No. 21-1247

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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ABADE IRIZARRY,

Plaintiff-Appellant

v.

AHMED YEHIA,

Defendant-Appellee

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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# BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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## INTEREST OF THE UNITED STATES

The United States has a significant interest in this case, which involves the public's right to record law-enforcement officers performing their duties in public. The U.S. Department of Justice frequently relies on photos and videos of police misconduct—including photos and videos taken by members of the public—when investigating and prosecuting police officers under 18 U.S.C. 241 and 242 for violating individuals' constitutional rights. See, *e.g.*, Indictment, *United States* v.

*Chauvin*, No. 21-cr-00109-WMW (D. Minn. May 6, 2021), available at https://perma.cc/WS3T-DW9R (Section 242 prosecution of officer who used deadly force on George Floyd); *United States* v. *Slager*, 912 F.3d 224, 228 (4th Cir.) (citing bystander footage used in the Section 242 prosecution of officer who shot Walter Scott), cert. denied, 139 S. Ct. 2679 (2019); *Koon* v. *United States*, 518 U.S. 81, 86 (1996) (citing bystander footage used in the Section 242 prosecution of officers involved in the beating of Rodney King).

The Department of Justice also has authority to investigate and sue police departments whose officers engage in "a pattern or practice of conduct * * * that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or the laws of the United States," including the First Amendment. 34 U.S.C. 12601. Through its investigations, the Department has documented residents' concerns in several cities about police efforts to prevent the public and the press from recording officers' public conduct. Most recently, in Baltimore, the Department encountered numerous allegations that police "seize, view, and destroy video and audio recordings that constitute private property without just cause to do so." U.S. Dep't of Just., Civil Rights Div., *Investigation of the Baltimore City Police Department* 119 (Aug. 10, 2016), available at https://perma.cc/P5WM-F9TU. The Department's investigation determined that these "First Amendment

violations acutely affect a community's trust in the legitimacy of law enforcement operations." *Id.* at 120.

Finally, the federal government's own law-enforcement officers benefit in various ways from the public's ability to record their actions. Recordings can provide transparency that helps foster community trust in law enforcement more generally. Cf. Deputy Att'y Gen. Lisa Monaco, Memorandum on Body-Worn Camera Policy 1 (June 7, 2021), available at https://perma.cc/UU47-D8MT ("The Department of Justice recognizes that transparency and accountability in law enforcement operations build trust with the communities we serve."). In particular, bystander and journalist recordings of police may be used to "exonerate an officer charged with wrongdoing." *Fields* v. *City of Phila.*, 862 F.3d 353, 360 (3d Cir. 2017) (quoting *Turner* v. *Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017)). And such recordings may also be used to prosecute people who have harmed law-enforcement officers in the line of duty. Federal prosecutors, for instance, have recently used bystander and journalist footage in prosecuting people who assaulted Capitol Police officers on January 6.

## STATEMENT OF THE ISSUE

Whether the First Amendment provides a qualified right to record police officers performing their duties in public places.[1]

## STATEMENT OF THE CASE

Plaintiff Abade Irizarry is a self-identified journalist and blogger who "regularly publishes stories about police brutality and * * * misconduct." AA9, 11.[2] In this lawsuit, he alleges that defendant Ahmed Yehia, an officer with the Lakewood (Colorado) Police Department, violated the First Amendment by preventing Irizarry from recording a traffic stop. The district court granted Officer Yehia's motion to dismiss the complaint. The following facts are as alleged in the complaint.

1. Irizarry and three other "journalists/bloggers" were at the scene of a traffic stop in Lakewood in May 2019. AA9, 92-93. Irizarry and the others began to use their 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]." AA9. When the officers saw the group of journalists, they radioed Officer Yehia to alert him that the stop was being recorded. AA9.

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[1] This brief takes no position on the issue of qualified immunity.

[2] "AA__" refers to the Appellant's appendix and relevant page numbers.

Upon arriving at the scene, Officer Yehia stepped out of his cruiser, positioned himself directly in front of Irizarry, and then "purposefully readjust[ed] himself to make sure that he intentionally obstructed the camera view of the [traffic stop]." AA9. Irizarry believed that it "was Yehia's clear intention to irritate and obstruct [Irizarry]'s recording device preventing the clear and meaningful collection of the ENTIRE content as it unfolded for his publication." AA9.

Irizarry and one of the other journalists "loudly criticize[d]" Officer Yehia and expressed disapproval of his actions. AA10. Officer Yehia responded by shining his flashlight into their cameras, which "saturat[ed] the camera sensors." AA10. Officer Yehia then continued to harass Irizarry and the others until another officer arrived and instructed Officer Yehia to stop. AA10. At that point, Officer Yehia returned to his vehicle. He then "drove right at [Irizarry and his companion], and sped away" before turning around and "gunn[ing] his cruiser directly at [Irizarry's companion], swerv[ing] around him, stop[ping], [and] then repeatedly * * * blast[ing] his air horn at [them]." AA10.

2. Irizarry filed this suit, *pro se*, against Officer Yehia. AA7. His complaint contained a single 42 U.S.C. 1983 claim asserting that Officer Yehia's actions "deprived [him of] his rights to freedom of the press secured by the [F]irst [A]mendment of the United States Constitution." AA11.

The district court dismissed Irizarry's complaint under Rule 12(b)(6), holding that Officer Yehia was entitled to qualified immunity. AA105-112. The court held 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." AA103. To reach that conclusion, the court cited Tenth Circuit precedents recognizing that the First Amendment protects news-gathering activities; out-of-circuit case law holding that such protections are not limited to professional journalists or established media companies; and the widely accepted proposition that the First Amendment protects the free discussion of government affairs, including sharing information about government misconduct. AA103-104. Nevertheless, despite holding that the First Amendment protects such a right, the court concluded that the right had not been clearly established in May 2019, when the incident that gave rise to this case occurred. AA105-112. The court thus dismissed Irizarry's complaint with prejudice. AA113.

## SUMMARY OF ARGUMENT

This case raises an important issue that this Court has not yet addressed: whether the First Amendment provides a qualified right to record law-enforcement officers performing their duties in public. All six circuit courts to confront that question have concluded that such a right exists. This Court should do the same.

1. As the other circuits to consider this issue have all recognized, the right to record law-enforcement activity is firmly rooted in well-settled First Amendment principles. The First Amendment generally protects recordings as expressive works and, separately, protects the ability to record matters of public interest. It also extends protections to gathering information about the government's public activities, particularly in the policing context. Protecting the free flow of information about the criminal justice system ultimately "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559-560 (1976) (citation omitted). Although the right to record law-enforcement activity is not absolute—and generally remains subject to reasonable time, place, and manner restrictions—it falls squarely within the ambit of the First Amendment's protections.

2. This Court should hold that the First Amendment protects the right to record police officers performing their duties in public (subject to reasonable time, place, and manner restrictions, as noted above) before resolving the qualified-immunity question. Although this Court has declined to resolve this constitutional question in the past, cases implicating the question continue to regularly arise within the Circuit. And, unlike prior cases this Court has considered, this case presents ideal circumstances for resolving the question.

## ARGUMENT

## I

## THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECORD POLICE OFFICERS PERFORMING THEIR DUTIES IN PUBLIC, SUBJECT TO REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS

### *A. Every Court Of Appeals To Consider The Issue Has Held That The First Amendment Protects The Right To Record Public Police Activity*

The Supreme Court has long recognized that "the 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." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978). That protection applies with special force to governmental attempts to restrict the gathering and dissemination of information about the government's own actions. After all, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966).

The courts of appeals have consistently relied on that principle in explaining why the First Amendment protects the right to record police officers performing

their official duties in public.[3] In *Glik* v. *Cunniffe*, for instance, the First Circuit reasoned that filming the police constitutes protected activity because "[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.'" 655 F.3d 78, 82 (1st Cir. 2011) (citation omitted). Similarly, in *Fields* v. *City of Philadelphia*, the Third Circuit emphasized that the public's ability to record law-enforcement activity promotes the free flow of information about the conduct of government officials. 862 F.3d 353 (3d Cir. 2017). That information, the court explained, "is particularly

[3] Six circuits have held that the First Amendment protects the right to record public law-enforcement activity. See *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 Phila.*, 862 F.3d 353, 359 (3d Cir. 2017) ("[R]ecording police 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 that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist."); *ACLU of Ill.* v. *Alvarez*, 679 F.3d 583, 603 (7th Cir.) (holding that an Illinois statute prohibiting eavesdropping generally could not be constitutionally applied to audio recordings of police officers in public), cert. denied, 568 U.S. 1027 (2012); *Askins* v. *U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) ("The First Amendment protects the right to photograph and record matters of public interest. This includes the right to record law enforcement officers engaged in the exercise of their official duties in public places.") (internal citations omitted); *Smith* v. *City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.) ("As to the First Amendment claim under Section 1983, we agree with the [plaintiffs] that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."), cert. denied, 531 U.S. 978 (2000).

important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values.'" *Id.* at 359 (quoting *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011)).

Courts have also drawn on other bedrock First Amendment principles in holding that the public has a right to record law-enforcement activity. In *ACLU* v. *Alvarez*, for example, the Seventh Circuit invoked the First Amendment's free-press guarantee to explain why an Illinois eavesdropping statute could not be used to stop people from recording the police in public places. 679 F.3d 583, 595-599 (7th Cir.), cert. denied, 568 U.S. 1027 (2012). The court specifically relied on the Supreme Court's observation in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), that "press freedom includes, by implication, 'some protection' for gathering information about the affairs of government" and "is consistent with the historical understanding of the First Amendment." *Alvarez*, 679 F.3d at 599. The Fifth Circuit's decision in *Turner* v. *Lieutenant Driver*—which likewise recognized a right to record police activity—echoed that same reasoning, noting that "without some protection for seeking out the news, freedom of the press could be

eviscerated." 848 F.3d 678, 688 (5th Cir. 2017) (citation omitted); accord *Fordyce* v. *City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995).[4]

The many cases recognizing the First Amendment right to record public police activity comport with the policies and views of a growing number of police departments and law-enforcement officials. See, *e.g.*, Int'l Ass'n of Chiefs of Police, Law Enf't Pol'y Ctr., *Recording Police Activity: Concepts and Issues Paper* 1 (Dec. 2015), available at https://perma.cc/VM7L-EE4K ("Recording the actions and activities of police officers in the performance of their public duties is a form of speech through which individuals may gather and disseminate information of public concern."). In fact, Officer Yehia's own police department explicitly instructs officers not to interfere with "the lawful efforts of the news media to photograph, tape, record and televise adult subjects in a public place." Lakewood Police Dep't, Policy & Procedural Manual § 4120.C.2 (emphasis omitted), available at https://perma.cc/DTS6-EZ77. Policies like these reflect a widespread recognition that permitting the public to record police officers promotes transparency, and that public scrutiny often has a "salutary effect" on officers' performance. *Glik*, 655 F.3d at 82-83.

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[4] The First Amendment's free-press protections apply to members of both the institutional press and the general public alike. As the First Circuit noted in *Glik*, "[t]he First Amendment right to gather news is * * * 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." 655 F.3d at 83.

*B. Recordings And Photographs Of Law-Enforcement Conduct Play A Critical Role In Civic Discourse*

The case law recognizing a right to record public police activity has underscored the unique role that photographs and recordings, in particular, play in furthering civic discourse. The Seventh Circuit in *Alvarez*, for instance, stressed that "audio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public." 679 F.3d at 607. And the Third Circuit likewise observed in *Fields* that recordings "lay[] aside subjective impressions for objective facts" and help "facilitate discussion because of the ease in which they can be widely distributed via different forms of media." 862 F.3d at 359. The logic of these cases has been powerfully reaffirmed in recent years as bystander and journalist recordings of police misconduct have helped to shape national debates over law-enforcement policy.

These cases also fit squarely within the broader constellation of decisions recognizing that documenting matters of public concern constitutes core First Amendment activity. In *Western Watersheds Project* v. *Michael*, for example, this Court struck down a Wyoming law that barred people from photographing wildlife or collecting natural-resource data in certain ways. 869 F.3d 1189, 1198 (10th Cir. 2017). The Court held that the "collection of resource data constitutes the protected creation of speech." *Id.* at 1195-1196. Critically, in reaching that

conclusion, the Court analogized directly to the cases concerning the right to record police activity, reasoning that "[a]n individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter." *Id.* at 1196.

Several other cases have similarly invalidated government efforts to prevent people from recording or photographing matters of public concern. The Eighth Circuit, for instance, recently held that a city ordinance forbidding people from photographing children in a public park violated the First Amendment rights of a resident who sought to use photos of the park to criticize the city's use of the space. *Ness* v. *City of Bloomington*, 11 F.4th 914, 923-924 (8th Cir. 2021). The court concluded that the ordinance infringed the resident's right to disseminate information on a matter of "public controversy." *Ibid.* The Ninth Circuit similarly held that a ban on filming agricultural-production facilities violates the First Amendment "right to film matters of public interest." *Animal Legal Def. Fund* v. *Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) (citation omitted). And the First Circuit held that a "ban on ballot selfies [*i.e.*, a photograph of a voter's completed ballot] would suppress a large swath of political speech, which 'occupies the core of the protection afforded by the First Amendment.'" *Rideout* v. *Gardner*, 838 F.3d 65, 75 (1st Cir. 2016) (quoting *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995)), cert. denied, 137 S. Ct. 1435 (2017).

These cases illustrate that when the government prevents someone from recording a matter of public concern, it also suppresses that person's ability to create and disseminate speech on the same matter. And these cases further illustrate that the First Amendment protects the public's right to record those matters, even when they do not involve government activity. If the First Amendment prohibits government interference with recording non-governmental activity—as some of these cases demonstrate—then *a fortiori*, it prohibits such interference when the government is involved.

### *C. The Right To Record Is Subject To Reasonable Time, Place, And Manner Restrictions*

The district court properly recognized that the public's right to record police officers is not absolute. Rather, as every circuit court to confront the issue has concluded, the right is subject to reasonable "time, place, and manner" restrictions.[5] See *Project Veritas Action Fund* v. *Rollins*, 982 F.3d 813, 835-836

[5] The "time, place, and manner" test is typically used to assess the validity of government-imposed speech restrictions in public fora. The test—which is often described as a form of intermediate scrutiny—examines whether the restriction at issue is "narrowly tailored to serve a significant governmental interest" and whether it "leave[s] open ample alternative channels for communication of the information." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). To the extent that the government attempts to restrict a person's right to record the police by means other than a "time, place, or manner" limitation, the right may be subject to some other standard that would similarly protect significant government interests. See *Alvarez*, 679 F.3d at 604-605.

(1st Cir. 2020), cert. denied, No. 20-1598, 2021 WL 5434360 (S. Ct. Nov. 22, 2021); *Fields*, 862 F.3d at 360; *Turner*, 848 F.3d at 688; *Alvarez*, 679 F.3d at 605; *Askins* v. *U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Smith* v. *City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.), cert. denied, 531 U.S. 978 (2000).

In its current posture, this case does not require the Court to decide what types of "time, place, or manner" restrictions may be permissibly imposed on people who seek to record police officers. The district court dismissed this case before discovery, and Officer Yehia has not cited any facts in Irizarry's complaint that could justify Officer Yehia's actions as a valid "time, place, or manner" restriction. The complaint does not, for instance, suggest that Irizarry's efforts to record the traffic stop somehow threatened to impede the stop itself. Nor does anything in the complaint suggest that the stop might have occurred in a non-public place. Thus, while the right to record remains subject to reasonable limitations, the Court has "no occasion to explore those limitations here." *Glik*, 655 F.3d at 84.

## II

## THIS COURT SHOULD ANSWER THE CONSTITUTIONAL QUESTION IN THIS CASE, REGARDLESS OF HOW IT RESOLVES THE QUALIFIED IMMUNITY QUESTION

This Court has never explicitly recognized a First Amendment right to record public law-enforcement activity. Yet, cases implicating that right continue

to arise on a regular basis within this Circuit. This Court should therefore take this opportunity to clarify that the right exists, and join the "growing consensus" of circuits that have held that, as a general matter, "the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public." *Fields* v. *City of Phila.*, 862 F.3d 353, 356 (3d Cir. 2017).

This year alone, three other district courts in this Circuit (in addition to the district court in the present case) have confronted the question whether the First Amendment protects the right to record public police activity. See *Bustillos* v. *City of Carlsbad*, No. 2:20-cv-01336-JB-GJF, 2021 WL 4272739, at *5-6 (D.N.M. Sept. 20, 2021), appeal pending, No. 21-2129 (docketed Oct. 21, 2021); *Kerr* v. *City of Boulder*, No. 19-cv-01724-KLM, 2021 WL 2514567, at *10 (D. Colo. June 18, 2021); *Gutierrez* v. *Geofreddo*, No. 1:20-cv-00502, 2021 WL 1215816, at *21-22 (D.N.M. Mar. 31, 2021). The frequency with which this issue now arises underscores the need for this Court to provide a clear answer to the substantive constitutional question here, regardless of how it ultimately resolves the issue of qualified immunity. See *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009).

Other courts of appeals have specifically cited the recurring nature of right-to-record cases to explain why it was necessary to decide the First Amendment question directly, rather than resolving cases on qualified immunity. For instance,

in *Turner* v. *Lieutenant Driver*, the Fifth Circuit emphasized that "[b]ecause the issue continues to arise in the qualified immunity context, [it should] proceed to determine it for the future." 848 F.3d 678, 687-688 (5th Cir. 2017) (footnote omitted). Courts have also cited the broader significance of the First Amendment question itself. As the Third Circuit reasoned in *Fields*, "this First Amendment issue is of great importance and the recording of police activity is a widespread, common practice." 862 F.3d at 357 (rejecting the defendants' "invitation to take the easy way out" by deciding the case on qualified-immunity grounds without resolving the underlying First Amendment issue). This Court should adhere to the same approach as its sister circuits.

To be sure, this Court has twice declined opportunities to answer the First Amendment question at issue here. But unlike those prior cases, the present case provides an ideal vehicle for resolving the question.

Most recently, in *Frasier* v. *Evans*, 992 F.3d 1003 (10th Cir.), cert. denied, No. 21-57 (S. Ct. Nov. 1, 2021), the Court granted qualified immunity to a group of Denver police officers who sought to confiscate a video that the plaintiff had recorded of the officers arresting someone. In that decision, the court elected "not [to] consider, nor opine on, whether [the plaintiff] actually had a First Amendment right to record the police performing their official duties in public spaces." *Id.* at 1020 n.4. The Court explained that its decision not to address that question was

"influenced by the fact that neither party disputed that such a right exists (nor did the district court question its existence)." *Ibid.*; see also *id.* at 1012 (noting that, at the time of the incident, the City of Denver had an "official policy which clearly affirmed citizens' First Amendment rights to record the police in the public discharge of their official duties") (citation omitted). That concern does not exist in the present case. As noted above, Officer Yehia explicitly argued in the district court that "videotaping a police officer's actions in public spaces is not protected activity under the First Amendment." AA20-21. Thus, this case presents a better vehicle for deciding the constitutional question than *Frasier*.

This case also presents a better vehicle for deciding the question than *Mocek* v. *City of Albuquerque*, 813 F.3d 912 (10th Cir. 2015), the other case in which this Court declined to address the First Amendment right-to-record issue. That case involved an individual who sought to record law-enforcement activity at an airport security checkpoint—a *non-public* forum. As this Court explained, "even if we agreed there is a First Amendment right to record law enforcement officers in *public*, we would still need to determine whether that conduct is protected at an airport security checkpoint." *Mocek*, 813 F.3d at 931. And, the Court concluded, it did not need to answer that question "because Mocek cannot satisfy the third prong of a retaliation claim: that the government's actions were substantially motivated in response to his protected speech." *Ibid*. Here, in contrast, the

complaint makes clear that Officer Yehia not only acted with a clear purpose to prevent Irizarry from recording, but also did so on a public street. In short, Irizarry's allegations squarely present the constitutional question in a way that *Mocek* did not.

## CONCLUSION

The United States respectfully urges this Court to hold that the First Amendment protects the right to record police officers in public, subject to reasonable time, place, and manner restrictions.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

(1) This brief complies with Federal Rule of Appellate Procedure 29 and with Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 4,088 words according to the word processing program used to prepare the brief.

(2) This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019, in 14-point Times New Roman font.

s/ Natasha N. Babazadeh
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Date: November 24, 2021

**CERTIFICATE OF DIGITAL SUBMISSION**

I certify that the electronic version of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY, prepared for submission via ECF, complies with the following requirements:

(1) All required privacy redactions have been made under Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5;

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s/ Natasha N. Babazadeh
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Date: November 24, 2021

## CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY with the United States Court of Appeals for the Tenth Circuit via this Court's CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users. Pursuant to the Tenth Circuit Rule 31.5, the United States will mail seven (7) paper copies of this filing within five business days following receipt of notice that the electronic filing is compliant.

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