No. 21-1247

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
No. 20-cv-02881-NYW (Magistrate Judge Nina Y. Wang)

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Oral Argument Requested

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STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule R. 28.2(C)(3), Plaintiff-Appellant states that there are no prior or related appeals.

INTRODUCTION

This Court should follow in the thoughtful footsteps of six sister circuits in recognizing and protecting a citizen's clearly established constitutional right to unobtrusively record a government actor's official behavior in a public space without retaliation. In this case a police officer intimidated and retaliated against Abade Irizarry, a journalist and blogger, for the mere act of recording a traffic stop with his cell phone while standing on a public street. The court below *agreed* that Mr. Irizarry had stated a violation of his constitutional right to film the traffic stop. But the court nevertheless dismissed his case on qualified immunity grounds because, the court believed, this Circuit had not yet addressed the unlawfulness of police retaliation in these precise circumstances. As explained below, that myopic inquiry misapplied the law of qualified immunity to reach the wrong result.

The factual allegations are straightforward and uncontested at this stage. Late one night in May 2019, Mr. Irizarry was filming a traffic stop with some companions when Officer Yehia arrived on the scene "in full regalia in a Marked cruiser, with every single light available on the cruiser turned on." AA9 ¶ 13.[1] Officer Yehia had apparently been called to the scene *because* Mr. Irizarry and his companions were filming. AA9 ¶ 12. He immediately began harassing Mr. Irizarry

[1] "AA#" denotes the page(s) in Appellant's Appendix, which comprises a single volume.

and his companions, purposefully blocking their view of the scene, shining his flashlight into their cameras, and otherwise provoking them to the point that another officer told Officer Yehia to stop. AA9 ¶¶ 15–19. Not satisfied that he had gotten his message across, Officer Yehia then dramatically escalated the encounter. AA9 ¶¶ 20–22. He returned to his vehicle, "threw it in drive," and drove "right at" Mr. Irizarry and his companions. AA10 ¶ 20. Officer Yehia then sped away, turned around, and "gunned" his cruiser directly at one of Mr. Irizarry's companions before swerving around him, stopping, and repeatedly blasting his airhorn. AA10 ¶ 21. Officer Yehia's actions were overt and calculated. They were designed to intimidate Mr. Irizarry and his companions and deter them from filming the ongoing police encounter. They therefore constituted actionable retaliation for engaging in protected First Amendment activity under clearly established law.

The court below recognized that the question in this case is whether Officer Yehia violated clearly established law by retaliating against Mr. Irizarry for filming the stop. And the court articulated the appropriate framework, asking whether (1) Mr. Irizarry was exercising a constitutional right; (2) whether Officer Yehia's actions would chill a person of ordinary firmness in the exercise of that right; and (3) whether Officer Yehia's actions were motivated by Mr. Irizarry's exercise of his right. AA99. But the court erroneously held that Officer Yehia was entitled to qualified immunity. AA110–11 & n.10. According to the court below, it would not

have been clear to every reasonable government official that Officer Yehia's actions amounted to actionable retaliation because the court could not locate a case in which "a law enforcement official's obstruction of a civilian's camera" had been held to "violate[] the First Amendment right to record the police." AA109–11. And the court declined to consider whether Officer Yehia's other acts constituted actionable retaliation because "[i]t does not appear that Mr. Irizarry bases his First Amendment claim on this conduct." AA111–12 n.10. The court then held that, even though Mr. Irizarry was proceeding *pro se*, it would be "futile" for Mr. Irizarry to amend his complaint to potentially add additional factual allegations. AA112–13.

The district court erred by conflating two distinct questions and thereby demanding much more granularity than this Court's qualified immunity precedents demand. In a retaliation case like this one, the court undertakes two separate inquiries: first, whether a constitutional right is clearly established, and, second, whether retaliation occurred to chill the exercise of that right. *See Van Deelen v. Johnson*, 497 F.3d 1151, 1157 (10th Cir. 2007); *Worrell v. Henry*, 219 F.3d 1197, 1213 (10th Cir. 2000). Considered separately, both factors are met here under clearly established law.

First, when the police confrontation occurred in this case—May 2019—every reasonable officer knew or should have known that citizens have a First Amendment right to film a traffic stop carried out by police officers in a public place. Decisions

from the Supreme Court and the weight of persuasive authority from six other circuits clearly established, as of May 2019, that Mr. Irizarry had a First Amendment right to film the traffic stop under the circumstances alleged in his complaint.

Second, every reasonable officer knew or should have known that the defendant officer's alleged acts of intimidation amounted to harassment and retaliation for the exercise of a constitutionally protected right. As this Court has held, in accord with the weight of nationwide circuit precedent, retaliatory conduct is actionable unless it is "trivial," "inconsequential," or "*de minimis*." Officer Yehia's conduct was none of these things. His actions, carried out while on duty, in a police uniform, in the presence of other police officers, and using a police cruiser as a deadly weapon of intimidation, would chill a person of ordinary firmness from the exercise of his First Amendment right to record the police.

The court should reverse the decision below, join its colleagues in the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits, and dispel the dangerous notion that government actors in our jurisdiction can continue to infringe with impunity the fundamental constitutional right to unobtrusively film the police in the discharge of their duties in public. At a minimum, the Court should vacate the decision below to permit Mr. Irizarry the opportunity to amend his complaint.

JURISDICTIONAL STATEMENT

Plaintiff sued under 42 U.S.C. § 1983 to enforce federal rights provided by the First Amendment to the United States Constitution. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on June 8, 2021. AA115. Plaintiff timely filed a notice of appeal on July 06, 2021. AA116. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Officer Yehia violated Mr. Irizarry's clearly established First Amendment right to record police in the discharge of their duties in public by retaliating against him for filming a routine traffic stop from a public street.

STATEMENT OF THE CASE

A. Factual Background

Abade Irizarry is a YouTube journalist and blogger who "regularly publishes stories about police brutality and police conduct or misconduct." AA92 (opinion below). "On May 26, 2019, Mr. Irizarry was on the scene of a traffic stop of a third-party being conducted by the Lakewood Police Department in Lakewood, Colorado." AA92–93. Mr. Irizarry was accompanied by three other journalists/bloggers—Eric Brandt, Elijah Westbrook, and Michael Sexton. AA93. Mr. Irizarry and his three companions "began using cameras and cell phones to record the traffic stop 'for later broadcast, live-streaming, premier[e]s, and archiving for their respective social media channel[s].'" AA93 (quoting AA9 ¶ 11).

Lakewood Police officers on the scene advised Defendant Ahmed Yehia that "'four males had arrived on the scene and were video recording their D.U.I. traffic stop.'" AA93 (quoting AA9 ¶ 12). "Officer Yehia then arrived at the scene 'in full regalia in a Marked cruiser, with every single light available on the cruiser turned on.'" AA93 (quoting AA9 ¶ 13). "Flood lights, take down lights. Spot light, colored emergency lights, etc." AA9 ¶ 13. "Officer Yehia exited his vehicle and positioned himself directly in front of Mr. Irizarry to obstruct Mr. Irizarry's camera's view of the field sobriety test that was occurring as part of the traffic stop." AA93 (citing AA9 ¶ 14).

"Mr. Irizarry and Mr. Brandt began to 'loudly criticize' Officer Yehia and voiced their disapproval of Officer Yehia's actions." AA93 (quoting AA10 ¶ 16). "Officer Yehia then began to shine his flashlight into Mr. Irizarry's and Mr. Brandt's cameras, which 'saturat[ed] the camera sensors.'" AA93 (quoting AA10 ¶ 17). "Officer Yehia continued to harass him and Mr. Brandt until a fellow police officer instructed him to stop." AA93. "Officer Yehia returned to his vehicle, 'drove right at [Mr. Irizarry] and Mr. Brandt, and sped away' before turning around and 'gunn[ing] his cruiser directly at Mr. Brandt, swerv[ing] around him, stopp[ing], [and] then repeatedly . . . blast[ing] his air horn at Mr. Irizarry and Mr. Brandt.'" AA93 (quoting AA10 ¶¶ 20–21) (alterations in original). "Officer Yehia was then instructed to depart the scene." AA93–94.

B. Proceedings Below

On September 23, 2020, Mr. Irizarry filed this lawsuit *pro se* against Officer Yehia, raising one claim under 42 U.S.C. § 1983 alleging a First Amendment violation. AA7 (Complaint). Mr. Irizarry sought "[a]ppropriate declaratory … relief," compensatory damages, punitive damages, and attorneys' fees. AA12. The parties consented to have the case heard before a magistrate judge. AA1–2.

Officer Yehia moved to dismiss on the basis of qualified immunity, and the court below granted his motion. AA113. As relevant here, the court recognized that Mr. Irizarry had a First Amendment "right to record police officers performing their official duties in public, subject to reasonable time, place, and manner restrictions." AA103. The court also "conclude[d] that Mr. Irizarry … alleged sufficient facts at this stage to sufficiently allege a First Amendment violation based on either a theory of prior restraint or retaliation, i.e., that he was recording police conduct in a public forum and Officer Yehia's conduct did not amount to a reasonable time, manner, or place restriction." AA104.

The court nonetheless concluded that the right—which it framed as the right not to have a police officer "stand[] in front of and shin[e] a flashlight into [a person's] camera for an unknown period of time," AA107–08—was not clearly established in this circuit as of May 2019. AA105–12. Focusing the inquiry on whether "the contours of the constitutional right were so well-settled in the context

of the particular circumstances that a 'reasonable official *would have understood that what he is doing violates that right*," AA106 (quoting *Estate of Carrigan v. Park Cty. Sherriff's Office*, 381 F. Supp. 3d 1316, 1327 (D. Colo. 2019) (quoting *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (emphasis added)), the court concluded that a reasonable official would not have known that Officer Yehia's actions "violate[d] the constitutional right." AA107–08 (brackets omitted) (quoting *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013)).

Considering cases from other circuits that have recognized a right to film police officers in the discharge of their duties in public, the court below concluded that those cases were not sufficiently factually similar to this case to put Officer Yehia on notice that his specific conduct in this case violated the First Amendment right that those cases have recognized. AA107–09. Each of those cases, the court stated, "concern[ed] whether the detainment, arrest, or prosecution of an individual for filming the police in public spaces would violate the individual's First Amendment rights." AA109. According to the court, however, "a police officer's act of standing in front of a camera or shining a light into a camera to allegedly obstruct the recording" is "significant[ly]" and "material[ly]" different. AA109. The court also disagreed with Mr. Irizarry's contention that it would be "obvious" to a reasonable officer that standing in front of a camera or shining a light into a camera violates the First Amendment, stating "[t]he court cannot conclude that the general

proposition that the press has a right to record in public rendered Officer Yehia's conduct unconstitutional 'with obvious clarity.'" AA111.

In undertaking this analysis, the court below did not draw any distinction between Mr. Irizarry's prior restraint and retaliation claims. *See* AA108–12. In examining Mr. Irizarry's claim, the court treated the question of *whether* Mr. Irizarry had a clearly established right to film police in the discharge of their duties as inextricably bound up in the question of whether Officer Yehia's specific conduct had been previously held in a prior case to clearly "violate" that specific right. Citing three cases from this Court—none of which involved retaliation claims—the district court held that to succeed on his claims Mr. Irizarry was required to show "a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited" in the specific context of filming police officers. AA109 (quoting *Duncan v. Gunter*, 15 F.3d 989, 992 (10th Cir. 1994), and citing *Apodaca v. Raemisch*, 864 F.3d 1071, 1076 (10th Cir. 2017) and *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)).

In a footnote, the court explained that it would not consider whether Officer Yehia's other actions beyond shining his flashlight into the camera—including arriving at the scene with all of his cruiser's lights on, intentionally obstructing Mr. Irizarry's filming, driving "right at" Mr. Irizarry and Mr. Brandt, and blasting his air horn at them—amounted to a First Amendment violation. AA111–12 n.10. The court

stated that because it "[did] not appear that Mr. Irizarry [based] his First Amendment claim on this conduct," it "[would] not analyze whether he states a claim based on those facts." AA111–12 n.10.

The court concluded its opinion by denying Mr. Irizarry the opportunity to amend his complaint. AA111–12. The court recognized that a *pro se* plaintiff's complaint "generally" should not be dismissed with prejudice unless it is "obvious" that he "cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." AA112. But the court held that this was such a case, explaining that "[t]he court's ruling is based on the fact that Officer Yehia is entitled to qualified immunity from Mr. Irizarry's lawsuit because Mr. Irizarry has not met his burden of demonstrating that Officer Yehia violated clearly established law. In these circumstances, leave to amend would be futile." AA113.

SUMMARY OF ARGUMENT

I. The court below erred in dismissing this case at the Rule 12 stage on qualified immunity grounds because Officer Yehia violated Mr. Irizarry's clearly established First Amendment right to record police in the discharge of their duties in public by retaliating against him for filming. To make out that claim, Mr. Irizarry needed only to establish that he was (1) exercising a clearly established constitutional right; (2) it was clearly established that Officer Yehia's conduct amounted to actionable retaliation for the exercise of a right; and (3) Officer Yehia's

conduct was motivated by the exercise of his right. Mr. Irizarry's complaint plausibly alleges all three prongs.

Mr. Irizarry had a clearly established First Amendment right to film the officers—for two reasons. *First*, as of May 2019 the Supreme Court's cases established with "obvious clarity" that individuals have a First Amendment right to film anyone in a public place, including police, subject only to reasonable time, place, and manner restrictions. *Second*, as of May 2019, the weight of authority from six other circuits clearly established the right to film police in the discharge of their duties in public.

Every reasonable officer would have understood that Officer Yehia's actions would chill a person of ordinary firmness from continuing to exercise his rights in this case. All but "trivial" or "*de minimis*" adverse actions by government officials taken in retaliation for exercise of a constitutional right amount to actionable retaliation under the First Amendment. Mr. Irizarry's complaint easily clears that low bar. It was clearly established in this circuit as of May 2019 that threatening someone with deadly force—by driving a police cruiser right at them—would chill a person of ordinary firmness from exercising his constitutional rights. *See Van Deelen v. Johnson*, 497 F.3d 1151, 1157 (10th Cir. 2007) (Gorsuch, J.). Moreover, because Officer Yehia undertook his actions in full uniform in the presence of other police officers, his other actions also constituted actionable retaliation because a

reasonable factfinder could conclude that a person of ordinary firmness would have understood that Officer Yehia's actions carried the implicit threat of potential sanction—namely, arrest. Even Officer Yehia's fellow officers understood his actions crossed the line, twice instructing him to stop harassing Mr. Irizarry and his companions and to leave the scene.

Officer Yehia's actions were taken in response to Mr. Irizarry's exercise of his rights. He allegedly came to the scene *because* Mr. Irizarry and his companions were filming the traffic stop, and his specific conduct—intentionally obstructing their view of the scene, shining his flashlight directly into the cameras to saturate their sensors—establishes that he was retaliating *because* Mr. Irizarry was filming. AA9–10.

The district court erred by incorrectly collapsing the first and second prongs of the retaliation inquiry. AA109. In doing so, the court relied on cases that frame the inquiry by reference to the specific conduct alleged to have violated the right in question. If this were only a *prior restraint* case, that would be the correct analysis: the question would be whether every reasonable official would have known that taking a particular action was the functional equivalent of *preventing* someone from engaging in a First Amendment protected activity.

But this also is a *retaliation* case. In constitutional retaliation cases, as this Court and the Supreme Court have both recognized, the question of whether a right

was being exercised, and whether the actions of the government official in question constitute retaliation for the exercise of that right, are separate inquiries. That approach follows from the fact that even otherwise lawful actions "offend[] the Constitution" when undertaken to chill the exercise of a constitutional right. *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).

II. At a minimum, the court below should have granted Mr. Irizarry leave to amend his complaint. Especially where the court below knew Mr. Irizarry wanted to add additional causes of action, AA100–01, knew that Mr. Irizarry wanted to allege additional facts, AA96–97, and knew that Mr. Irizarry may have been able to state a claim against Officer Yehia by broadening his retaliation claim to include Officer Yehia's other retaliatory actions, AA111–12 n.10, it is not obvious that amendment would be futile in this case.

STANDARD OF REVIEW

This Court "review[s] *de novo* the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Gee v. Pacheco*, 627 F.3d 1178, 1183 (10th Cir. 2010). "To determine whether a motion to dismiss was properly granted" the Court "appl[ies] a plausibility standard to ascertain whether the complaint includes enough facts that, if assumed to be true, state a claim to relief that is plausible on its face." *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). The Court "accept[s] all factual

allegations in the complaint as true and draw[s] all reasonable inferences in favor of the nonmoving party, here the plaintiff." *Id.*

The Court "also review[s] *de novo* the district court's decision regarding qualified immunity." *Id.* "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Frasier v. Evans*, 992 F.3d 1003, 1014 (10th Cir. 2021). "A plaintiff can demonstrate that a constitutional right is clearly established by reference to cases from the Supreme Court, the Tenth Circuit, or the weight of authority from other circuits." *Mink*, 613 F.3d at 1000 (quoting *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008)). "There need not be precise factual correspondence between earlier cases and the case at hand, because general statements of the law are not inherently incapable of giving fair and clear warning." *Id.* (quoting *Archuleta*, 523 F.3d at 1283). "[Q]ualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) (citations omitted).

ARGUMENT

I. Mr. Irizarry Plausibly Alleged that Officer Yehia's Retaliation Violated Clearly Established Law

Mr. Irizarry's complaint should not have been dismissed. To state a claim for retaliation, Mr. Irizarry needed only to establish (1) that he "was engaged in constitutionally protected activity"; (2) that Officer Yehia's actions "would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) that Officer Yehia's actions were "substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). In a suit for damages under § 1983, a plaintiff must overcome the additional hurdle of showing that an official was on "clear notice" that his actions constituted unlawful retaliation under this standard. *See Perez v. Ellington*, 421 F.3d 1128, 1132 (10th Cir. 2005). Under a proper application of this standard, Mr. Irizarry plausibly alleged all three elements of a retaliation claim.

A. Mr. Irizarry Had a Clearly Established First Amendment Right to Record the Traffic Stop

As of May 2019, it was clear to every reasonable law enforcement officer that individuals have a First Amendment right to film police in the discharge of their duties in public subject only to reasonable time, place, and manner restrictions. The Tenth Circuit did not need to have a published precedent specifically adjudicating that right for it to be clearly established. "In the absence of controlling authority that specifically adjudicates the right in question, a right may still be clearly established

in one of two ways." *Booker v. S.C. Dep't of Corrections*, 855 F.3d 533, 543 (4th Cir. 2017). A right may be clearly established if "a general constitutional rule already identified in the decisional law [ ] appl[ies] with obvious clarity to the specific conduct in question." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *accord A.N. by & through Ponder v. Syling*, 928 F.3d 1191, 1198 (10th Cir. 2019). A right may also be clearly established based on "the weight of authority from other circuits." *Mink*, 613 F.3d at 1001 (quoting *Archuleta*, 523 F.3d at 1282).

Here, the First Amendment right was clearly established in both ways. First, the Supreme Court's cases clearly established before May 2019 that the First Amendment protects the right to gather and disseminate information about the conduct of government officials in public and that such right includes filming. Second, the overwhelming consensus of persuasive authority from other circuits adjudicating the precise right at issue here—the right to film the conduct of police—further shows that the right at issue in this case is clearly established.

1. Supreme Court Precedent Establishes a First Amendment Right to Record Police Activity

"Basic First Amendment principles" long recognized by the Supreme Court establish that citizens have a right to record the actions of government officials in public places. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). These principles are so clear, and so well established, that they led the First, Ninth, and Eleventh Circuits to conclude over a decade ago that the Supreme Court's cases establish a right to

film police with obvious clarity before any of those circuits had a precedent on the precise question. *See id.* at 82–86; *Smith v. City of Cumming*, 212 F.3d 1332, 1332–33 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

This right sits at the convergence of four lines of First Amendment doctrine: (1) the right to discuss, debate, and criticize the actions of government officials; (2) the right to create and disseminate information; (3) the right of individuals to receive truthful information; and (4) the right to access places traditionally open to the public, which encompasses the right to listen, observe, and learn what happens there.

First, the right to record police activity flows from the right to discuss, debate, and criticize the actions of government officers. "'[T]here is practically universal agreement that a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs' …." *ACLU of Illinois* v. *Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012) (quoting *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 753 (2011)). "This agreement 'reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). There is "a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). And "[f]reedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive

to repress opposition and often wields a more effective power of suppression.'" *Id.* (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978)). "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010)).

The Supreme Court has held that the right to discuss, debate, and criticize the government also includes the right to create and disseminate the information needed to do so. "Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)); *see also Gentile v. State Bar*, 501 U.S. 1030, 1034–35 (1991) (gathering and "disseminat[ing] of information relating to alleged governmental misconduct" helps to deter abuses of power and to formulate policy responses when abuses occur); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (recognizing the "paramount public interest in a free flow of information to the people concerning public officials, their servants").

The Supreme Court has applied these principles to protect First Amendment activity in a wide range of circumstances. For example, individuals have a constitutional right to access criminal proceedings in part because insight into criminal prosecution is integral to safeguarding the ability of citizens to hold the government accountable. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576–77 (1980) ("The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily."); *Turner*, 848 F.3d at 688 ("'[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.'") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). Similarly, the Supreme Court's campaign-finance cases illustrate the principle that government may not cut off the ability of people to get their message into the public square by denying them the means to access it: "The Court held long ago that campaign-finance regulations implicate core First Amendment interests because raising and spending money *facilitates* the resulting political speech." *ACLU of Illinois*, 679 F.3d at 596–97 (collecting cases).

Mr. Irizarry's action—filming police officers in the discharge of their duties—falls squarely within the ambit of these cases. "Filming 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." *Turner*, 848 F.3d at 689. "Filming the police also frequently helps officers; for example, a citizen's recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing." *Id.*

Among all of the government officials that citizens have a right to film, police officers are the officials for whom the right to film is clearest. They are, as part of their duties, already "expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." *Glik*, 655 F.3d at 84 (citing *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)). Indeed, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* (quoting *City of Houston*, 482 U.S. at 462–63); *see also Gentile*, 501 U.S. at 1035–36 (observing that "[t]he public has an interest in [the] responsible exercise" of the discretion granted police and prosecutors)).

Second, the right to record and broadcast the actions of police in public flows from First Amendment rights over "the creation and dissemination of information." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Glik*, 655 F.3d at 82 (quoting *First Nat'l Bank*, 435 U.S. at 783); *see also id.* ("It is … well established that the Constitution protects the right to

receive information and ideas.") (quoting *Stanley v. Georgia,* 394 U.S. 557, 564 (1969)). "An important corollary to this interest in protecting the stock of public information is that '[t]here is an undoubted right to gather news 'from any source by means within the law.'" *Id.* (quoting *Houchins v. KQED, Inc.,* 438 U.S. 1, 11 (1978)).

The Supreme Court has thus held that "[a]n individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated." *Sorrell*, 564 U.S. at 568; *see Citizens United*, 558 U.S. at 339 (invalidating the federal ban on corporate and union spending for political speech because government may not "repress speech by silencing certain voices at any of the various points in the speech process"); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 582 (1983) (holding that a tax on ink and paper "burdens rights protected by the First Amendment"). "[T]he Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979)); *see also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'").

Third, the right to record and disseminate flows from the First Amendment right of the public to receive information. *See Community Communications Co. v. Boulder*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981) ("The First Amendment protects not only the right to disseminate, but also the public's interest in the receipt of diversified communications."). As the Supreme Court has recognized, the First Amendment assumes that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public…." *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see also Fields*, 862 F.3d at 359 ("Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media.").

Fourth, the right to record and disseminate flows from the right of individuals in "public places not only to speak or to take action, but also to listen, observe, and learn" what happens there. *Richmond Newspapers*, 448 U.S. at 578. The fact that Mr. Irizarry's recording happened in a traditionally public place is significant. "Such space occupies 'a special position in terms of First Amendment protection.'" *Snyder*, 562 U.S. at 456 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). "[T]he rights of the state to limit the exercise of First Amendment activity" in such places "are 'sharply circumscribed.'" *Glik*, 655 F.3d at 84 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). In such "traditional public forum[s]"—namely, public streets or parks—speech restrictions must be "narrowly

tailored to serve a compelling government interest." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). And public officials carrying out public functions in such public places "lack any 'reasonable expectation of privacy'" because their actions are "knowingly expose[d] to the public" there. *ACLU of Illinois*, 679 F.3d at 605–06 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

As of May 2019, each of these threads of First Amendment doctrine—the intertwined rights to collect, create, disseminate, receive, and debate information about public officials—established with obvious clarity that individuals had a constitutional right to film police officers during traffic stops subject only to reasonable time, place, and manner restrictions.

The United States agrees. In 2012, the Department of Justice expressly recognized "individuals' First Amendment right to observe and record police officers engaged in the public discharge of their duties." *U.S. Dep't of Justice, Civil Rights Div., Re: Christopher Sharp v. Baltimore City Police Dep't* at 2 (May 14, 2012), https://bit.ly/2ZNJNXT. The Government has since reiterated that position in particular cases. *See Statement of Interest of the United States, Garcia v. Montgomery County*, No. 8:12-cv-03592 (D. Md. March 4, 2013), Dkt.15, https://bit.ly/3CLliZn; Consent Decree at 44–45, *United States v. City of New Orleans*, 35 F. Supp. 3d 788 (E.D. La. 2013), Dkt.114-1, https://bit.ly/3BImDif;

Settlement Agreement at 20–21, *United States v. Town of E. Haven*, No. 3:12-cv-01652 (D. Conn. Dec. 20, 2012), Dkt.2-1, https://bit.ly/31h74l5.

2. Six Circuits Recognized a Clearly Established First Amendment Right to Record Police as of May 2019

"[T]he weight of authority from other circuits," *Mink*, 613 F.3d at 1001, also confirms that the public has the right to record police officers conducting official police activity in public areas. *See Fields v. City of Philadelphia*, 862 F.3d 353, 355–56 (3d Cir. 2017). Before Officer Yehia retaliated against Mr. Irizarry for filming in May 2019, "[e]very Circuit Court of Appeals to address this issue" in a precedential opinion—the First, Third, Fifth, Seventh, Ninth, and Eleventh—"ha[d] held that there is a First Amendment right to record police activity in public." *Id.* at 355. That is still the case: there are six Circuits with published precedents holding that the First Amendment protects the right to film police in the discharge of their public duties.[2]

The Ninth and Eleventh Circuits found the right to be clearly established more than two decades ago. In 1995, in *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), the Ninth Circuit held there was a clearly established right to "photograph and record" "law enforcement officers engaged in the exercise of their official duties

[2] At least one other circuit has also impliedly recognized a right to film police in an unpublished decision. *See Quraishi v. St. Charles Cty.*, 986 F.3d 831, 836 (8th Cir. 2021) (affirming the district court's determination that factual disputes precluded summary judgment and qualified immunity on First Amendment claim because officers had no probable cause to believe that reporters peacefully filming protest were interfering with officers in manner that impacted officer safety).

in public places." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (citing *Fordyce*, 55 F.3d at 439). In 2000, in *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000), the Eleventh Circuit held that individuals have "a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." *Id.* at 1333.

The First Circuit joined the growing consensus in 2011. In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), the First Circuit held that, subject to reasonable time, place, and manner restrictions, "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." *Id.* at 84–85. Like the Ninth and Eleventh Circuits before it, *Glik* was a § 1983 damages suit, and like *Fordyce* and *Smith*, *Glik* held that the right to film police was *already* clearly established because it necessarily flowed from long-settled First Amendment principles, even though there was no previously decided First Circuit case directly on point. *Id.* at 84–85.

Relying substantially on the First Circuit's analysis in *Glik*, the Seventh Circuit in 2012 joined the First, Ninth, and Eleventh Circuits, holding that citizens have a First Amendment right to "openly audio record the audible communications of law-enforcement officers … when the officers are engaged in their official duties in public places." *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012). In

so holding, the Seventh Circuit court recognized that the "self-authenticating character" of audio and audiovisual recording is unique to such mediums, which "makes it highly unlikely that other methods could be considered reasonably adequate substitutes." *Id.* at 607.

The Third and Fifth Circuits reached the same conclusion in 2017, holding that the First Amendment protects the right to film police in the discharge of their duties in public. In *Turner v. Lieutenant Driver*, the Fifth Circuit agreed "with every circuit that has ruled on this question" and held that "the First Amendment protects the right to record the police." 848 F.3d 678, 687, 690 (5th Cir. 2017). Similarly, in *Fields* the Third Circuit held "the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public." 862 F.3d at 356.

Notwithstanding the uniform authority above, some courts have wrestled with whether to characterize the right to record police officers as "clearly established." After initially declining to find a clearly established right, two circuits subsequently reversed course, and the bourgeoning consensus of authority in recent years confirms a clearly established right as of May 2019. The Fourth Circuit in an unpublished per curiam opinion in 2009 held that the "right to record police activities on public property was not clearly established" in that circuit as of June 2007. *Szymecki v. Houck,* 353 F. App'x 852, 853 (4th Cir. 2009) (per curiam); *see Szymecki v. City of*

Norfolk, No. 2:08-CV-142, 2008 WL 11259782, at *1 (E.D. Va. Dec. 17, 2008) (providing date of incident). The Third Circuit held that the right to record police was not clearly established in the Third Circuit as of September 2013 in conjunction with recognizing that the right *was* established by 2017. *See Fields*, 862 F.3d at 356. This Court held that the right was not clearly established in this circuit as of August 2014. *Frasier v. Evans*, 992 F.3d 1003, 1012 (10th Cir. 2021). And the Fifth Circuit held that the right was not clearly established in the Fifth Circuit as of September 2015 in conjunction with finding it *was* clearly established by 2017. *See Turner*, 848 F.3d at 687–89.

The Third and Fifth Circuit's rulings increased by 50 percent the number of circuits recognizing the constitutional right was clearly established by 2017. As of May 2019, half of the federal regional circuit courts had officially recognized the constitutional right Mr. Irizarry sought to exercise. Those circuits cover 25 states and five territories that include more than 200 million people, representing over 60 percent of the nation's population.

3. The Right to Film Police Advances Important Societal Goals

Failing to protect the right to film and disseminate recordings of police would have grave consequences. That is why courts that have recognized this clearly established right have remarked that "the First Amendment interests are quite

strong," *ACLU of Illinois*, 679 F.3d at 597, and that "this First Amendment issue is of great importance…." *Fields*, 862 F.3d at 357.

The "increase in the observation, recording, and sharing of police activity has contributed greatly to our national discussion of proper policing." *Id.* at 358. Bystanders with cell phones captured the killing of George Floyd, which the Minneapolis Police Department initially characterized as a "medical incident during police interaction." Philip Bump, *How the First Statement From Minneapolis Police Made George Floyd's Murder Seem Like George Floyd's Fault*, WASH. POST, (Apr. 20, 2021, 9:31 PM), https://bit.ly/3b8wByR. "It is because of that cellphone video that we all, the Minneapolis Police Department included, understand what preceded Floyd's death." *Id.* "That point was reiterated repeatedly during [Officer Derek Chauvin's] trial: You saw what happened." *Id.* "Even as the defense tried to again suggest that Floyd had somehow died of a drug overdose, there was that video footage of Chauvin blocking off George Floyd's breath." *Id.*; *see also Index Newspapers LLC v. United States Marshals Service*, 977 F.3d 817, 831 (9th Cir. 2020) ("Indeed, the public became aware of the circumstances surrounding George Floyd's death because citizens standing on a sidewalk exercised their First Amendment rights and filmed a police officer kneeling on Floyd's neck until he died."). The Pulitzer Prize board subsequently awarded a special citation to Darnella Frazier, the teenager who filmed George Floyd's murder, for her video footage,

which illustrated "the crucial role of citizens in journalists' quest for truth and justice." Elahe Izadi, *Darnell Frazier, The Teen Who Filmed George Floyd's Murder, Awarded a Pulitzer Citation*, WASH. POST (June 11, 2021, 1:33 PM), https://bit.ly/2YLtIRT. Had Ms. Frazier's right to film been unprotected, the officers on the scene could have ordered her to turn off her camera or perhaps confiscated it altogether.

"Bystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture." *Fields*, 862 F.3d at 359. "Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public." *Id.* These recordings have served as key evidence in investigating those suspected of unlawful behavior, whether it be in cases of law enforcement accused of misconduct or instances in which police officers lawfully perform their duties and protect their communities. For instance, in August 2021, a Chicago police officer told a woman walking her dog to leave a park because it was closed. As the woman was walking away, the officer proceeded to follow and attack her. The encounter was filmed by a third-party bystander. WGN News, *Protesters Call For Firing of CPD Officer Who Seized Black Woman Walking Dog*, YOUTUBE (Aug. 31, 2021), https://bit.ly/3kvlPYd. Bystander video is also used to provide various angles of an incident that can exonerate police officers, as well. Bystander video of an interaction

between police in Ohio and a woman shows a second angle that may be used to clear the officer of wrongdoing. Brian Hamrick, *Police Believe New Video of Student's Arrest Exonerates Officer*, WLWT5 (May 10, 2018), https://bit.ly/2YH9A3i.

The ubiquitous accessibility of cellphone recording has been transformational. "[T]he proliferation of bystander videos has 'spurred action at all levels of government to address police misconduct and to protect civil rights.'" *Fields*, 862 F.3d at 360. A nationwide push to review the doctrine of qualified immunity stems in no small measure from incidents of extraordinary police misconduct captured by ordinary people with their cell phones. Indeed, in June 2020, Colorado passed a state law that creates a new cause of action for people to sue police officers for damages in state court, explicitly stating qualified immunity is not a defense. Colo. Rev. Stat. § 13-21-131.

The failure to protect the right to record and disseminate video of police interactions will result in a return to a time when the word of police officers was the only word on what happened during an arrest or a traffic stop. It will mean a return to a time before the advent of the smartphones where individuals interacting with police had no objective evidence to support their characterization of events. And it will result in less opportunity for the public to judge for themselves whether police actions are consistent with the letter and spirit of the law.

4. *Frasier* Has No Bearing on Plaintiff's Rights in May 2019

This Circuit held that it was not clearly established in the Tenth Circuit *as of August 2014* that individuals have a First Amendment right to film police officers in the discharge of their duties in public. *Frasier v. Evans*, 992 F.3d 1003, 1020–23 (10th Cir. 2021). *Frasier* is inapposite here for two reasons. *First*, a consensus of persuasive authority existed in May 2019 that did not exist in August 2014, putting every reasonable police officer on notice that, as of at least May 2019, individuals have a First Amendment right to film police officers in the discharge of their duties in public. *Frasier* held that there was a "circuit split" on the question whether the right to film police was clearly established *in 2014*. *Id.* at 1022–23. But there is *no* circuit split on whether the right to film police in the discharge of their duties was clearly established in *May 2019*. By May 2019, six circuits had held that there was a First Amendment right in published decisions, and no Circuit had reached a different conclusion.

Second, to the extent *Frasier* held that the Supreme Court's cases do not establish a right to film police in public with "obvious clarity," that aspect of *Frasier* was incorrect, conflicts with three other circuits, and should be overruled. *Id.* at 1021. The Ninth Circuit in *Fordyce*, the Eleventh Circuit in *Smith*, and the First Circuit in *Glik* all held the opposite: that the Supreme Court's cases established the right to film police in the discharge of their duties in public with obvious clarity.

Fordyce, 55 F.3d at 439; *Smith*, 212 F.3d at 1333; *Glik*, 655 F.3d at 84–85. *Frasier* neither explains how those courts erred in their analyses nor acknowledges that its holding conflicts with the contrary conclusions in three circuits. *See Frasier*, 992 F.3d at 1021–22.

Notably, *Frasier*'s obvious-clarity holding conflicts with a longstanding First Amendment principle: that every person has a First Amendment right to *film* what is happening around them while standing on a public street. *See Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021). *Frasier* does not explain why that right disappears if a person filming on a public street films a police officer, or why a reasonable police officer would conclude that it does. Indeed, this aspect of *Frasier* cannot be reconciled with the Supreme Court's decision in *United States v. Stevens*, 559 U.S. 460, 469–470 (2010). In *Stevens* the Court held that the content of a depiction—outside of a small number of "well-defined and narrowly limited" "categories long familiar to the bar"—is *never* sufficient to remove it categorically from First Amendment protection. *Id.* Specifically, the Court held that 18 U.S.C. § 48, which provided a criminal penalty of up to five years for "'knowingly creat[ing] … a depiction of animal cruelty"' for commercial gain, violated the First Amendment. *Id.* at 464–65.

The Supreme Court rejected the government's contention that the creation of such depictions is unprotected by the First Amendment. *Id.* at 469. The

government's "free-floating test for First Amendment coverage" the Court explained, was "startling and dangerous." *Id.* at 470. "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.* "When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis." *Id.* at 471. The *Frasier* Court did not mention *Stevens* in its First Amendment analysis. *See Frasier*, 992 F.3d at 1019–1023. Yet *Frasier* held that the creation of some depictions—recordings of police officers—are entirely outside of First Amendment protection simply because of what they depict (i.e., because of their content). *See id.* That reasoning is incompatible with *Stevens*.

To be clear, this Court does not need to overrule *Frasier* to decide this case. When the events underlying this case occurred in 2019, six circuits had explicitly held in published decisions that individuals have a First Amendment right to film police officers in the discharge of their duties. None had held otherwise. Accordingly, the right was clearly established at the time of the events here, and that conclusion creates no tension with the Court's decision in *Frasier*, which analyzed the question as of 2014.

B. Mr. Irizarry's Complaint Alleges Retaliatory Conduct Sufficiently Severe to Survive a Motion to Dismiss

Mr. Irizarry's complaint also stated a plausible claim that Officer Yehia engaged in actionable First Amendment retaliation. As an initial matter, all but "trivial," "*de minimis*," or "inconsequential" adverse actions are sufficient to state a claim for retaliation. A litigant need only show that the conduct at issue "would *chill* a person of ordinary firmness from continuing to engage in that activity," *Worrell*, 219 F.3d at 1212 (emphasis added), not that it would stop them cold. "The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable." *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

In retaliation cases, the question of whether a government official engaged in retaliation for the exercise of a constitutional right is "objective" and is considered separately from whether the plaintiff was in fact exercising a constitutional right. *See, e.g.*, *Van Deelen*, 497 F.3d at 1155–58 (analyzing the three prongs of a retaliation claim separately); *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203–04 (10th Cir. 2007) (conducting the analysis in a similar fashion and stating "[w]hen the plaintiff alleges that the defendant's action was taken in retaliation for protected speech, our standard for evaluating that chilling effect on speech is objective" (quoting *Eaton v. Meneley*, 379 F.3d 949, 954–55 (10th Cir. 2004)). The district court therefore did not need to, and should not have, tried to find a case where a law

enforcement officer retaliated in a specific manner against a person *for filming*. The court needed only to locate a case, like *Van Deelen*, where a police officer engaged in actionable retaliation by threatening an individual with deadly force in retaliation for exercising a constitutionally protected right, as Officer Yehia did by driving his cruiser "right at" Mr. Irizarry and Mr. Brandt.

Measured under the appropriate standard, Officer Yehia's conduct clearly rises to the level of actionable retaliation. Officer Yehia: (1) arrived at the scene "in full regalia in a Marked cruiser, with every single light available on the cruiser turned on," AA93 (quoting AA9 ¶ 13); (2) intentionally harassed Mr. Irizarry and his companions and obstructed Mr. Irizarry's and his companion's ability to film what was happening, AA93 (citing AA9–10 ¶¶ 14, 16, 17, 19); then (3) drove his police cruiser "right at" Mr. Brandt and Mr. Irizarry, AA93 (quoting AA10 ¶¶ 20–21); before (4) repeatedly blasting his air horn at them, AA93 (citing AA10 ¶ 21). Every reasonable police officer would have known in May 2019 that Officer Yehia's actions "would surely suffice" under this Court's precedents "to chill a person of ordinary firmness from continuing" to engage in protected activity. *Van Deelen*, 497 F.3d at 1157.

1. Retaliatory Conduct Need Only Be More Than "Trivial" or "Inconsequential"

Every reasonable police officer knew at the time of the events in this case that nontrivial adverse actions taken against a citizen for engaging in constitutionally

protected conduct are actionable retaliation. That is particularly true in the First Amendment context. "'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves*, 139 S. Ct. at 1722 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). "If an official takes adverse action against someone based on that forbidden motive, and 'non-retaliatory grounds are in fact insufficient to provoke the adverse consequences,' the injured person may generally seek relief by bringing a First Amendment claim." *Nieves*, 139 S. Ct. at 1722 (quoting *Hartman*, 547 U.S. at 256). The Supreme Court has therefore stated that the First Amendment protects against "even an act of retaliation as trivial as failing to hold a birthday party for a public employee … when intended to punish her for exercising her free speech rights." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n.8 (1990) (quoting *Rutan v. Republican Party of Ill.*, 868 F.2d 943 (7th Cir. 1989)); *see Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1065 (9th Cir. 2013) ("[T]he type of sanction … need not be particularly great in order to find that rights have been violated.") (internal quotation marks and citations omitted).

Thus, to bring his constitutional claim, Mr. Irizarry needed only to allege conduct by Officer Yehia that would "chill" a person of ordinary firmness from engaging in protected activity. *Worrell*, 219 F.3d at 1212. This standard is expansive. "The ordinary-firmness test … is designed to weed out trivial matters from those

deserving the time of the courts as real and substantial violations of the First Amendment." *Garcia v. City of Trenton*, 348 F.3d 726, 728–29 (8th Cir. 2003); *accord Shero*, 510 F.3d at 1203; *Morris v. Powell*, 449 F.3d 682, 686 (5th Cir. 2006) ("The *de minimis* standard enunciated by our sister circuits is consistent with this court's precedent."); *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) (en banc) ("[T]his threshold is intended to weed out only inconsequential actions ….").[3]

An action that merely *chills* protected conduct, without eliminating it, is actionable. *See Bart*, 677 F.2d at 625. This extends to official conduct that merely threatens an individual's reputation—such as by implying that the exercise of the right is unlawful. In *Meese v. Keene,* for example, the Supreme Court held that

[3] Ordinarily, a government official may not assert a qualified immunity defense on the grounds that a reasonable officer would not have known that his specific conduct in a case amounted to unlawful retaliation. *See DeLoach v. Bevers,* 922 F.2d 618, 620 (10th Cir. 1990) ("The unlawful intent inherent in … a retaliatory action places it beyond the scope of a police officer's qualified immunity if the right retaliated against was clearly established."); *see Robbins v. Wilkie*, 433 F.3d 755, 767 (10th Cir. 2006) ("*DeLoach* requires only that the right retaliated against be clearly established."), *rev'd on other grounds*, 551 U.S. 537 (2007); *accord Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998). But this Court has also stated otherwise. In *Perez*, the Court held, without citing authority for the proposition, that a plaintiff in a retaliation case must show that "the type of conduct" engaged in by a government official "is so egregious that an official would be on clear notice that his actions would deter the ordinary person from continuing" to engage in a constitutionally protected activity. 421 F.3d at 1132. While *DeLoach* would be controlling over any subsequent contrary authority because panels are bound by earlier opinions, the Court need not address this question in this case because Mr. Irizarry's complaint alleges conduct sufficiently "egregious" to put the defendant on "clear notice" that his actions "would deter the ordinary person from continuing."

allegations of harm to one's reputation is a cognizable injury sufficient to bring a First Amendment retaliation claim. 481 U.S. 465, 472–77 (1987). In *Riggs v. City of Albuquerque,* this Court similarly recognized that harms to personal and professional reputations arising from illegal surveillance give rise to First Amendment injury. 916 F.2d 582, 584–86 (10th Cir. 1990).

The court below erred in resolving this question against Mr. Irizzary at the motion to dismiss stage because the issue of whether adverse conduct constitutes actionable retaliation is virtually always a matter for the factfinder. *See Bennie v. Munn*, 822 F.3d 392, 398 n.2 (8th Cir. 2016) ("Except when the alleged harassment is so inconsequential that even allowing a claim would trivialize the First Amendment … the determination of whether government action would chill an ordinary person's speech is a matter for the factfinder.") (internal quotation marks and citations omitted); *see also Douglas v. Reeves*, 964 F.3d 643, 647 (7th Cir. 2020) ("Whether retaliatory conduct is sufficiently severe to deter is generally a question of fact, but when the asserted injury is truly minimal, we can resolve the issue as a matter of law."); *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008) ("Whether the discipline 'would likely deter' presents an objective standard and a factual inquiry."); *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006) ("[I]t is generally a question of fact whether a retaliatory campaign of harassment has reached the threshold of actionability under § 1983 ….") (quoting *Suppan v.*

Dadonna, 203 F.3d 228, 233 (3d Cir. 2000)); *Bennett v. Hendrix*, 423 F.3d 1247, 1252 (11th Cir. 2005) ("Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry …."); *Suarez Corp. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) (same).

The magistrate judge's analysis below did not consider the full range of actionable retaliation. In addition to explicit threats and overt acts, implicit threats are actionable retaliation under the First Amendment. And because of the highly fact-intensive and contextual nature of retaliation claims, these allegations should almost always survive a motion to dismiss. In *Brodheim v. Cry*, for example, the Ninth Circuit held that a prison official's warning to a prisoner "to be careful what you write," 584 F.3d 1262, 1265–66 (9th Cir. 2009), following the prisoner's filing of a grievance, survived a motion to dismiss because it "intimated that some form of punishment or adverse regulatory action would follow a failure to comply," *id.* at 1271; *see Okwedy v. Molinari*, 333 F.3d 339, 343 (2d Cir. 2003) (per curiam) (similar).

Adverse actions by a government official need not constitute the exercise or threatened exercise of official government power to be actionable. In *Collopy v. City of Hobbs*, this Court held that an effort by a chief of police to "gratuitously" portray a special master's juvenile children as criminals in retaliation for the exercise of the special master's First Amendment rights constituted actionable retaliation. 27 F.

App'x 980, 983, 985–86 (10th Cir. 2001). The Court found that this "deliberate[] disparage[ment]" was "[t]he most compelling circumstance" supporting a retaliation claim. *Id.* at 985. Other circuits take the same view that conduct taken by a government official is actionable even if the action is not an exercise of official government authority. In *Dawes v. Walker*, for example, the Second Circuit explained that statements by prison guards that would incite other inmates to attack a prisoner would be actionable retaliation. 239 F.3d 489, 493 (2d Cir. 2001).

This Court's decision in *Van Deelen* involved similar facts and put every reasonable officer on notice that Officer Yehia's actions amounted to unlawful retaliation. 497 F.3d at 1157. In *Van Deelen*, the plaintiff alleged "physical and verbal intimidation" arising from "an ongoing and increasingly personal spat with County tax officials." 497 F.3d at 1156. This "spat" included "a threat by a deputy sheriff to shoot [the plaintiff] if he brought any more tax appeals …." *Id.* at 1157. Hyperbolic or not, this intimidation was "surely" enough to state a claim for retaliation under this Court's precedents. *See id.* As Justice Gorsuch wrote for the panel:

> If accepted as credible by a jury, [the plaintiff's] allegations of physical and verbal intimidation, including a threat by a deputy sheriff to shoot him if he brought any more tax appeals, would surely suffice under our precedents to chill a person of ordinary firmness from continuing to seek redress for (allegedly) unfair property tax assessments.

Id.

2. Mr. Irizarry Stated a Claim for Retaliation

The allegations in Mr. Irizarry's complaint were more than sufficient to state a claim for retaliation by Officer Yehia under the cases discussed above. Not only does Mr. Irizarry's complaint allege that another officer on the scene had to intervene and "instruct[]" Officer Yehia's to stop harassing Mr. Irizarry, AA93 (citing AA10 ¶ 19), but the complaint also alleges that Officer Yehia in fact *ignored* his fellow officers' instructions and *escalated* the situation by driving his marked police cruiser "right at" Mr. Irizarry and his companions, AA93 (quoting AA10 ¶ 20).

Even putting aside all of Officer Yehia's other actions, by driving his cruiser "right at" Mr. Irizarry and Mr. Brandt, Officer Yehia engaged in "physical" intimidation that would chill a person of ordinary firmness from continuing to engage in constitutionally protected conduct. "[A]n automobile can inflict deadly force on a person and … can be used as a deadly weapon." *United States v. Aceves-Rosales,* 832 F.2d 1155, 1157 (9th Cir. 1987); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) ("[A] car can be a deadly weapon."). A car driven "right at" someone is as threatening as pulling out a gun and aiming it at them. Police departments recognize that a vehicle is a deadly weapon and routinely invoke a car's threat potential as a justification for using deadly force against otherwise unarmed individuals. Kim Barker et al., *How Police Justify Killing Drivers: The Vehicle Was a Weapon*, N.Y. TIMES (Nov. 6, 2021), https://bit.ly/3oApRjl. Driving a police

cruiser "right at" someone is certainly as threatening as the mere verbal "threat by a deputy sheriff to shoot" a person "if he brought any more tax appeals." *Van Deelen*, 497 F.3d at 1157. That is particularly true when, as here, the vehicle was being driven by an agitated police officer who just moments before was told by a fellow officer to stop harassing Mr. Irizarry, disengage, and leave the scene. AA93–94 (citing AA10 ¶¶ 19–22).[4]

Officer Yehia's other actions also were retaliatory. First, Officer Yehia's antagonistic conduct, carried out in full uniform in the presence of other officers, carried with it the implicit threat that Officer Yehia would, at any moment, arrest Mr. Irizarry and his companions for "knowingly … impair[ing] … the preservation of the peace by a peace officer." Colo. Rev. Stat. § 18-8-104. Officer Yehia did not need to use precise words to convey that threat. *See Bee See Books, Inc. v. Leary*, 291 F. Supp. 622, 626 (S.D.N.Y. 1968); *Andree v Ashland Cnty.*, 818 F.2d 1306, 1316 (7th Cir. 1987). A reasonable factfinder could interpret his actions "as intimating that some form of punishment or adverse regulatory action would follow." *Brodheim*, 584 F.3d at 1270 (quoting *Okwedy*, 333 F.3d at 343). When police officers take active measures to stop a citizen from doing something, a

[4] Mr. Irizarry's complaint alleges that Officer Yehia had to be told to leave the scene *twice*, for *two* separate reasons: his harassment of Mr. Irizarry while Mr. Irizarry attempted to film the encounter, AA93 (citing AA10 ¶ 19), and his threat of deadly force by driving a marked police cruiser right at Mr. Irizarry, AA93–94 (citing AA10 ¶ 20–22).

reasonable person interprets that instruction or action as accompanied by an implicit threat of arrest, detention, or citation for failure to comply. Indeed, police officers have facilitated that perception for decades (if not centuries) in order to create more cooperative and non-combative interactions with civilians. A police command to "stop" necessarily carries with it the implicit threat of "or else."

Second, even if a reasonable person would not interpret Officer Yehia's actions as an implicit threat of arrest, the other implication—that Mr. Irizarry and his companions were violating the law—is independently sufficient to chill a person of ordinary firmness from continuing to engage in the relevant conduct because of potential harm to Mr. Irizarry's reputation. *See Meese*, 481 U.S. at 472–77 (harm to reputation is a First Amendment injury); *Riggs*, 916 F.2d at 584–86 (similar). Officer Yehia's harassment was captured on video—video that Mr. Irizarry intended to distributed widely. Mr. Irizarry's own reputation stood to be harmed by the inclusion of Officer Yehia's antagonistic conduct during what should have been a constitutionally protected peaceful activity. Officer Yehia's actions stood not only to deter Mr. Irizarry—by impugning his reputation through conduct that suggests Mr. Irizarry's behavior was unlawful—but also to deter other citizens by conveying broadly to the public that filming police is a dangerous activity that carries the risk of official sanction.

At bottom, Officer Yehia's actions were intentional, overt, and calculated to interfere with and deter Mr. Irizarry's exercise of his First Amendment rights. "[T]here is no justification for harassing people for exercising their constitutional rights …." *Bart*, 677 F.2d at 625. No reasonable police officer in May 2019 would have thought that Officer Yehia's actions were innocent and nonretaliatory. Indeed, if Officer Yehia's actions did not constitute retaliation at all, then police officers could engage in the exact same conduct Officer Yehia undertook in this case for the exercise of *any* constitutionally protected right, including leafletting, praying, or marching in a protest, without risking any legal sanction.

II. At a Minimum, the Court Should Have Allowed Mr. Irizarry To Amend His Complaint

Even if Mr. Irizarry's complaint contained insufficient factual allegations to give rise to the reasonable inference that Officer Yehia engaged in actionable retaliatory conduct, the court below erred by dismissing the complaint with prejudice and denying Mr. Irizarry an opportunity to amend. As the court acknowledged, if "'it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend,' particularly in cases where the 'deficiencies in a complaint are attributable to oversights likely the result of an untutored pro se litigant's ignorance of special pleading requirements.'" AA112 (quoting *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990)). The dismissal below was rooted in a purported

deficiency in the facts alleged—namely, that Mr. Irizarry had failed to plead facts that would permit a reasonable factfinder to conclude that Officer Yehia engaged in conduct that every reasonable officer would have known amounted to retaliation. But Mr. Irizarry's two-page summary of the incident, AA9–10, could readily be supplemented with additional facts that could support such an inference. Indeed, Mr. Irizarry apparently attempted to amend his complaint to provide additional facts (albeit improperly) while proceeding *pro se* below. AA96–97, AA100–01. Given the basis for the dismissal, the court should have permitted Mr. Irizarry the opportunity to amend his complaint.

CONCLUSION

Mr. Irizarry respectfully asks the Court to reverse the decision below, reinstate his complaint, and remand for further proceedings. At minimum, the Court should reverse with instructions to permit Mr. Irizarry to amend his complaint.

Respectfully submitted,

s/ Andrew Tutt

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November 17, 2021

ORAL ARGUMENT STATEMENT

Pursuant to 10th Cir. L. R. 28.2(C)(2), Mr. Irizarry requests oral argument in this case in light of the public significance of the issues raised.

CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because the brief contains 11,101 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

Dated: November 17, 2021

s/ Andrew Tutt
Andrew T. Tutt

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that all required privacy redactions have been made in this brief pursuant to 10th Cir. R. 25.5. I further certify that the hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically and that the electronic submission of this brief was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

Dated: November 17, 2021

s/ Andrew Tutt
Andrew T. Tutt

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2021, I electronically filed the foregoing brief with the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users.

Dated: November 17, 2021

s/ Andrew Tutt
Andrew T. Tutt

ADDENDUM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02881-NYW

ABADE IRIZARRY,

Plaintiff,

v.

A. YEHIA,

Defendant.

MEMORANDUM OPINION AND ORDER ON MOTION TO DISMISS

Magistrate Judge Nina Y. Wang

This matter comes before the court on Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion to Dismiss" or "Motion") [#14, filed December 9, 2020]. The undersigned considers the Motion pursuant to 28 U.S.C. § 636(c) and the Order of Reference for all purposes [#17] and concludes that oral argument will not materially assist in the resolution of this matter. Accordingly, upon review of the Motion and the related briefing, applicable case law, and the entire docket, and being fully advised in the premises, I **GRANT** the Motion to Dismiss.

BACKGROUND

The court draws the following facts from the Complaint [#1] and presumes they are true for purposes of the instant Motion. Plaintiff Abade Irizarry ("Mr. Irizarry" or "Plaintiff") is a YouTube journalist and blogger who regularly publishes stories about police brutality and police conduct or misconduct. [#1 at ¶¶ 10, 24]. On May 26, 2019,[1] Mr. Irizarry was on the scene of a

[1] Plaintiff's Complaint does not indicate what year the alleged events took place in. However, the Complaint indicates that the traffic stop and the alleged constitutional violation occurred on Sunday, May 26. [#1 at ¶ 9]. The court takes judicial notice of the fact that May 26, 2019 fell on a Sunday, and of the fact that most recent year in which May 26 fell on a Sunday, other than 2019,

traffic stop of a third-party being conducted by the Lakewood Police Department in Lakewood, Colorado. [*Id.* at ¶ 12]. Mr. Irizarry was accompanied by three other "journalists/bloggers"—Eric Brandt ("Mr. Brandt"), Elijah Westbrook, and Michael Sexton. [*Id.* at ¶¶ 9-10]. Mr. Irizarry and the three other individuals began using cameras and cell phones to record the traffic stop "for later broadcast, live-streaming, premier[e]s, and archiving for their respective social media channel[s]." [*Id.* at ¶ 11]. Lakewood Police officers on the scene advised Defendant Ahmed Yehia ("Officer Yehia") that "four males had arrived on the scene and were video recording their D.U.I traffic stop." [*Id.* at ¶ 12]. Officer Yehia then arrived at the scene "in full regalia in a Marked cruiser, with every single light available on the cruiser turned on." [*Id.* at ¶ 13]. Officer Yehia exited his vehicle and positioned himself directly in front of Mr. Irizarry to obstruct Mr. Irizarry's camera's view of the field sobriety test that was occurring as part of the traffic stop. [*Id.* at ¶ 14].

Mr. Irizarry and Mr. Brandt began to "loudly criticize" Officer Yehia and voiced their disapproval of Officer Yehia's actions. [*Id.* at ¶ 16]. Officer Yehia then began to shine his flashlight into Mr. Irizarry's and Mr. Brandt's cameras, which "saturat[ed] the camera sensors." [*Id*. at ¶ 17]. Mr. Irizarry alleges that Officer Yehia continued to harass him and Mr. Brandt until a fellow police officer instructed him to stop. [*Id.* at ¶ 19]. Officer Yehia returned to his vehicle, "drove right at [Mr. Irizarry] and Mr. Brandt, and sped away" before turning around and "gunn[ing] his cruiser directly at Mr. Brandt, swerv[ing] around him, stopp[ing], [and] then repeatedly . . . blast[ing] his air horn at Mr. Irizarry and Mr. Brandt." [*Id.* at ¶¶ 20-21]. Officer

was 2013. *See* Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *see also Lopez v. Rivera*, No. 07-cv-650 WPJ/WDS, 2008 WL 11451558, at *3 (D.N.M. Apr. 10, 2008 ("The Court takes judicial notice of the fact that July 6, 2007 fell on a Friday."). Moreover, Defendant appears to agree that the incident in question occurred in 2019. *See* [#14 at ¶ 1]. Thus, the court proceeds in this matter with the assumption that the events in question occurred on May 26, 2019.

Yehia was then instructed to depart the scene. [*Id.* at ¶ 22].[2]

On September 23, 2020, Mr. Irizarry filed this lawsuit against Officer Yehia, raising one claim under 42 U.S.C. § 1983 alleging a First Amendment violation. [*Id.* at 4]. Mr. Irizarry asserts that Officer Yehia's actions "deprived [Plaintiff of] his right[] to freedom of the press secured by the [F]irst [A]mendment of the United States Constitution" and that Officer Yehia's conduct "constituted a blatant prior restraint on [Plaintiff's] right to free speech and free press." [*Id.* at ¶¶ 27-28]. On December 9, 2020, Officer Yehia filed the instant Motion to Dismiss, arguing that Mr. Irizarry fails to state a claim upon which relief could be granted because Officer Yehia is entitled to qualified immunity. [#14 at 4]. Mr. Irizarry has responded in opposition to the Motion to Dismiss and Defendant has since replied. [#29; #30]. Because the Motion is ripe for disposition, I consider the Parties' arguments below.

LEGAL STANDARDS

I. Rule 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Walker v. Mohiuddin*, 947 F.3d 1244, 1248-49 (10th Cir. 2020) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cummings v. Dean*, 913 F.3d 1227, 1238 (10th Cir. 2019) (internal quotation marks omitted). In making this determination, the "court accepts as true all well-pleaded factual allegations in [the] complaint and views those allegations in the light most favorable to the plaintiff." *Straub v. BNSF Ry. Co.*, 909 F.3d 1280, 1287 (10th Cir. 2018).

[2] The Complaint does not indicate who gave Officer Yehia this instruction. [#1].

In applying these legal principles, this court is mindful that Mr. Irizarry proceeds *pro se* and is entitled to a liberal construction of his papers. *Smith v. Allbaugh*, 921 F.3d 1261, 1268 (10th Cir. 2019). But the court cannot and does not act as an advocate for a *pro se* party. *United States v. Griffith*, 928 F.3d 855, 864 n.1 (10th Cir. 2019). Nor does a party's *pro se* status exempt him from complying with the procedural rules that govern all civil actions filed in this District, namely, the Federal Rules of Civil Procedure and the Local Rules of Practice for the District of Colorado. *See Requena v. Roberts*, 893 F.3d 1195, 1205 (10th Cir. 2018); *Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 n.2 (10th Cir. 2008).

II. Qualified Immunity

The doctrine of qualified immunity protects government officials from individual liability for actions carried out while performing their duties so long as their conduct does not violate clearly established constitutional or statutory rights. *Washington v. Unified Gov't of Wyandotte Cty.*, 847 F.3d 1192, 1197 (10th Cir. 2017). To facilitate the efficient administration of public services, the doctrine functions to protect government officials performing discretionary actions and acts as a "shield from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Once a defendant has asserted a defense of qualified immunity, the burden shifts to the plaintiff who must establish that (1) the defendant violated a constitutional right, and (2) the right was clearly established at the time of the defendant's action. *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015).

A right is clearly established if there is a Supreme Court or Tenth Circuit Court of Appeals ("Tenth Circuit") decision on point or if the weight of authority in other courts provides that the right is clearly established. *Washington*, 847 F.3d at 1197 (quoting *Thomas v. Kaven*, 765 F.3d

1183, 1194 (10th Cir. 2014) (internal quotation marks omitted)); *DeSpain v. Uphoff*, 264 F.3d 965, 979 (10th Cir. 2001). The purpose of the clearly established prong is to establish that an officer had sufficient notice such that he knows, or should know, what conduct will violate a constitutional right. *See Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1265 (10th Cir. 2012). This is a particularized, fact-specific analysis as it presents an inquiry into whether a reasonable officer would have known, under the then-prevailing conditions, that his conduct violated Plaintiff's rights, and thus a court must take care not to define the right in too general of terms. *Leiser v. Moore*, 903 F.3d 1137, 1140 (10th Cir. 2018). Plaintiff's Complaint need not contain all the necessary factual allegations to sustain a conclusion that Officer Yehia violated clearly established law. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008) (recognizing that a heightened pleading standard is not required). The Complaint needs to satisfy only the minimum pleading requirements articulated in *Twombly* and discussed above. *Id.*

ANALYSIS

Officer Yehia argues that he is entitled to qualified immunity from Mr. Irizarry's lawsuit because (1) he did not violate Mr. Irizarry's First Amendment rights as a matter of law, [#14 at 5]; and (2) even if he did violate Mr. Irizarry's constitutional rights, those rights were not clearly established at the time of the traffic stop incident. [*Id.* at 8]. I consider these arguments below.

I. Materials Considered

To start, Officer Yehia states that Mr. Irizarry improperly introduces new factual allegations in his Response that were not included in his Complaint. [#30 at 1]. The court agrees. In his Response, Mr. Irizarry cites to trial testimony of Officer Yehia in which he discusses the traffic stop incident and the related events. *See* [#29 at 2].[3] However, when ruling on a motion to

[3] The Response does not indicate from where this testimony derives. *See* [#29]. Officer Yehia

dismiss, the court may consider only "the four corners of the complaint and . . . any attached exhibits or documents referenced therein whose accuracy is not disputed." *Sanchez v. Bauer*, No. 14-cv-02804-MSK-KLM, 2015 WL 5026195, at *3 (D. Colo. Aug. 26, 2015); *see also Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) ("The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint *alone* is legally sufficient to state a claim for which relief may be granted.") (emphasis added) (quotation omitted). Thus, the court cannot consider any factual allegations not made or exhibits not referenced in or incorporated by the Complaint. And Mr. Irizarry may not amend his pleading by adding new factual allegations in his Response to the Motion to Dismiss. *See Abdulina v. Eberl's Temp. Servs., Inc.*, 79 F. Supp. 3d 1201, 1206 (D. Colo. Feb. 3, 2015). For these reasons, this court's analysis focuses solely on the allegations contained in the Complaint.

II. Nature of Plaintiff's First Amendment Claim

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. "The Tenth Circuit recognizes two separate claims arising from First Amendment violations: (1) retaliation for engaging in protected speech; and (2) unlawful prior restraint prohibiting a citizen from making protected speech." *Berger v. City & Cty. of Denver*, No. 18-cv-01836-KLM, 2019 WL 2450955, at *4 (D. Colo. June 11, 2019).

Mr. Irizarry alleges that Officer Yehia's conduct amounted to a prior restraint on his rights to free speech and free press. [#1 at ¶ 28]. "A prior restraint on speech is conduct that restricts, or 'chills,' speech because of its content before the speech is communicated." *Berger*, 2019 WL

indicates that this testimony was given "in a criminal case against one of Plaintiff's cohorts, Eric Brandt, arising from the same incident [at the center of in this case]." [#30 at 1].

2450955, at *5; *see also Independence Inst. v. Gessler*, 869 F. Supp. 2d 1289, 1207 (D. Colo. 2012) ("Unlike adverse action taken in response to actual speech, a prior restraint chills potential speech before it happens."). Prior restraints can take multiple forms: traditional prior restraint claims "involve judicial orders or administrative regulations 'forbidding certain communications' prior to [the communications] being made," but "courts have found that more informal conduct can also rise to the level of a prior restraint." *Berger*, 2019 WL 2450955, at *5 (quoting *Dirks v. Bd. of Cty. Comm'rs of Ford Cty.*, No. 15-cv-7997-JAR, 2016 WL 2989240, at *5 (D. Kan. May 24, 2016)). Indeed, "[a]lthough much less commonly found in the case law, an impermissible prior restraint can also be found where *news gathering* (as opposed to speech) is unreasonably restricted in advance." *Bralley v. Albuquerque Pub. Sch. Bd. of Educ.*, No. 13-cv-0768 JB/SMV, 2015 WL 13666482, at *3 (D.N.M. Feb. 25, 2015) (emphasis in original), *report and recommendation adopted*, 2015 WL 1568834 (D.N.M. Mar. 30, 2015). In evaluating a prior-restraint claim based on informal conduct, the pertinent question is whether the conduct has "a chilling effect on the exercise of a plaintiff's First Amendment rights" which "arises from an objectively justified fear of real consequences." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1182 (10th Cir. 2010). Mere allegations "that the restraint has a subjective chilling effect on [the plaintiff's] speech or association" are insufficient to state a claim. *Id.*[4]

[4] Officer Yehia argues that Plaintiff has failed to "establish any of the prerequisites for a prior restraint claim under the First Amendment." [#14 at 6]. Based on Officer Yehia's briefing, the court presumes that the prerequisites to which he refers are the requisite elements for "traditional" prior restraint claims: (1) "the speaker must apply to the decision maker for approval before engaging in the proposed speech"; (2) "the decision maker must be empowered to determine whether the applicant should be granted permission on the basis of its review of the content of the proposed communication"; (3) "approval of the application requires the decision maker's affirmative action"; and (4) "approval is not a matter of routine, but involves appraisal of facts, the exercise of judgment, and the formation of an opinion." *Berger*, 2019 WL 2450955, at *5; *see also* [#30 at 5 (arguing that "[i]ndisputably, the factual allegations of the Complaint occurred without any prior involvement of a 'decision maker'")]. However, the court finds that these

Although Mr. Irizarry frames his claim as a prior restraint claim, Officer Yehia suggests in his Motion that the Complaint raises allegations of First Amendment retaliation rather than a prior restraint. [#14 at 6-7]. The court agrees that, construing Plaintiff's Complaint liberally, it can be read to assert a retaliation claim under the First Amendment. *See, e.g.*, [#1 at ¶ 7 (alleging that Officer Yehia's motivations were to "punish plaintiff for exercising his rights"); [*id.* at ¶ 26 ("Mr. Irizarry was . . . gathering content on matters of public concern . . . when [Officer] Yehia interfered with his ability to do so without any legal justification to do so."). In order to state a claim of First Amendment retaliation, Mr. Irizarry must assert factual allegations demonstrating "(1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).

elements are inapplicable to Plaintiff's prior restraint claim. Mr. Irizarry does not allege a "traditional" prior restraint claim—instead, he asserts that Officer Yehia's informal conduct constituted a prior restraint, which can serve as the basis for his claim. *Multimedia Holdings Corp. v. Circuit Ct. of Fla., St. Johns Cty.*, 544 U.S. 1301, 1306 (2005) ("A prior restraint may take many forms, including . . . informal procedures undertaken by officials intended to chill expression"). The court finds that Plaintiff need not allege a formal application and denial process with respect to the asserted speech in order to state a prior restraint claim. *See Berger*, 2019 WL 2450955, at *6 ("Given that Plaintiff has not pled any of the four elements traditionally required to bring a prior restraint claim, the Court examines whether Defendants' informal conduct . . . amounted to an unlawful prior restraint on his speech."); *see also Dirks*, 2016 WL 2989240, at *5 (finding that the plaintiff had alleged an informal prior restraint claim by alleging that his government employer instructed him to lie during a deposition and threatened him with consequences if he did not plead the Fifth Amendment at the deposition, and that plaintiff then refused to answer questions at the deposition). Thus, the court is respectfully not persuaded my Officer Yehia's argument that Mr. Irizarry's failure to plead the traditional elements of a prior-restraint claim is fatal to his First Amendment claim.

Because the court finds that Plaintiff's Complaint can be construed to raise a retaliation claim, the court will liberally consider the Complaint as raising a First Amendment claim alleging both a prior restraint and retaliation. In order to state a First Amendment claim based on either retaliation or an informal prior restraint, the plaintiff must sufficiently allege that the plaintiff was, or was about to be, engaged in constitutionally protected activity and that the plaintiff's right to engage in that activity was violated. *Id.*; *Berger*, 2019 WL 2450955, at *5.

III. Constitutional Violation

First, Officer Yehia asserts that he is entitled to qualified immunity because Mr. Irizarry's constitutional rights were not violated. [#14 at 5]. Specifically, Officer Yehia argues that "videotaping a police officer's actions in public spaces is not protected activity under the First Amendment in the [Tenth] Circuit" and any hindrance of Mr. Irizarry's attempts to film the police did not result in a constitutional violation. [*Id.* at 7-8]. Mr. Irizarry responds that Officer Yehia's conduct violated the law because it violated Colo. Rev. Stat. §§ 16-3-311[5] and 13-21-128.[6] [#29 at 3]. According to Plaintiff, this precludes dismissal of his case. [*Id.*].

The court respectfully disagrees with Mr. Irizarry's assertion that the Colorado statutes cited by Plaintiff are relevant here. Mr. Irizarry does not assert any state law claims against Officer Yehia; instead, his sole claim arises under the First Amendment. *See* [#1]. The fact that Colorado state law permits a cause of action against a peace officer's employer if that peace officer

[5] "A person has the right to lawfully record any incident involving a peace officer and to maintain custody and control of that recording and the device used to record the recording. A peace officer shall not seize a recording or recording device without consent, without a search warrant or subpoena, or without a lawful exception to the warrant requirement." Colo. Rev. Stat. § 16-3-311(1).

[6] "Notwithstanding any other remedies, a person has a right of recovery against a peace officer's employing law enforcement agency if a person attempts to or lawfully records an incident involving a peace officer and . . . [a] peace officer intentionally interferes with the person's lawful attempt to record an incident involving a peace officer." Colo. Rev. Stat. § 13-21-128(1)(a)(III).

intentionally interferes with a person's lawful attempt to record an interaction with the peace officer has no bearing on whether Officer Yehia's conduct violated the First Amendment; a § 1983 claim must "allege the violation of a right secured by the Constitution or law of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988); *see also Matson v. Kansas*, No. 11-3192-SAC, 2012 WL 28073, at *5 (D. Kan. Jan. 5, 2012) ("[V]iolations of a state statute . . . do not amount to federal constitutional violations, and thus fail to state a claim for relief in federal court under 42 U.S.C. § 1983."). Thus, any alleged violations of state law have no bearing on the court's analysis regarding whether Officer Yehia violated Mr. Irizarry's constitutional rights.

Thus, the court turns to Officer Yehia's argument that, as a matter of law, "videotaping a police officer's actions in public spaces is not protected activity under the First Amendment in the [Tenth] Circuit." [#14 at 7]. In support of his argument, Officer Yehia relies on *Mocek v. City of Albuquerque*, 813 F.3d 912, 931 (10th Cir. 2015). [*Id.*]. This court respectfully disagrees that *Mocek* stands for the proposition that videotaping a police officer's actions in public spaces is not a protected First Amendment activity; indeed, it does not appear that the Tenth Circuit reached that precise question. In *Mocek*, the plaintiff asserted a § 1983 claim arguing that his First Amendment rights were violated when he was arrested for recording TSA agents at an airport during his security check. 813 F.3d at 920-21. The plaintiff encouraged the Tenth Circuit to follow other Circuit courts in recognizing a First Amendment protection "for creating audio and visual recordings of law enforcement officers in public places." *Id.* at 930. The Tenth Circuit declined to consider whether the plaintiff was engaged in protected activity, observing that an airport is a *nonpublic* forum and stating that "even if [it] agreed there is a First Amendment right to record law enforcement officers in public, [it] would still need to determine whether that conduct is

protected at an airport security checkpoint," and ultimately concluding that it "need not answer this question because [the plaintiff could not] satisfy the third prong of a retaliation claim: that the government's actions were substantially motivated in response to [the plaintiff's] protected speech." *Id.* at 931.

More recently, the Tenth Circuit considered whether a First Amendment right to record police officers performing their official duties in public spaces was *clearly established* as of 2014. *See Frasier v. Evans*, 992 F.3d 1003, 1019 (10th Cir. 2021). The court concluded that such a right was not clearly established in 2014. *Id*. at 1023. However, in so doing, the court "[did] not consider, nor opine on, whether [the plaintiff] actually had a First Amendment right to record the police performing their official duties in public spaces," noting that it was "influenced by the fact that neither party disputed that such a right exists (nor did the district court question its existence)" and indicating that it sought to avoid the risk of "glibly announcing new constitutional rights in dictum." *Id.* at 1020 n.4 (quotation and alteration marks omitted). Thus, the Tenth Circuit has not decided whether a First Amendment right exists to record police officers performing their official duties in public spaces.

However, several other Circuit courts have found that the act of recording law enforcement officers implicates the First Amendment. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) ("The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [First Amendment] principles."); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) ("[R]ecording policy activity in public falls squarely within the First Amendment right of access to information."); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) ("We conclude the First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First

Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions."); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The 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.") (emphasis in original); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("As to the First Amendment claim under Section 1983, we agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."). Simply put, the Circuit courts which have reached this issue "are not split . . . on whether the right exists." *Turner*, 848 F.3d at 687.

Against this out-of-Circuit authority, this court is persuaded that it is appropriate to decide this preliminary question and concludes that a right to record police officers performing their official duties in public, subject to reasonable time, place, and manner restrictions, exists under the First Amendment. Although the Tenth Circuit has not expressly recognized such a right, it has recognized that "[n]ews gathering is an activity protected by the First Amendment." *J. Pub. Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986). And other Circuit courts have held that this right is not limited to professional journalists or established media companies: "The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press." *Glik*, 655 F.3d at 83. Moreover, the Supreme Court has indicated that "there is practically universal agreement 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) (quotation and alteration marks omitted), and that "dissemination of information relating to alleged governmental misconduct . . . '[lies] at the core of the First

Amendment.'" *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034-35 (1991) (quoting *Butterworth v. Smith*, 494 U.S. 624, 632 (1990)).

With these principles in mind, the court agrees that "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Mr. Irizarry alleges that he recorded government officials performing their official duties in a public space for the purpose of disseminating the collected information to the public. [#1 at ¶¶ 3, 9, 11, 25, 26]. Indeed, Mr. Irizarry describes himself as a "journalist who regularly publishes stories about police brutality and conduct or misconduct." [*Id.* at ¶ 24]. He further alleges that Officer Yehia intentionally turned on all of his lights and positioned himself in front of Mr. Irizarry to purposefully obstruct Mr. Irizarry's ability to record the DUI stop. [*Id.* at ¶ 14]. Plaintiff further alleges that Defendant took these actions in response to his recording, as he readjusted his position to make sure he was obstructing the camera view of the sobriety test and, after being criticized for such actions, "pulled out a large, extremely bright flashlight and began to shine it in both the plaintiff's camera as well as Mr. Brandt's saturating the camera sensors." [*Id.* at ¶¶ 14-16]. In addition, Mr. Irizarry alleges that, when Officer Yehia was instructed to leave, Officer Yehia drove right at Messrs. Irizarry and Brandt, gunned his cruiser directly at Mr. Brandt, and repeatedly blasted his air horn at Messrs. Irizarry and Brandt. [*Id.* at ¶¶ 20-22]. Taking these facts as true as it must at this juncture, the court concludes that Mr. Irizarry has alleged sufficient facts at this stage to sufficiently allege a First Amendment violation based on either a theory of prior restraint or retaliation, i.e., that he was recording police conduct in a public forum and Officer Yehia's conduct did not amount to a reasonable time, manner, or place restriction. Thus, the court turns its analysis to whether the First

Amendment right was clearly established in 2019 "such that a reasonable person in the defendant's position would have known that his conduct violated that right." *Maestas v. Lujan*, 351 F.3d 1001, 1007 (10th Cir. 2003).

IV. Clearly Established Law

"For a constitutional right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013) (brackets, citation, and internal quotation marks omitted). A plaintiff may satisfy this burden "when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *Washington*, 847 F.3d at 1197 (quoting *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014) (internal quotation marks omitted)). But a plaintiff need not provide case law that is factually identical to his case if the constitutional violation is "obviously egregious . . . in light of prevailing constitutional principles," *A.M. v. Holmes*, 830 F.3d 1123, 1135-36 (10th Cir. 2016), and the Tenth Circuit has noted that a defendant may be on notice that her conduct violates clearly established law even in novel factual circumstances. *See Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007).

Drawing on these principles, the Tenth Circuit has expounded on the parameters of demonstrating a clearly established right:

> A constitutional right is clearly established when a Tenth Circuit precedent is on point, making the constitutional violation apparent. This precedent cannot define the right at a high level of generality. Rather, the precedent must be particularized to the facts. But even when such a precedent exists, subsequent Tenth Circuit cases may conflict with or clarify the earlier precedent, rendering the law unclear.
>
> A precedent is often particularized when it involves materially similar facts. But the precedent may be adequately particularized even if the facts differ, for general precedents may clearly establish the law when the defendant's conduct obviously violates the law. Thus, a right is clearly established when a precedent involves

> materially similar conduct or applies with obvious clarity to the conduct at issue.
>
> By requiring precedents involving materially similar conduct or obvious applicability, we allow personal liability for public officials only when our precedent puts the constitutional violation beyond debate. Thus, qualified immunity protects all officials except those who are plainly incompetent or those who knowingly violate the law.

Apodaca v. Raemisch, 864 F.3d 1071, 1076 (10th Cir. 2017) (internal brackets, citations, and quotation marks omitted).

Importantly, "[t]he clearly-established inquiry focuses on whether the contours of the constitutional right were so well-settled in the context of the particular circumstances that a 'reasonable official *would have understood that what he is doing violates that right*.'" *Estate of Carrigan v. Park Cty. Sherriff's Office*, 381 F. Supp. 3d 1316, 1327 (D. Colo. 2019) (quoting *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (emphasis added)). Although a "precise factual correlation between the then-existing law and the case at hand" is not necessary, *Patrick v. Miller*, 953 F.2d 1240, 1249 (10th Cir. 1992) (citation and internal quotation marks omitted), "there must be a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Duncan v. Gunter*, 15 F.3d 989, 992 (10th Cir. 1994) (quotation omitted).

As acknowledged above, Plaintiff's Complaint does not indicate in what year the alleged violation occurred. This complicates the court's analysis, which focuses on whether the constitutional right was clearly established *at the time of the violation*. *Puller*, 781 F.3d at 1196. However, as discussed above, the court presumes that the incident in question occurred in 2019 and therefore focuses its analysis on whether the right was clearly established at that time. *See supra* n.1.

First, the court notes that there is no on-point Supreme Court or Tenth Circuit case that

satisfies the court that this right was so clearly established. As set out above, the Tenth Circuit has yet to recognize that a First Amendment right to record the police exists, *Mocek*, 813 F.3d at 931; *Frasier*, 992 F.3d at 1020 n.4,[7] and the Supreme Court has not addressed whether such a right exists, either. As a result, the court turns to whether "the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *Washington*, 847 F.3d at 1197.

Mr. Irizarry directs the court to a number of cases, many of which have been previously cited in this Order, to support his assertion that Officer Yehia violated a right that was clearly established in 2019. [#29 at 3-4, 5-6].[8] But the court is "[m]indful that the law must be clearly established in a *particularized* sense," and "looks to the specific conduct [in those cases] analogous to that presented here." *Curtis v. Lloyd*, No. 17-cv-00046-MSK-KMT, 2019 WL 4450214, at *5 (D. Colo. Sept. 17, 2019) (quotation omitted). Although there are a number of pre-2019 Circuit cases *identifying* a First Amendment right to record the police in public spaces while the police are performing their official duties, the court finds that Mr. Irizarry has failed to direct the court to a case which demonstrates that Officer Yehia was on notice that his conduct—standing in front of

[7] In addition, Tenth Circuit recently ruled that, as of 2014, this First Amendment right to record police officers in public was not clearly established. *Frasier*, 992 F.3d at 1022-23. Specifically, the Tenth Circuit noted that, although a number of Circuit courts had, as of 2014, ruled that there was a First Amendment right to record the police, "the out-of-circuit authorities appear[ed] to be split on the clearly-established-law question." *Id.* at 1023. Thus, the court determined that "those [Circuit] decisions do not indicate that this right was clearly established law in our circuit in August 2014." *Id.* at 1022. While the court is mindful of the Tenth Circuit's analysis in *Frasier*, the *Frasier* decision is not determinative of the court's inquiry into whether the right was clearly established as of 2019.

[8] For purposes of concision, the court addresses only the cases cited by Plaintiff which specifically address the First Amendment right to record the police in public settings while they perform official duties, rather than the cases that discuss the right of the press generally. *Duncan*, 15 F.3d at 992 ("[T]here must be a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited.").

and shining a flashlight into Plaintiff's camera for an unknown period of time—violated Mr. Irizarry's First Amendment rights. In other words, the court concludes that the cases cited by Plaintiff do not demonstrate "that a reasonable official would understand that what he is doing violates [the constitutional] right." *Wilson*, 715 F.3d at 852.

Indeed, each of the cases cited by Mr. Irizarry is distinguishable in significant ways. For example, in *Glik*, the First Circuit found that an individual's First Amendment rights were violated when he was *arrested* for filming several police officers carrying out an arrest. 655 F.3d at 79, 84. And in *Turner*, the Fifth Circuit considered whether a First Amendment right to record the police exists in the context of reviewing an individual's *detainment* by police for recording a police station. 848 F.3d at 686. Finally, in *Alvarez*, the American Civil Liberties Union ("ACLU") sued the State's Attorney to block the enforcement of an "eavesdropping law," which made it a crime to record all or part of any oral conversation without the consent of all parties to the conversation. 679 F.3d at 587. The Seventh Circuit, finding a *credible threat of prosecution* for engaging in First Amendment protected activity, directed the district court to grant a preliminary injunction barring the enforcement of the eavesdropping statute against the ACLU, which planned to record police officers without their consent while those officers were performing their official duties in public places. *Id.* at 592-93, 608.[9]

Each of the cases cited by Mr. Irizarry in support of his argument that the right was clearly

[9] Circuit decisions not cited by Plaintiff but finding a First Amendment right to film the police similarly do not demonstrate that standing in front of a camera or shining a flashlight into a camera lens constitutes a First Amendment violation. In *Fields*, one plaintiff was arrested, and his phone was confiscated, after he filmed the police. 862 F.3d at 356. The other plaintiff was filming an arrest when she was "pushed . . . and pinned . . . against a pillar for one to three minutes, which prevented her from observing or recording the arrest." *Id.* The Eleventh Circuit in *Smith* did not discuss the underlying factual circumstances in finding the existence of a First Amendment right. *See* 212 F.3d at 1333.

established concerns whether the detainment, arrest, or prosecution of an individual for filming the police in public spaces would violate the individual's First Amendment rights. Plaintiff need not present cases which are factually identical to the instant case, *Holmes*, 830 F.3d at 1135-36, and "factual novelty alone will not automatically provide a state official with the protections of qualified immunity." *Marquez v. Norton*, No. 09-cv-02584-PAB-MJW, 2010 WL 4388307, at *6 (D. Colo. Oct. 29, 2010). However, "there must be a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited," *Duncan*, 15 F.3d at 992, and there is a significant and material factual gap between the actual or threatened arrest, detainment, or prosecution of an individual for filming the police and a police officer's act of standing in front of a camera or shining a light into a camera to allegedly obstruct the recording. Because the precedent cited by Mr. Irizarry is not "particularized to the facts," *Apodaca*, 864 F.3d at 1076, and because the "dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quotation omitted) (emphasis in original), the court finds that Mr. Irizarry has not met his burden of citing authority demonstrating that it was clearly established in 2019 that Officer Yehia's actions violated Mr. Irizarry's First Amendment rights.

Moreover, the court's independent research has unearthed very few federal cases discussing whether a law enforcement official's obstruction of a civilian's camera violates the First Amendment right to record the police. In *Asociación de Periodistas de Puerto Rico v. Mueller*, No. 06-1931 (JAF), 2007 WL 5312566 (D.P.R. June 12, 2007), *aff'd in part, vacated in part on other grounds, remanded*, 529 F.3d 52 (1st Cir. 2008), a number of individuals and media organizations alleged that their First Amendment rights had been violated when agents from the Federal Bureau of Investigation ("FBI") "intentionally interfered with the gathering of information

and news" by "violently knock[ing] aside microphones and cameras in an attempt to prevent [an] event from being recorded" and when one agent "used his hand to block a video camera lens." *Id.* at *4. In the summary judgment context, the court concluded that the plaintiffs had failed to allege a violation of their First Amendment rights, noting that the plaintiffs "[d]id not contend that law enforcement instructed them to stop recording the event, . . . that the agents threatened to arrest them," or "that the agents asked Plaintiffs to turn over their cameras or film in violation of the First Amendment." *Id.* The court indicated that it was unable to find a case in which a court found a First Amendment violation "based on law enforcement agents pushing away a microphone or temporarily seeking to obstruct recording by placing a hand in front of a camera." *Id.*

Similarly, in *Reno v. Nielson*, No. 19-00418 ACK-WRP, 2020 WL 2309250 (D. Ha. May 8, 2020), the plaintiff alleged that a police officer had violated his First Amendment rights by hindering his ability to record an interaction with that police officer. *Id.* at *1. Specifically, the plaintiff alleged that, once the police officer realized the plaintiff was recording the interaction, the officer "stood too close to [the plaintiff], thereby obstructing the view of the camera." *Id.* at *9. The court noted that the plaintiff "was not prevented from filming, but only had some portion of the camera's view blocked by [the police officer's] body." *Id.* Ultimately, the court concluded that "standing uncomfortably close . . . all the while permitting Plaintiff to continue filming, . . . would not chill a person of ordinary firmness from filming police activity in the future." *Id.*

The court finds neither *Asociación de Periodistas de Puerto Rico* nor *Reno* helpful to Plaintiff's case, as both cases declined to find a First Amendment violation when a law enforcement officer obstructed an individual's camera when that individual was attempting to record a public interaction. In sum, the court finds that the weight of authority does not establish that the violative nature of Officer Yehia's conduct was clearly established in 2019 so as to "put[]

the constitutional violation beyond debate." *Apodaca*, 864 F.3d at 1076.

In the alternative, Plaintiff appears to argue that, even if there is no binding case law with materially similar facts, the law was nevertheless clearly established because certain constitutional precedent establishing the First Amendment right of the press applies "with obvious clarity." *See* [#29 at 4 (quoting *Lowe v. Raemisch*, 864 F.3d 1205, 1210 (10th Cir. 2017)]. The court respectfully disagrees. The cases cited by Mr. Irizarry, as well as Mr. Irizarry's arguments, focus on general statements of law concerning the right of the press to photograph and record in public places. *See* [*id.* at 4-5]. But the Supreme Court has consistently stated that clearly established law cannot be defined "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). The general notion that the press has the right to record in public spaces does not demonstrate whether it is clearly established that a police officer's act of standing in front of or shining a light into a camera violates that right. *Cf. id.* ("The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."); *cf. Marquez*, 2010 WL 4388307, at *6 (finding that qualified immunity applied where the defendant's conduct "[did] not so obviously run afoul of law that an assertion of qualified immunity [could] be overcome based solely on the Fourth Amendment's general prohibition against arrests without probable cause."). The court cannot conclude that the general proposition that the press has a right to record in public rendered Officer Yehia's conduct unconstitutional "with obvious clarity."

For these reasons, the court finds that Officer Yehia is entitled to qualified immunity from Mr. Irizarry's lawsuit.[10] As a result, the court will grant Officer Yehia's motion to dismiss based

[10] Plaintiff's Complaint contains allegations that, after shining his flashlight at Mr. Irizarry's camera, Officer Yehia "drove right at [Mr. Irizarry] and Mr. Brandt, and sped away," and "blasted his air horn at Mr. Irizarry and Mr. Brandt." [#1 at ¶ 20-21]. It does not appear that Mr. Irizarry

on qualified immunity grounds.

V. Prejudice

"Generally, a court will not dismiss a pro se litigant's action without leave to amend." *Alfaro v. Cty. of Arapahoe*, No. 18-cv-00737-MSK-NYW, 2018 WL 5259609, at *2 (D. Colo. May 2, 2018), *report and recommendation adopted*, 2018 WL 4577253 (D. Colo. Sept. 25, 2018). The Tenth Circuit has instructed that if "it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend," particularly in cases where the "deficiencies in a complaint are attributable to oversights likely the result of an untutored pro se litigant's ignorance of special pleading requirements." *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990). In these circumstances, "dismissal of the complaint without prejudice is preferable." *Id.* "[D]ismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." *Gee v. Pacheco*, 627 F.3d 1178, 1195 (10th Cir. 2010).

Here, the court's ruling of dismissal is not based on "deficiencies . . . attributable to . . . an

bases his First Amendment claim on this conduct. *See, e.g.*, [*id.* at ¶ 28 ("By purposefully [interfering] with . . . and obstructing [Mr. Irizarry's] ability to gather content[,] . . . [Officer] Yehia's conduct constituted a blatant prior restraint on [Plaintiff's] right to free speech and free press")]. Moreover, Mr. Irizarry does not indicate in his Response that his First Amendment claim is based on these allegations and makes no argument that such conduct violated his constitutional rights. *See* [#29 at 5, 7 (focusing only on Officer Yehia's acts of obstructing Plaintiff's camera and asserting that Officer Yehia violated his rights by "blocking and interfering with [his] ability to record")]. While the court must construe a *pro se* plaintiff's filings liberally, a court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues." *Drake v. Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991). Moreover, "[the] court may not assume that a plaintiff can prove . . . a defendant has violated laws in ways that a plaintiff has not alleged." *ElHelbawy v. Pritzker*, No. 14-cv-01707-CBS, 2015 WL 5535246, at *1 (D. Colo. Sept. 21, 2015). Because there is no indication in Mr. Irizarry's filings that he asserts his First Amendment claim on these facts, the court will not analyze whether he states a claim based on those facts.

untutored pro se litigant's ignorance of special pleading requirements." *Reynoldson*, 907 F.2d at 126. The court's ruling is based on the fact that Officer Yehia is entitled to qualified immunity from Mr. Irizarry's lawsuit because Mr. Irizarry has not met his burden of demonstrating that Officer Yehia violated clearly established law. In these circumstances, leave to amend would be futile. *Session v. Clements*, No. 14-cv-02406-PAB-KLM, 2016 WL 820978, at *6 (D. Colo. Jan. 21, 2016), *report and recommendation adopted*, 2016 WL 814715 (D. Colo. Mar. 1, 2016). The court finds that dismissal of Mr. Irizarry's Complaint with prejudice is appropriate. *See Watkins v. Donnelly*, 551 F. App'x 953, 960-61 (10th Cir. 2014) (unpublished) (affirming dismissal with prejudice where plaintiff failed to allege violation of clearly established right); *Lybrook v. Members of the Farmington Mun. Schs. Bd. of Educ.*, 232 F.3d 1334, 1341 (10th Cir. 2000) (affirming dismissal with prejudice where dismissal was based on qualified immunity grounds).

CONCLUSION

For the reasons stated herein, **IT IS ORDERED** that:

(1) Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) [#14] is **GRANTED**;

(2) Plaintiff's Complaint is **DISMISSED with prejudice**;

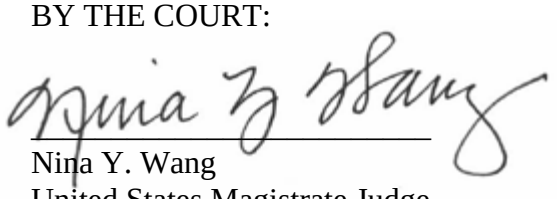
(3) Each Party shall bear their own costs;[11] and

(4) The Clerk of Court shall **TERMINATE** this matter accordingly.

[11] While costs should generally "be allowed to the prevailing party," Fed. R. Civ. P. 54(d)(1), the district court may in its discretion decline to award costs where a "valid reason" exists for the decision. *See, e.g., In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d 1144, 1147 (10th Cir. 2009) (citations omitted). Given Plaintiff's *pro se* status, the court finds that it is appropriate for each Party to bear their own costs associated with this action.

DATED: June 8, 2021

BY THE COURT:



Nina Y. Wang
United States Magistrate Judge

ABADE IRIZARRY,

Plaintiff

v. Civil Action No. 1:20-cv-02881-NYW

A. YEHIA,

Defendant

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

❒ the Plaintiff *(name)* recover from the Defendant *(name)* the amount of (amount) dollars ($_____), which includes prejudgment interest at the rate of_____%, plus post judgment interest at the rate of____% per annum, along with costs.

❒ the Plaintiff recover nothing, the action be dismissed on the merits, and the Defendant *(name)* recover costs from the Plaintiff *(name)*.

☒ other: The Defendant's Motion to Dismiss Pursuant Fed. R. Civ. P. 12(b)(6) [#14] is **GRANTED**; Plaintiff's Complaint is **DISMISSED** with prejudice; Each Party shall bear their own costs; and The Clerk of the Court shall **TERMINATE** this matter accordingly.

This action was *(check one)*:

❒ tried by a jury with Judge *(name)* presiding, and the jury has rendered a verdict.

❒ tried by Judge *(name)* without a jury and the above decision was reached.

☒ decided by Magistrate Judge Nina Y. Wang in the Memorandum Opinion and Order on Motion to Dismiss [36] issued June 8, 2021.

Date : 8 June 2021

CLERK OF COURT

s/ B. Wilkins

Signature of Deputy Clerk