at 80.

On interlocutory appeal from the denial of the officers' motion, the First Circuit affirmed. *Id.* 81-89. The First Circuit concluded that "[b]asic First Amendment principles, along with case law from this and other circuits" "unambiguously" established that there was at the time of the incident a clearly established "constitutionally protected right to videotape police carrying out their duties in public." *Id.* at 82.

The First Circuit found the right was clearly established for multiple reasons. At the outset, the First Circuit looked to this Court's cases recognizing that the First Amendment protects "a range of conduct related to the gathering and dissemination of information." *Id.* at 82. The First Circuit also explained that the right is rooted in this Court's cases recognizing a First Amendment right to gather news and a First Amendment right to report on and disseminate information about government affairs. *Id.* at 83-84. "The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles." *Id.* at 82.

The First Circuit also looked to earlier circuit-level cases finding a First Amendment right to film police in the discharge of their duties, including the Ninth Circuit's decision in *Fordyce*, 55 F.3d at 439, and the Eleventh Circuit's decision in *Smith*, 212 F.3d at 1333, and its own earlier case in *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999), a case in which a local journalist succeeded in a First Amendment § 1983 claim arising from his arrest in the course of filming officials in the hallway outside a public meeting of a historic district commission, *see Glik*, 655 F.3d at 83.

The First Circuit found "the brevity of the First Amendment discussion" in those earlier right-to-film cases "particularly notable." *Id.* at 84-85. "This terseness," the First Circuit held, "implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment's protections in this area." *Id.* at 85. The First Circuit also explained that the absence of an earlier case involving precisely the same fact pattern did not require the court to grant qualified immunity to the officers because the "'clearly established' inquiry does 'not require a case directly on point.'" *Id.* at 84-85 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The First Circuit thus had "no trouble concluding that the state of the law at the time of the alleged violation gave the defendants fair warning that their particular conduct was unconstitutional." *Id.* (cleaned up).

The First Circuit has consistently applied this precedent across a range of factual circumstances, holding repeatedly that "the right to film [police]" subject only to "reasonable time place and manner restrictions" is clearly established.[5] Had petitioner's case arisen a few states away in the First Circuit, the outcome would have been starkly different than the decision below.

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[5] *See Gericke v. Begin*, 753 F.3d 1, 9 (1st Cir. 2014) (holding that the "right to film the traffic stop was clearly established" at "the time of the underlying events" in *Glik*); *United States v. Owens*, No. 2:20-cr-00041-jdl, 2021 WL 2939935, at *10 (D. Maine July 13, 2021) (citing *Gericke* and holding that "[a] reasonable suspicion cannot be grounded on a person's constitutionally-protected recording of a police encounter"); *Martin v. Evans*, 241 F. Supp. 3d 276, 287 (D. Mass. 2017) ("[T]he First Circuit has expressly recognized that the First Amendment protects 'a citizens right to film government officials, including law enforcement officers, in the discharge of their duties in a public space.'" (cleaned up)); *Project Veritas Action Fund v. Conley*, 244 F. Supp. 3d 256, 262 (D. Mass. 2017) (same).

2. The decision below also conflicts with settled law in the Third, Fifth, Seventh, and Tenth Circuits. Each of those Courts, building on the established consensus of authority, have held that the right to film police in the discharge of their duties in public is protected by the First Amendment.

a. In 2012, in *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), the Seventh Circuit held that restrictions on the recording of police officers performing their duties in public places and engaging in public communications audible to persons who witness the events violates the First Amendment's free-speech and free-press guarantees. 679 F.3d at 586-87. The Seventh Circuit reviewed the denial of a preliminary injunction against the enforcement of the Illinois eavesdropping statute—which made it a class-one felony to create audio or audiovisual recordings of law enforcement officers performing their duties. *Id.* at 586, 608. In holding that the statute was "likely unconstitutional," *id.* at 608, the court explained that "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording," *id.* at 595. And because the statute "interferes with the gathering and dissemination of information about government officials performing their duties in public … the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny." *Id.* at 600. Courts have since recognized that *Alvarez* clearly established that there is a First Amendment right to record police officers in the discharge of their duties in public.[6] Had this case arisen in the Seventh

[6] *See Hoeppner v. Billeb*, No. 17-cv-430-bbc, 2018 WL 5282898, at *12 (W.D. Wis. Oct. 24, 2018) (applying *Alvarez* to hold that there

Circuit, qualified immunity would not have barred petitioner's claim.

b. In 2017, in *Fields v. City of Philadelphia*, the Third Circuit held that "the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public." 862 F.3d 353, 356 (3d Cir. 2017). *Fields* held that the right was not clearly established at the time of the events in that case—in 2014—but, recognizing the importance of the question, established the right prospectively. *Id.* at 358, 360-62. Courts in the Third Circuit recognize that *Fields* clearly established the right.[7] Because *Fields* was decided in 2017, the Third Circuit would not have hesitated to apply *Fields* to hold that petitioner had engaged in First Amendment protected conduct at the time of the incident in this case.

c. In 2017, in *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017), the Fifth Circuit held that "a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions." 848

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is a constitutionally protected First Amendment right to record police officers performing their duties in public).

[7] *Karns v. Shanahan*, 879 F.3d 504, 524 n.12 (3d Cir. 2018) (acknowledging that since *Fields*, the right was "clearly established in this Circuit"); *Aguilar v. Moyer*, No. 3:21-CV-595, 2021 WL 5804619, at *6 (M.D. Pa. Dec. 7, 2021) ("The right of individuals to record public police activity has been clearly established within the Third Circuit since 2017."); *Booker v. Borough of N. Braddock*, No. 2:19-CV-01649-CCW, 2021 WL 37618, at *6 (W.D. Pa. Jan. 5, 2021) ("Furthermore, the right to record police officers, such as Butler, conducting official police activity, such as a traffic stop, in a public area and without interfering with the police activity, was clearly established at the time Plaintiff was arrested and charges filed against her in August 2019."); *Contreras v. Conrad*, No. 3:17-CV-02360, 2020 WL 2193429, at *10 (M.D. Pa. May 6, 2020) (acknowledging that *Fields* clearly established "First Amendment right to record the police").

F.3d at 688. The court held that the right was not clearly established as of September 2015 but held that the right was clearly established going forward. *Id.* at 687-88. The Fifth Circuit noted that "[f]ilming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy." *Id.* at 689. Courts have recognized that *Turner* clearly established that individuals have a First Amendment right to film police.[8] Because petitioner's case arose after *Turner* was decided, had it arisen in the Fifth Circuit, the outcome would be decidedly different from the decision below.

d. In 2022, in *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022), the Tenth Circuit held that "there is a First Amendment right to film the police performing their duties in public." 38 F.4th at 1292. Surveying the consensus of cases from other circuits, the Tenth Circuit concluded that there was a national consensus of persuasive authority clearly establishing a right to film police officers by 2017. *See id.* at 1288-97. Had petitioner's case arisen in the Tenth Circuit, or had the Fourth Circuit applied the reasoning applied in *Irizarry*,

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[8] *Zinter v. Salvaggio*, 610 F. Supp. 3d 919, 956 (W.D. Tex. 2022) ("By June 2018, the Fifth Circuit had clearly established that individuals have a First Amendment right to film the police."); *Reyes v. City of Austin, Inc.*, No. 1:21-CV-00992-LY-SH, 2021 WL 5871543, at *2 (W.D. Tex. Nov. 29, 2021) (similar); *Miller v. Salvaggio*, No. SA-20-CV-00642-JKP, 2021 WL 3474006, at *5 (W.D. Tex. Aug. 6, 2021) (similar); *Rincon v. Elizondo*, No. 5:21-CV-45, 2022 WL 4241662, at *5 (S.D. Tex. Aug. 24, 2022) (similar); *Hill v. Haren*, No. SA20CV985OLGHJB, 2023 WL 3444074, at *6 (W.D. Tex. Mar. 20, 2023), *report and recommendation adopted*, 2023 WL 3441567 (W.D. Tex. May 11, 2023) (similar); *Blakely v. Andrade*, 360 F. Supp. 3d 453, 484 (N.D. Tex. 2019) (similar).

the outcome would have been unquestionably different than the decision of the court below.

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The decision below breaks with clearly established law in numerous circuits. The conflict over the First Amendment right to record police is clear. Until this Court intervenes, parties will continue to face widely varying outcomes depending on the circuit. Review is urgently warranted.

II. THE QUESTION PRESENTED IS SIGNIFICANT AND SHOULD BE REVIEWED IN THIS CASE

1. Whether filming police in the discharge of their duties in public is activity protected by the First Amendment is a critically important question that recurs hundreds of times each year in police-citizen encounters with profound real-world stakes. The importance of clearly establishing this First Amendment right has been widely-recognized by scholars.[9] It is essential for all stakeholders to know the scope and extent of police officers' authority to restrict the ability of citizens to film them while they discharge their duties. As it now stands, it is unclear to parties in the Second, Sixth, Eighth, and D.C. circuits whether and when they have the right to film police officers in the discharge of their duties in public. This is a question of national significance whose

[9] *See, e.g.*, Jocelyn Simonson, *Beyond Body Cameras: Defending A Robust Right to Record the Police*, 104 Geo. L.J. 1559 (2016); Matthew Slaughter, *First Amendment Right to Record Police: When Clearly Established Is Not Clear Enough*, 49 J. Marshall L. Rev. 101 (2015); 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 (2015); Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. Ill. U. L. Rev. 485 (2013).

parameters should be determined by this Court. The importance of this Court's review is heightened by the fact that there is now a widespread public understanding that there already is a clearly established First Amendment right to film police, driven in part by countless media pieces asserting that this right exists.

a. The countless reported decisions litigating this issue confirm its importance, and there is no genuine dispute that the issue arises constantly in police-citizen interactions nationwide. There are over 50,000 traffic stops every day in the United States and over 50 million overall every year.[10] An estimated one million civilians experience the use of force, or threats of force, by police each year, and approximately 1,200 civilians were killed by police in 2022.[11] These encounters collectively present the potential for millions of encounters each year in which individuals might film the police in the discharge of their duties on matters of exceptional public concern. Uncertainty regarding this fundamental right in these encounters leaves civilians vulnerable to retaliation and all too often chills the exercise of their speech such that these encounters are never filmed.

b. The ability of individuals to document police activity through filming is of paramount importance for police accountability and citizen and officer safety. In recent years, filming has "spurred action at all levels of

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[10] Stanford, *Findings*, Open Policing, https://bit.ly/3LlsK3Y; Contacts Between Police and the Public, 2018, U.S. Department of Justice (Dec. 2020, Revised Feb. 2023).

[11] *Facts and Figures on Injuries Caused by Law Enforcement*, University of Chicago, https://bit.ly/3rbBEdj; *2022 Police Violence Report*, Mapping Police Violence, https://policeviolencereport.org/. Since 2017, at least 600 of such civilian killings occurred during routine traffic stops. Sam Levin, *US Police Have Killed Nearly 600 People Since 2017, Data Shows*, The Guardian (Apr. 21, 2022), https://bit.ly/3Pe7Btn.

government to address police misconduct and to protect civil rights." *Fields*, 862 F.3d at 358, 360. Civilian videos create an independent record of encounters, and allow the public to fact-check police accounts, exposing instances of police misconduct and exculpating falsely accused individuals, saving them from imprisonment and other life-changing penalties.[12] Conversely, civilian videos can provide different angles and additional context to police body camera videos, and can therefore be important sources of evidence in litigation.

The profound impact that cellphone videos have had on national political discourse illustrates the fundamental importance of the question presented. The cellphone video of George Floyd's murder is emblematic of the critical importance of civilian filming for police accountability, public dialogue, and systemic change. It was only because of a bystander video, filmed on a cellphone camera, that the true circumstances of George Floyd's death were revealed.

And that is far from the only instance of such videos contradicting police accounts. The death of Eric Garner at the hands of police in 2014 became national news because there was a recording of what happened. Eric Garner's last words—"I can't breathe"—were captured by Ramsey Orta, who filmed as officers choked Mr. Garner to death. "I can't breathe" became a rallying cry for those protesting against police violence.

The 2016 death of Philando Castile similarly became national news when his fiancé Diamond Reynolds, a passenger in the car Mr. Castile was driving, began livestreaming the moments after he was shot by a police officer during a traffic stop. The video showed Mr.

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[12] Nick Pinto, *Jury Finds Occupy Wall Street Protester Innocent After Video Contradicts Police Testimony*, The Village Voice (Mar. 1, 2013), https://bit.ly/3PLuhTz.

Castile bleeding on the ground while officers failed to provide medical attention.[13] Asked why she instantly started filming, Ms. Reynolds's stated: "Because I know that the people are not protected against the police," and "I wanted to make sure that everyone could see that if I was to die in front of my daughter, someone would know the truth."[14]

The 1991 civilian video of Los Angeles police officers beating Rodney King led to widespread public outcry. The response led to the prosecution of the officers involved, an investigation revealing a pattern of civil rights violations by the Los Angeles Police, and federal legislation empowering the Department of Justice to take action against police departments with similar patterns of misconduct. *See* U.S. DEP'T OF JUSTICE, REPORT OF THE INDEP. COMM'N OF THE LOS ANGELES POLICE DEP'T (1991); 42 U.S.C. § 14141.

These and countless other incidents make clear that filming police encounters falls squarely and obviously within the First Amendment's core protections. Individuals who witness police interactions must have the right to film them. Civilian filming—like other First Amendment protected activity—plays a powerful role in bringing perpetrators to justice, informing reasoned and important public debate, and driving systemic reforms.

2.a. The legal importance of this case is evident. The First Amendment is rooted in the nation's profound

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[13] Matt Furber and Richard Pérez Peña, *After Philando Castile's Killing, Obama Calls Police Shooting 'an American Issue'*, N.Y. Times (July 7, 2016), https://bit.ly/3PiSRtc; Ralph Ellis and Bill Kirkos, *Officer Who Shot Philando Castile Found Not Guilty on All Counts*, CNN (June 16, 2017), https://bit.ly/3PhIsOn.

[14] *Fearing for Her Life, Philando Castile's Girlfriend Livestreamed Fatal Police Shooting*, CBS News, June 6, 2017, https://bit.ly/30Ybg9f.

"commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Civilian videos are critical to informing public discourse about issues of police accountability, race, and the use of force. The core purpose of the First Amendment is to protect the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Civilian videos capturing instances of police misconduct have played a unique role in serving this exact purpose and must be protected.

The answer to the First Amendment question in this case should have been obvious to any reasonable police officer a decade before the events in this case. By 2011, this Court had definitively held that generating and disseminating information is speech safeguarded under the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). The Court had also unequivocally recognized that "'a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)). Indeed, seven circuits have already recognized the right to film police, and no circuit has held that filming police is not First Amendment protected activity.

This case thus offers an opportunity to reaffirm that the "qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts," *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016), that public officials are not free to disregard "fairly specific statements of principle" in this Court's precedents, *Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004), and that government officials cannot shield obviously unconstitutional conduct by claiming

they are "incapable of drawing logical inferences, reasoning by analogy, or exercising common sense," *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019). It also offers the Court a chance to confirm the principle that "it defeats the purpose of § 1983 to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas)." *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508-09 (6th Cir. 2012) (Sutton, J.)).

b. The Department of Justice has recognized that there is a "First Amendment right to observe and record police officers engaged in the public discharge of their duties" and has emphasized the importance of policies that "affirmatively set forth" that right.[15] U.S. DEP'T OF JUSTICE, RE: CHRISTOPHER SHARP V. BALTIMORE CITY POLICE DEP'T, ET AL., 2, 4 (May 14, 2012). As the Department recently told the Tenth Circuit in an *amicus* brief in *Irizarry*, the question "whether the First Amendment provides a qualified right to record law-

[15] The Department of Justice has consistently reiterated that the right to record police officers is protected by the First Amendment. *See, e.g.*, *United States v. City of New Orleans*, No. 2:12-cv-1924, ECF Dkt. 565 at 45 (E.D. La. Oct. 2, 2018) (settlement agreement); *United States v. Police Dep't of Balt. City*, No. 1:17-cv-99, ECF Dkt. 2-2 at 84 (D. Md. Jan. 1, 2017) (settlement agreement); *United States v. City of Newark*, No. 2:16-cv-1731, ECF Dkt. 4-1 at 22 (D.N.J. Apr. 29, 2016) (settlement agreement); *United States v. City of Ferguson*, No. 4:16-cv-180, ECF Dkt. 41 at 27 (E.D. Mo. Apr. 19, 2016) (settlement agreement clarifying that "[t]he use of a recording device during a police encounter shall not in itself be considered a threat to officer safety"); *Garcia v. Montgomery County*, No. 8:12-cv-3592, ECF Dkt. 15 at 2 (D. Md. Mar. 4, 2013) (Department of Justice statement of interest emphasizing that "recording a police officer performing duties on a public street" is "[c]ore First Amendment conduct"); *United States v. Town of East Haven*, No. 3:12-cv-1652, ECF Dkt. 2-1 at 20 (D. Conn. Nov. 20, 2012) (settlement agreement).

enforcement officers performing their duties in public" is "an important issue." Brief for the United States as Amicus Curiae in Support of Neither Party at 6, *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022) (No. 21-1247), 2021 WL 5577946, at *6. And "as the other circuits to consider this issue have all recognized, the right to record law-enforcement activity is firmly rooted in well-settled First Amendment principles." *Id.* at *7.

The widespread consensus that filming police is First Amendment protected activity, recognized not only by seven circuits but also by the Department of Justice, the media, civil society groups, and the public at large, indicates that the right to film police is an issue that has sufficiently percolated in the public discourse to warrant this Court's definitive resolution.

3. The fact that this is a retaliation case, decided on a motion to dismiss, makes this an especially ideal vehicle for addressing the question presented. In a retaliation case, the question whether a citizen was exercising a protected right is distinct and separate from the question whether an official's conduct amounted to retaliation for exercising that right. *See Van Deelen v. Johnson*, 497 F.3d 1151, 1155–56 (10th Cir. 2007) (Gorsuch, J.). As the district court correctly recognized, *see* Pet. App. 50a-52a, the qualified immunity analysis in this case turns *only* on the question whether it was clearly established in 2018 that petitioner's conduct was First Amendment protected activity.[16]

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[16] The Fourth Circuit panel below incorrectly framed the question in this case as whether Officer Helms would have understood that prohibiting petitioner from filming violated the First Amendment. Pet. App. 15a-16a. But that is not the allegation in the complaint: the allegation is that Officer Helms assaulted petitioner *in retaliation for* filming. This is not a case where a police officer prohibited a citizen from filming mistakenly believing he had the

This case is therefore an optimal vehicle for deciding this important question. The dispute turns on a pure question of law: whether the First Amendment right to film police officers in the discharge of their duties was clearly established in October 2018. The question presented was squarely raised and resolved below, and the court treated it as dispositive. There is no doubt that this issue was outcome-determinative. This case presents an opportunity for the Court to hold that, even if the right was not clearly established in October 2018, it is clearly established going forward.

Nor are there any factual or procedural obstacles to resolving the question presented. The relevant facts are undisputed and directly implicate the circuit conflict. This case was decided on a motion to dismiss, and the allegations in the complaint are that an officer retaliated against petitioner for recording him by assaulting petitioner and threatening him with arrest. Petitioner would have prevailed in any of the seven circuits that had previously confronted this question. This clean presentation is the perfect backdrop for deciding this significant constitutional question.

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legal authority to do so; this is a case where an officer *retaliated* against petitioner for filming as punishment for filming him.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2023