No. 21-1247

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ABADE IRIZARRY,
Plaintiff-Appellant,
v.
AHMED YEHIA,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Colorado (Civil Action No. 20-cv-02881, Hon. Nina Y. Wang)

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Matthew R. Cushing
Counsel of record
Elizabeth Truitt
UNIVERSITY OF COLORADO LAW SCHOOL APPELLATE ADVOCACY PRACTICUM
2450 Kittredge Loop Road
Boulder, CO 80309
(303) 735-6554
matthew.cushing@colorado.edu
elizabeth.truitt-prac@colorado.edu

Counsel for Amici Curiae First Amendment Scholars

ORAL ARGUMENT REQUESTED

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There are no prior or related appeals.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors—many of whom teach in the State of Colorado—who write in First Amendment and privacy law. They teach and publish on the First Amendment and privacy, and their expertise can aid the Court in the resolution of this case. In this brief, *amici* outline the contours of the clearly established First Amendment right to record public officials performing public duties in public locations, as well as the theoretical underpinnings of that right, and urge this Court to join its sister circuits in holding that such a right exists.[2] The following list of *amici*'s employment and titles are for identification purposes only.

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[1] In accordance with Rule 29 of the Federal Rules of Appellate Procedure, the parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, and no party, party's counsel, or person other than *amici*, has contributed money intended to fund the preparation or submission of this brief. This brief has been prepared and joined by individuals affiliated with various law schools, but it does not purport to present any institution's views.

[2] *Amici* believe that the right to record in public-cubed settings was clearly established as of 2019, and this Court should say as much. While *amici* support reversal, this brief focuses solely on the existence and underpinnings of the right to record.

Jane Bambauer is a Professor of Law at the University of Arizona James E. Rogers College of Law. Her scholarship focuses on law and technology and data governance, including First Amendment protection for data.

Ashutosh Bhagwat is the Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality at the University of California at Davis School of Law. His recent scholarship has focused on many aspects of First Amendment theory and doctrine, including the right to record.

Clay Calvert is a Professor of Law and the Brechner Eminent Scholar in Mass Communication at the University of Florida, where he also directs the Marion B. Brechner First Amendment Project. His scholarship focuses on the First Amendment, including the right to record.

Alan K. Chen is the Thompson G. Marsh Law Alumni Professor at the University of Denver Sturm College of Law. His scholarship focuses on issues concerning free speech doctrine and theory, including the right to record.

Margot E. Kaminski is an Associate Professor of Law at the University of Colorado Law School. Her scholarship focuses on emerging technologies and the relationship between privacy and speech.

Seth F. Kreimer is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School. He writes and teaches on the First Amendment, including the right to record.

Justin Marceau is the Brooks Institute research scholar and Professor of Law at the University of Denver Sturm College of Law. His scholarship on constitutional law includes recent work on First Amendment protection for video recording.

Helen Norton is the University Distinguished Professor and Rothgerber Chair in Constitutional Law at the University of Colorado School of Law. Her scholarship focuses on First Amendment law and antidiscrimination law.

Scott Skinner-Thompson is an Associate Professor of Law at the University of Colorado Law School. His recent scholarship focuses on privacy and the right to record.

ARGUMENT

The substantial weight of circuit authority around the country

recognizes that the First Amendment protects an individual's right to record public officials performing their public duties in public locations (sometimes called a "public-cubed" setting). *See* Part I.A. The First Amendment is key to the function of our democracy: it protects speech and expressive conduct, newsgathering activities, and the right to gather information. Recordings in public-cubed settings serve all of these vital functions. *See* Part I.B And because that right to record had been recognized by numerous circuits at the time of the events giving rise to this suit, the district court was correct to find that the right to record in public-cubed settings was clearly established.

Regardless of how this Court ultimately rules on the qualified immunity question in this case, it should hold that there is a right to record public officials performing their public duties in public locations in this Circuit. *See* Part II. Courts in this Circuit are grappling with right to record cases in the public-cubed context with increasing frequency, risking inconsistent results. This Court should decide the issue now to provide guidance to the lower courts, thereby enhancing judicial efficiency. Such guidance would also be extremely valuable to law enforcement departments and officials in the Tenth Circuit.

I. The First Amendment Protects a Right to Record Public Officials Performing Public Duties in Public Places.

The First Amendment protects an individual's right to record public officials performing public duties in public locations. *See* Part A. As this Court has previously recognized, that position aligns with the weight of circuit authority around the country. *See Sandberg v. Englewood, Colo.*, 727 F. App'x 950, 963 (10th Cir. 2018) (acknowledging holdings in "the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits"). Those six circuits had found a constitutional right to record public officials performing public duties in public locations by the time of the incident in 2019 giving rise to this case. *Id.* Because a constitutional right can be "clearly established" based on "the weight of authority from other circuits," *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006), it was clearly established at the time this case arose that Mr. Irizarry had a right to record the officers. *See* Part B.

A. The Circuits Have Uniformly Recognized the First Amendment Right to Record Public Officials Performing Public Duties in Public Locations.

At the time of Mr. Irizarry's arrest, it was clearly established that an individual has a right to record public officials performing public duties in public spaces. When the weight of authority from other

circuits sides one way on a legal issue, that issue becomes clearly established for purposes of the qualified immunity analysis in this Circuit. *See Anderson*, 469 F.3d at 914.

At the time of the incident in 2019, the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits had already held that the First Amendment protects the right to record public officials performing public duties in public spaces. *See, e.g.*, *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017) ("Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public."); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (finding that the First Amendment protects the right of individuals to record police activities); *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82-83 (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). No circuit had held otherwise.[3] Thus, the right to record police officers

[3] The clear weight of the circuits is even more persuasive in light of the relatively recent proliferation of recording devices in daily life.

performing public duties in public spaces was clearly established as of the time of this incident. *See Anderson*, 469 F.3d at 914.

B. The Right to Record in Public-Cubed Settings Is Grounded in the Theories and Doctrines Underpinning the First Amendment

Circuits have found a right to record in public-cubed settings for good reason: audiovisual recording is analogous to at least three forms of protected First Amendment activity, *see* Part i, and is grounded in First Amendment theory, *see* Part ii.

i. At least three First Amendment doctrines support a right to record public officials performing public duties in public locations.

Audiovisual recording of public officials—police officers, politicians, and other government officers—performing public duties in public locations is analogous to at least three different forms of protected First Amendment activity: an expressive activity in and of itself, *see* Part a; a critical component of speech production, *see* Part b; and a form of newsgathering necessary to our democracy, *see* Part c.

a. Recording is an expressive activity.

Recording can be considered 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).

Expressive activities that communicate a message to the intended audience are protected by the First Amendment. *Spence v. Washington*, 418 U.S. 405, 409 (1974) (hanging modified American flag was protected expressive activity); *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (burning flag was protected expressive activity).

For example, citizen recording of public officials 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." Scott Skinner-Thompson, *Recording as Heckling*, 108 GEO. L.J. 125, 127 (2019). Just as writing words on a page and applying paint to canvas are recognizably protected speech, recording video can be characterized not as conduct but as fully-protected expression. *See, e.g.*, Chen & Marceau, 116 COLUM. L. REV. at 1013-15; Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse and the Right to Record*, 159 U. PA. L. REV. 335, 342 (2011).

b. Recording is a critical component of speech production.

Recording can also be understood as a critical component of the speech-production process. If courts limit themselves to protecting only

the end product (speech), 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, it is often necessary to protect other links in the production and distribution chain, in order 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"); *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.").

The act of recording is thus protected as a necessary link in the production chain and as a corollary right necessary to make meaningful the First Amendment protection for the distribution of the end-product audiovisual recording or movie. *See W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195-96 (10th Cir. 2017) (invalidating trespass statute

that prohibited the collection of resource data on public lands on the grounds that the government could not ban the inputs needed for the creation of speech). Unlike an oral speech, in which the acts of creation and dissemination occur simultaneously, a movie usually has temporally distinct phases of creation and dissemination.[4] Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1033 (2015). In order to fully protect the end-product movie, then, the upstream acts of recording and gathering information must be protected as well, even though they are temporally distinct from dissemination. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010)

[4] Dissemination 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, and freedom of thought requires no audience. Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 82-83 (2014); Kreimer, 159 U. PA. L. REV. at 377-80; *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 993 (1978) (addressing First Amendment protection for diaries); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 285 (2011) (arguing that the First Amendment should protect "diaries and other forms of discourse meant primarily for self-consumption"). If writing in an undistributed diary is protected speech, *see* Kreimer, 159 U. PA. L. REV. at 342, 379, creating an undistributed recording is protected as well.

(observing that "the 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"); 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.

Thus, 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.* A law "banning photography or note-taking at a public event would raise serious First

Amendment concerns . . . [because it] 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, or buying pen and paper, video recording can be characterized as conduct that is part and parcel of speech. *See Minneapolis Star & Trib. Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 591 (1983) (striking down tax on paper and ink products as a violation of the First Amendment); Chen & Marceau, 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."). It is therefore protected under the First Amendment.

c. Recording is a form of protected newsgathering.

Finally, recording can be a form of newsgathering necessary for

the proper functioning of our democracy. *See* 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); 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); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 585–87 (1980) (Brennan, J., concurring) (identifying "the correlative freedom of access to 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 non-expressive process of generating the flows of information—that is, the newsgathering—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 our

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.*; *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.").

This newsgathering/access right forms the core of numerous decisions providing access to criminal trials and judicial proceedings, which implicate the ability of ordinary citizens to hold their public officials accountable. *See, e.g.*, *id.*; *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 because "[t]he process of juror selection is itself a matter of importance . . . to the criminal justice system"); *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"—in other words, that citizens' access to information about the functioning of government was, itself, critical to the functioning of government. *Richmond Newspapers*, 448 U.S. at 589.

Recording a police officer performing public duties in a public location is squarely situated within this newsgathering/access right and meets both elements of the test articulated in *Richmond Newspapers*. 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. CIO*, 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 criminal 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 127. Recordings of police officers performing their public duties have had significant real-world impacts, "sparking outrage and dialogue about police practices throughout the nation." Jocelyn Simonson,

Copwatching, 104 CALIF. L. REV. 391, 410 (2016); *see also, e.g.*, Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (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 have been solely caused by his health problems."). Contemporaneous video recordings can also serve to deter police misconduct in real time, improving the functioning of a governmental institution in the process. Simonson, 104 CALIF. L. REV. at 415; Kreimer, 159 U. Pa. L. Rev. at 347. It thus often serves the core purpose of the newsgathering/access right: to hold accountable and structurally improve our government institutions. Kreimer, 159 U. PA. L. REV. at 350.

Take, for example, the video recording that led to Officer Chauvin's conviction in the murder of George Floyd. Geoffrey Fowler, *You Have the Right to Film Police. Here's How to Do It Effectively – and Safely.*, WASH. POST (Apr. 22, 2021), https://www.washingtonpost.com/technology/2021/04/22/how-to-film-police-smartphone/. The video of Floyd's murder was the "star witness" in the trial, with the prosecution

going as far as to say in closing arguments, "Believe your eyes, what you saw you saw." Sandra Ristovska, *From Rodney King to George Floyd, How Evidence Can Be Differently Interpreted in Courts*, CONVERSATION (May 10, 2021), https://theconversation.com/from-rodney-king-to-george-floyd-how-video-evidence-can-be-differently-interpreted-in-courts-159794 (noting that the video recordings at trial "help[ed] reconstruct what led to George Floyd's death on May 25, 2020"). Citizen recordings of police can act as powerful forms of evidence that help jurors bear witness to an event from the complicated scenes of its occurrence. *Id.*

Such recordings also help to bring about social, political, and legal changes desired by the people, one of the core purposes of the First Amendment. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (citing cases). For example, citizens' recordings of police misconduct and other events of national importance involving law enforcement (including the George Floyd recording, 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://timesofsandiego.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 and prosecuting 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, *Rioter Charged With Assaulting Officer In Incident Captured On Viral Video*, 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.").

* * *

In sum, the First Amendment protects the right to record law enforcement officers performing public duties in public locations because these recordings are (1) a form of inherently expressive activity or protected speech, rather than mere conduct; (2) part of the speech-creation process; and (3) necessary to the exercise of the First Amendment-protected newsgathering right.

ii. First Amendment theory further supports the right to record public officials performing public duties in public locations.

As demonstrated above, numerous First Amendment doctrines

provide that individuals have a right to record police officers performing their duties in public locations. The theoretical underpinnings of the First Amendment confirm that such "public-cubed" recordings are squarely within the ambit of the First Amendment.

There are three main theories behind why the First Amendment protects freedom of expression: to encourage democratic self-governance, *see generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); to foster the marketplace of ideas, *see Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); and to protect individual autonomy, *see* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982). *See also, e.g.*, Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011). Under any of these theories, the First Amendment protects a right to record that covers at least recordings of the official behavior of public officials in public locations.

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. Under the self-governance theory, 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." MEIKLEJOHN, *supra* at 88. Collecting information about police interactions with the public fuels important policy discussions about law enforcement, including discussions of information the public would not otherwise know, and thereby facilitates review of police conduct by laypeople and legal professionals alike. *See* Chen & Marceau, 116 COLUM. L. REV at 1007, 1031; *City of Houston, Tex. v. Hill*, 482 U.S. 451, 463 n.12 (1987) ("[T]he 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." (internal citation omitted)). And as noted above, contemporaneous recordings of police can deter misconduct, promote respectful policing and accountability, and improve the functioning of a portion of government. *See* Kreimer, 159 U. PA. L. REV. at 347.

Recording public officials performing their public duties also 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" by "protect[ing] the

public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (citations omitted). Like leafleting, 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 easy, widespread distribution of additional information. This distribution of information is necessary to ensure a fully informed society. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.")

Finally, 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. The First Amendment protects from the government's interference individuals' rational, autonomous, and reflective choices as democratic agents. *See* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). Allowing civilians to record police officers performing their public duties in public locations serves

these values. It also enables individuals to express dissent towards local policing practices through the very act of recording itself. *See* Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record Police*, 104 GEO. L.J. 1559, 1572 (2016).

Protecting the recording of police officers also protects the autonomy of any would-be viewers. Bambauer, 66 STAN. L. REV. at 74; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 371 (1991) ("[F]reedom of expression is designed to protect the autonomy of potential listeners."). To interfere with the recording of police officers, and thus the eventual receipt of that recording, is to interfere with the ability of citizens to exercise their autonomy to receive and analyze their own chosen body of information. Thus, all three of the major theories of the First Amendment support the notion that the First Amendment protects recording police officers performing official functions in a public setting

II. This Court Should Resolve the First Amendment Question and Recognize a Right to Record in the Tenth Circuit.

Regardless of this Court's decision on the qualified immunity question, this Court should explicitly decide that there is a First Amendment right to record in a public-cubed setting. Whenever an

"official's action . . . gives rise to a First Amendment injury," *Husain v. Springer*, 494 F.3d 108, 128 (2d Cir. 2007), the Court should definitively say so. "Resolution of [the merits] will give guidance to officials about how to comply with legal requirements," *Chambers v. Pennycook,* 641 F.3d 898, 904 (8th Cir. 2011), and will help prevent "constitutional stagnation" in this important area of law, *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019). Nowhere is clarification for the government needed more than in the Tenth Circuit, where lower courts continue to grapple with this issue because they lack guidance from this court. *Compare, e.g.*, *Frasier v. Evans*, 992 F.3d 1003, 1020 n.4 (10th Cir. 2021) (declining to decide whether a right-to-record in the public-cubed setting is protected under the First Amendment, because neither party disputed that such a right existed and the district court in that case had not questioned the right's existence), *with, e.g.*, *W. Watersheds Project,* 869 F.3d at 1196 (noting that "[a]n individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter" and finding that collecting habitat conditions data was protected speech). As a result, lower courts throughout the Tenth Circuit have reached

inconsistent conclusions on whether a First Amendment right to record exists. *Compare, e.g.*, *Bustillos v. City of Carlsbad*, No. 20-1336, 2021 WL 3542825, at *14 (D.N.M. Aug. 11, 2021) (refusing to hold that a right to record in public-cubed settings exists because this Court refused to reach that question in *Frasier*), *with Irizarry v. Yehia*, No. 20-CV-02881-NYW, 2021 WL 2333019, at *7 (D. Colo. June 8, 2021) (holding that a right to record in public-cubed settings exists).

Without a clear ruling from this Court, the act of recording a public official performing public duties in a public space is treated differently under the law in New Mexico than it is in Colorado. Absent a definitive recognition of the right to record, lower courts will continue to splinter over this critical issue, wasting significant judicial resources.

Furthermore, until this Court declares that the right is established, 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. *See Camreta v. Greene*, 563 U.S. 692, 706 (2011) ("[If this] court does not resolve the claim because the official has immunity [the officer] thus persists in the challenged practice; [and] knows that he can avoid

liability in any future damages action, because the law has still not been clearly established.")

For example, in Baltimore, a woman made a cellphone recording of police officers assaulting an individual in public. Madeleine Bair, *Caught on Camera: Police Abuse in the U.S.*, WITNESS MEDIA LAB, https://lab.witness.org/caught-on-camera-police-abuse-in-the-u-s/ (last visited Nov. 17, 2021). Once officers discovered her filming, she was forced out of her car, tasered, and charged with attempting to run over an officer. *Id.* Her video camera recorded it all. *Id.* Once she was released from jail, she discovered that the video had been deleted off of her phone while it was in police custody. *Id.*[5]

Unfortunately, the problem of disappearing footage after an arrest is all too common. Indeed, Reynaldo Chaves, a former police officer in Albuquerque designated as the department's 'custodian of public records' testified that his Police Department "routinely altered and deleted lapel-camera footage, including two police shootings." Michael

[5] Ultimately, she was able to recover the footage because her phone had automatically uploaded the recording to online storage. When she showed officials the video, her charges were dismissed. *See id.*

Harriot, *Control+Assault+Delete: When Cops Destroy Video Evidence*, ROOT (Apr. 14, 2011), https://www.theroot.com/control-assault-delete-when-cops-destroy-video-evidenc-1794316875. Take for example, the well-known police brutality case of Laquan McDonald, shot by an officer sixteen times in as many seconds on a public street. *Id.* Afterwards, police went to the nearby Burger King to ask the manager for access to the video equipment and security camera footage that captured the scene. *Id.* According to the manager, the cops deleted the evidence. *Id.* Eighty-six minutes of footage went missing. *Id.* The city denied video tampering, and officials only released dashcam footage of the incident a year later pursuant to a judicial order. *Id.* By the time the video was released, the city had paid the victim's family $5 million and had not filed charges against the officer. *Id.*

A clear holding from this Court stating that individuals have a right to record public officials performing public duties in public places can help turn the tide against such behavior, thereby increasing the accountability of public officials to their constituents.

CONCLUSION

Amici urge this Court to join its sister circuits and hold that the

First Amendment protects the audiovisual recording of public officials performing public duties in public locations. Recognition of such a right protects individual autonomy, increases the stock of important information in the world, and protects the values on which our democracy depends. Recent efforts to improve 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 protects.

Respectfully submitted,

/s/ Matthew R. Cushing

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Matthew R. Cushing
Counsel of record
Elizabeth Truitt
UNIVERSITY OF COLORADO LAW SCHOOL APPELLATE ADVOCACY PRACTICUM
2450 Kittredge Loop Road
Boulder, CO 80309
(303) 735-6554
matthew.cushing@colorado.edu
elizabeth.truitt-prac@colorado.edu

Counsel for Amici Curiae First Amendment Scholars

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/s/ Matthew R. Cushing
November 19, 2021 *Counsel for Amici Curiae*

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November 19, 2021 *Counsel for Amici Curiae*