

No. 16-1650
No. 16-1651

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

RICHARD FIELDS and AMANDA GERACI,

Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, et al.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
THE HONORABLE MARK A. KEARNEY

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 31 MEDIA ORGANIZATIONS IN
SUPPORT OF PLAINTIFFS-APPELLANTS**

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Commonwealth of Massachusetts v. Hyde, 434 Mass. 594 (2001)..... 15

First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 781 (1978)..... 3

Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) 4, 5, 15

Herbert v. Lando, 441 U.S. 153, 185 (1979) 4

Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010) 1

New York Times Co. v. United States, 403 U.S. 713 (1971)..... 4

Saxbe v. Washington Post Co., 417 U.S. 843 (1974)..... 4

Other Authorities

Barajas, Joshua, *Second graphic video of Alton Sterling shooting emerges*, PBS (July 6, 2016)..... 8

Berman, Mark, *S.C. Investigators Say They Thought Fatal Police Shooting was Suspicious Before Video Emerged*, Wash. Post (Apr. 10, 2015)..... 7

Brown, Pete, *A Global Study of Eyewitness Media in Online Newspaper Sites*, Eyewitness Media Hub (2015)..... 11, 12

Chan, Sewell, *Police Investigate Officer in Critical Mass Video*, N.Y. Times (July 28, 2008) 14

Derrick, Geoffrey J., *Qualified Immunity and the First Amendment Right to Record Police*, 22 B.U. Pub. Int. L.J. 243, 259 (2013) 5

Domonoske, Camila, and Bill Chappell, *Minnesota Gov. Calls Traffic Stop Shooting ‘Absolutely Appalling At All Levels’*, NPR (July 7, 2016) 9

Eligon, John, *Charges Against Shoved Cyclist Are Dropped*, N.Y. Times (Sept. 5, 2008)..... 14

Eligon, John, *Ex-Officer Convicted of Lying About Confrontation with Cyclist*, N.Y. Times (Apr. 29, 2010)..... 14

Fernandez, Manny, Richard Pérez-Peña, and Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback*, N.Y. Times (July 8, 2016) 9

Gittens, Hasani, and Alex Johnson, *'All of a Sudden, You've Seen Them Just Fall': Witnesses Recount Dallas Horror*, NBC News (July 8, 2016, 3:25 AM)..... 9

Goodman, J. David, *Man Who Filmed Fatal Police Chokehold Is Arrested on Weapons Charges*, New York Times (Aug. 3, 2014) 8

Kopplin, Zack, and Justin Miller, *New Video Emerges of Alton Sterling Being Killed by Baton Rouge Police*, The Daily Beast (July 7, 2016) 7

Kreimer, Seth F., *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335 (2011)..... 5

Laplaca, Bryan, *Video Refutes Woman’s Alleged Claim Pequannock Officer Pointed Gun at Her*, NorthJersey.com (Dec. 4, 2015) 10

Lau, Maya and Bryn Stole, *'He’s got a gun! Gun’: Video shows fatal confrontation between Alton Sterling, Baton Rouge police officer*, The Advocate (July 5, 2016) 7, 8

McLaughlin, Elliott C., *Woman streams aftermath of fatal officer-involved shooting*, CNN (July 8, 2016) 9

Murphy, Heather, *A Guide to Watching Syria’s War*, N.Y. Times (Mar. 19, 2013) 11

Osterreicher, Mickey H., *Fields v. City of Philadelphia: Questioning a First Amendment Right*, MediaLawLetter, published by the Media Law Resource Center (Feb. 2016) 16

Pringle, Paul and Andrew Blankstein, *King Case Led to Major LAPD Reforms*, L.A. Times (June 17, 2012) 6

Report of the Independent Commission on the Los Angeles Police Department (1991) 6

Shoichet, Catherine E., *Facebook Live video offers new perspective on police shootings*, CNN (July 7, 2016)..... 9

USA TODAY, *Man who Filmed S.C. Cellphone Video Breaks his Silence*, YouTube (Apr. 9, 2015)..... 15

Wardle, Claire, et al., *Amateur Footage: A Global Study of User-Generated Content in TV and Online-News Output* 2, 11

Winton, Richard, \Gardena police shooting video: Justified or ‘cold-blooded’ killing?, Los Angeles Times (July 15, 2014)..... 10

RULE 29(C)(5) CERTIFICATION

Pursuant to Fed. R. App. P. 29(c)(5), *amici* states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici, all of whom are engaged in newsgathering or represent the interests of journalists and publishers, have an interest in seeing that their First Amendment rights are fully protected when photographing and filming the police, and that the same rights are recognized for members of the public who are often the first to record breaking news and other information. As discussed more fully in the following brief, *amici* believe the public has a significant interest in such citizen-generated content. Photographs and videos recorded by citizens are essential to the news media to fully tell many stories.

The members of the news media *amicus* coalition, all of whom are described more fully in Appendix A, are: The Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, Association of American Publishers, Inc., BuzzFeed, Daily News, LP, First Look Media Works, Inc., Foundation for National Progress, dba Mother Jones, Freedom of the Press Foundation, Gannett Co., Inc., Inter American Press Association, Investigative Reporting Workshop at American University, The McClatchy Company, The Media Consortium, Media Law Resource Center, Metro Corp. d/b/a Philadelphia Magazine, National Newspaper Association, The National Press Club, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, News

Media Alliance, Online News Association, Pennsylvania NewsMedia Association, Radio Television Digital News Association, Reporters Without Borders, Society of Professional Journalists, Student Press Law Center, TEGNA Inc., Tully Center for Free Speech, and The Washington Post.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Court in this case is asked to determine whether individuals have a First Amendment right to photograph and film police officers in public places. In addressing this question below, the district court held that such conduct is not eligible for First Amendment protection unless the person taking the photograph or making the film does so for the purpose of criticizing the police. JA7 (Memorandum Opinion at 1) (“[W]e find no basis to craft a new First Amendment right based solely on ‘observing and recording’ without expressive conduct and, consistent with the teachings of the Supreme Court and our Court of Appeals, decline to do so today.”).

This decision is at odds with the position of the U.S. Department of Justice, the decisions of numerous U.S. Courts of Appeals, and binding precedent of the U.S. Supreme Court. *See generally* Appellant’s Brief at 26–35. These authorities recognize that regardless of a citizen’s purpose or intent there is a qualified First Amendment right to photograph and video-record the police in public places subject to reasonable time, place, and manner restrictions. Indeed, this Court has previously suggested that a right to film the police in public places exists, although it was not clearly established in the context of traffic stops, which it found were “inherently dangerous situations.” *See Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (writing that the general right to record matters of public

concern “*is* clearly established” but is not absolute and is subject to reasonable time, place, and manner restrictions (emphasis in original)).

The district court’s decision, if allowed to stand, will hinder the ability of the news media to gather the news and provide the public with information of significant public interest. Today, the first source of information from the scene of a newsworthy event is frequently an ordinary citizen with a smart phone. These witnesses often play a meaningful role in monitoring the functioning of government, particularly when they work with the news media to distribute the information. *See* Claire Wardle et al., *Amateur Footage: A Global Study of User-Generated Content in TV and Online-News Output*, A Tow/Knight Report, at 5 (2014), http://towcenter.org/wp-content/uploads/2014/04/80458_Tow-Center-Report-WEB.pdf. With the power to contradict or support official accounts of events, images and video shot by eyewitnesses enable the press to tell stories that may not have been told in a different era.

As Fields’s and Geraci’s interactions with the police show, photographing and filming officers in public places has become a hazardous enterprise, one that can far too easily lead to detention or arrest. The significance of this case thus extends far beyond the individual actors involved. *Amici* urge this Court to recognize the First Amendment’s protections for public recording of police actions

by private citizens, and the importance of such protections to the news media and the public generally.

ARGUMENT

I. The ability of the news media to inform the public about the actions of its government is aided when all citizens, regardless of their purpose or intent, are allowed to photograph and record the police in public places.

In covering breaking news events, members of the news media often rely on video taken by bystanders. The district court’s decision, if allowed to stand, would interfere with the right to record such video and restrict, if not eliminate, an important source of information on public controversies. The public interest in receiving this information demonstrates the importance of recognizing the First Amendment right to create it.

A. By taking photographs and recording video, ordinary citizens provide the news media and the public with increasingly important newsworthy material.

The United States Supreme Court has repeatedly “emphasize[d] the special and constitutionally recognized role of . . . [the press] in informing and educating the public” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978); *see also Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (“[The press] is the means by which the people receive that free flow of information and ideas essential to intelligent self-government.”). In line with providing the public with information about public affairs, the news

media serves as an important and necessary check on governmental power. *See New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“The press was protected so that it could bare the secrets of government and inform the people.”); *Herbert v. Lando*, 441 U.S. 153, 185 (1979) (writing that “the [First] Amendment shields those who would censure the state or expose its abuses”).

The news media, however, performs none of these functions in isolation, and the law is clear that these constitutional protections apply equally to individuals as they do the institutional press. As explained in *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011), “changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw.” *Id.* at 84. Because professional journalists may not be the first on site to record a breaking news story, “the news-gathering protections of the First Amendment cannot turn on professional credentials or status.” *Id.* Based on such longstanding precedent as noted in *Glik*, “the public’s right of access to information is coextensive with that of the press.” *Id.* at 83 (internal citation omitted). Additionally, the fact that police officers may be “unhappy they were being recorded during an arrest ... does not make a lawful exercise of a First Amendment right a crime.” *Id.* at 80 (quoting Boston Municipal Court’s dismissal of charge for disturbing the peace).

The fact that both the news media and any member of the public have the right to engage in this collection of newsworthy information serves the public interest, as newsgathering works best when reporters work with regular citizens. “A reporter,” as Justice Douglas wrote, “is no better than his source of information.” *Branzburg v. Hayes*, 408 U.S. 665, 722 (Douglas, J., dissenting). Citizen-generated video and other content constitutes an increasingly important source of information for members of the news media and has helped journalists expose governmental abuse. See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 341 (2011) (“In public discourse, pervasive image capture allows its users to hold public actors accountable and to participate effectively in public dialogue.”). This is especially true in the context of police encounters with members of the public, the facts of which are often disputed. See generally Geoffrey J. Derrick, *Qualified Immunity and the First Amendment Right to Record Police*, 22 B.U. Pub. Int. L.J. 243, 259 (2013) (“Citizen recording is perhaps the most effective form of police oversight because so many citizens possess recording devices and the marginal cost of recording is close to zero.”).

George Holliday’s video of the 1991 police beating of Rodney King in Los Angeles is perhaps the most famous example of citizen-created video that shows how the news media can work with bystanders to inform the general public. See

Paul Pringle and Andrew Blankstein, *King Case Led to Major LAPD Reforms*, L.A. Times (June 17, 2012), <http://articles.latimes.com/2012/jun/17/local/la-me-0618-king-lapd-20120618>. After Los Angeles Police Department (“LAPD”) officials rejected Holliday’s attempts to provide them with the video, Holliday delivered the footage to KTLA, a local TV news station. KTLA broadcast the footage the following night, setting in motion a sequence of events that resulted in the video being seen by millions and spurring reforms within the LAPD. *Id.*

Many stories are not only enhanced by citizen-generated content, but may well have never been told without it. Although it is impossible to say definitively, it is unlikely that the story of Rodney King’s beating would have come to light without the actions of George Holliday. As the Christopher Commission, an independent commission formed to investigate the LAPD in the wake of the Rodney King case, wrote:

Our Commission owes its existence to the George Holliday videotape of the Rodney King incident. Whether there even would have been a Los Angeles Police Department investigation without the video is doubtful, since the efforts of King’s brother, Paul, to file a complaint were frustrated, and the report of the involved officers was falsified.

Report of the Independent Commission on the Los Angeles Police Department at ii (1991).

Media coverage of the many recent police shootings has also benefitted from eyewitness video. Last year, Feidin Santana, a 23-year-old barber, recorded North

Charleston, S.C., police officer Michael Slager shooting Walter Scott, a motorist whom Slager had stopped because of a broken tail light. The video, which aired on newscasts nationwide, showed Slager shooting Scott in the back multiple times after Scott had attempted to flee. Santana's video contradicted initial accounts from the police and Slager's attorney, who had said that Slager had feared for his life. *See* Mark Berman, *S.C. Investigators Say They Thought Fatal Police Shooting was Suspicious Before Video Emerged*, Wash. Post (Apr. 10, 2015), <http://wapo.st/2eHk0qD>. In addition to leading to the officer's indictment for murder, the video has caused many to question whether, if not for its presence, "the officer's narrative of . . . [the] struggle would have ever been truly challenged." *Id.*

The shooting of Alton Sterling this summer in Baton Rouge, La., raises similar issues. Two bystanders' video recordings show two Baton Rouge officers first pinning down Sterling and then shooting him twice in the chest, and again four more times. Zack Kopplin and Justin Miller, *New Video Emerges of Alton Sterling Being Killed by Baton Rouge Police*, The Daily Beast (July 7, 2016), <https://perma.cc/G6AC-XSNF>. The footage shows one officer tackling Sterling and both officers pushing him onto his back with their guns drawn. *Id.*; *see also* Maya Lau and Bryn Stole, *'He's got a gun! Gun': Video shows fatal confrontation between Alton Sterling, Baton Rouge police officer*, The Advocate (July 5, 2016, 7:00 AM), <https://perma.cc/SA7Q-W6E4>. With Sterling still laying on his back,

the officers continue to point their guns in his face, then shoot multiple times.

There is no indication in the video recordings that Sterling reached for a gun. *Id.*

In response to the video, the Baton Rouge Police Department put both officers on paid administrative leave, and the U.S. Justice Department said that it would separately investigate the shooting. *Id.*; see also Joshua Barajas, *Second graphic video of Alton Sterling shooting emerges*, PBS (July 6, 2016, 6:12 PM), <https://perma.cc/7SVG-HUKB>.

Even when the details of an incident are not necessarily disputed, eyewitness recordings can still help tell a story in a more complete way. The death of Eric Garner, a Long Island man who died on a sidewalk as police officers tried to detain him, brought the question of how police handle arrests—Garner had told the officers that he could not breathe as he was kept in a choke hold—to the forefront of a national conversation on race relations and other issues relating to the state of policing in America. See, e.g., J. David Goodman, *Man Who Filmed Fatal Police Chokehold Is Arrested on Weapons Charges*, New York Times (Aug. 3, 2014), <http://nyti.ms/2fh5G8N>. There is no doubt that the case would not have received the attention it did if bystanders had not recorded the arrest on cell phones.

Similarly, after a Minnesota police officer fatally shot Philando Castile during a traffic stop in July, Castile's girlfriend, Diamond Reynolds, used Facebook to livestream the harrowing aftermath, bringing the final moments of

Castile's life to the public as they occurred. Catherine E. Shoichet, *Facebook Live video offers new perspective on police shootings*, CNN (July 7, 2016, 3:37 PM), <https://perma.cc/6DUD-9PV2>. This video was then used by the news media to report the story. When a sniper shot and killed five police officers the very next day in Dallas, Texas, bystanders likewise streamed footage of the tragedy. Manny Fernandez, Richard Pérez-Peña, and Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback*, N.Y. Times (July 8, 2016), <https://perma.cc/M7QK-QA4H>; see also Hasani Gittens and Alex Johnson, *'All of a Sudden, You've Seen Them Just Fall': Witnesses Recount Dallas Horror*, NBC News (July 8, 2016, 3:25 AM), <https://perma.cc/J6J8-MAHG>. The news media quickly identified, worked to verify, and distributed this important footage to the public when reporting on these events, improving not only the timeliness but also the accuracy and depth of its reporting. See, e.g., *id.*; see also Elliott C. McLaughlin, *Woman streams aftermath of fatal officer-involved shooting*, CNN (July 8, 2016, 4:57 AM), <https://perma.cc/3MLV-P56U>; Camila Domonoske and Bill Chappell, *Minnesota Gov. Calls Traffic Stop Shooting 'Absolutely Appalling At All Levels'*, NPR (July 7, 2016, 7:19 AM), <https://perma.cc/L56F-N2ZY>.

Video evidence is useful whether it comes from a bystander or another source, like a patrol car dashcam, an officer's body-worn camera, or other surveillance video. Its release serves the public interest in understanding what

actually happened in a disputed event, regardless of which side it favors, if any. It may demonstrate that police properly performed their duties or were falsely accused. In October 2015, a woman from New Jersey filed a complaint with a police department in which she asserted that an officer yelled at her and pulled a gun on her during a traffic stop. See Bryan Laplaca, *Video Refutes Woman's Alleged Claim Pequannock Officer Pointed Gun at Her*, NorthJersey.com (Dec. 4, 2015, 10:15 AM), <http://www.northjersey.com/news/crime-and-courts/video-refutes-woman-s-alleged-claim-pequannock-officer-pointed-gun-at-her-1.1465762>. Dashcam footage from the traffic stop in question showed that the woman had fabricated the story, leading officials to charge her with making a false report to law enforcement. *Id.*

On the other hand, dashcam video from a patrol car showed officers from the City of Gardena, Calif., shoot two suspects, one fatally, in 2013 during an arrest. See Richard Winton, *Gardena police shooting video: Justified or 'cold-blooded' killing?*, Los Angeles Times (July 15, 2014), <http://lat.ms/1dZOX11>. When the city lost its fight to keep the video sealed, members of the public were finally given an opportunity to judge for themselves whether the unarmed suspects were a threat to police, and quickly learned why the city had settled a civil suit with family members for \$4.7 million, even though officials had argued the shooting was justified. *Id.*

The benefits of using eyewitness-created content extends to the most important issues of our times. One report has suggested that it would have been impossible for news outlets to tell the story of the Syrian conflict without the use of video clips from witnesses due to limitations placed on journalists when entering and moving around the country. *See Wardle, Amateur Footage* at 4, 20-21 (2014); *see also* Heather Murphy, *A Guide to Watching Syria's War*, N.Y. Times (Mar. 19, 2013, 2:52 PM), <http://nyti.ms/2f6CH4L> (stating that “[a]mateur video has been pivotal to the way the conflict in Syria is understood”).

With the ubiquity of mobile phones that contain high-tech cameras, video content generated by witnesses and bystanders has become a common component of news programming. A 2014 study of eight international 24-hour news channels found that “an average of 11 pieces of [user-generated content] were used every day on television by [the] news organizations [studied].” *Wardle* at 13. Another study of eight popular news websites uncovered that the sites collectively used 237 items of citizen-created video per day, with *The New York Times* using on average 20 pieces per day. Pete Brown, *A Global Study of Eyewitness Media in Online Newspaper Sites*, Eyewitness Media Hub, at 9 (2015), <http://eyewitnessmediahub.com/uploads/browser/files/Final%20Press%20Study%20-%20eyewitness%20media%20hub.pdf>.

The benefits of this material are significant. At the outset, bystander video enriches the stories journalists tell, routinely adding a distinct, first-person perspective to news coverage. Reflecting on the use of such content on *The New York Times*' website, the researchers of the website study concluded that it "was almost entirely found in well produced, highly polished videos that added depth and colour to nuanced world news stories, further demonstrating the capacity of eyewitness media to inform audiences in ways that simply would not be possible without it." Brown at 51.

Although eyewitnesses who video-record events can distribute the content without the assistance of traditional media through websites like YouTube, Facebook, and Twitter, involvement of the news media often means that the content will reach a larger and more mainstream audience, will often be verified for authenticity in an effort to ensure the audience is not misled, and can be accompanied by helpful commentary that assists viewers in understanding the context in which the photograph or footage appears. The dissemination of citizen-generated content by the news media is thus a great benefit to the public, and its creation must be protected by the First Amendment.

B. The district court’s decision stands to suppress the creation of video content relating to police officers and will thereby hinder the news media in gathering news.

By finding that ordinary citizens observing police activity in public have no constitutional protections when they try to record the event, the district court interferes with the general public’s right to learn about critically important public controversies. After all, if it becomes even more common for officers to arrest citizens who peacefully record their activities, it is reasonable to conclude that fewer citizens will engage in such conduct. “Gathering 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 (internal citation omitted), and this “role cannot be performed if citizens must fear criminal reprisals when they seek to hold government officials responsible by recording . . . an interaction between a citizen and a police officer.” *Commonwealth of Massachusetts v. Hyde*, 434 Mass. 594, 612 (2001) (Marshall, C.J., dissenting from majority opinion on statutory interpretation of surreptitious recording law).

Individuals may choose to record newsworthy events involving the police even when they have no interest in criticizing officers’ actions. Under the district court’s decision, these citizens would be deprived of the First Amendment’s

protection when shooting these images, leaving them at risk of being arrested or detained.

For example, a tourist's video of the Critical Mass bike ride through Times Square in July of 2008, which was uploaded to YouTube and widely distributed by the news media, starts by showing cyclists crossing through an intersection. Sewell Chan, *Police Investigate Officer in Critical Mass Video*, N.Y. Times (July 28, 2008, 5:07 PM), <http://cityroom.blogs.nytimes.com/2008/07/28/police-investigate-officer-in-critical-mass-video/>. It then pans to the left and generally focuses on two police officers. Less than ten seconds later, one of the two officers, Patrick Pogan, is shown violently knocking a cyclist from his bike. Prosecutors dismissed charges against the cyclist after the video, which contradicted Pogan's account of the situation, surfaced. See John Eligon, *Charges Against Shoved Cyclist Are Dropped*, N.Y. Times (Sept. 5, 2008), <http://nyti.ms/2ecpuGq>. Pogan was later convicted of filing a criminal complaint that contained false statements. See John Eligon, *Ex-Officer Convicted of Lying About Confrontation with Cyclist*, N.Y. Times (Apr. 29, 2010), <http://nyti.ms/2dY95rq>. It does not appear that the tourist who shot the video even intended to record the officer. But under the district court's rationale, the tourist was without First Amendment protection when filming Pogan.

The video recorded by Feidin Santana of Officer Slager shooting Walter Scott, *supra*, also was shot with an intent to observe, not criticize. When asked in an interview why he filmed Slager, Santana said:

I recorded the video so maybe that he [Officer Slager] can feel that someone is there. Like I say, it was an empty spot. There were just the three of us in that moment and, like I say, I couldn't tell what was going to happen. So I just wanted him to know that he is not by himself.

USA TODAY, *Man who Filmed S.C. Cellphone Video Breaks his Silence*, YouTube (Apr. 9, 2015), https://www.youtube.com/watch?v=CVVtJf_RXe4.

This is similar to the purpose expressed by plaintiffs-appellants Fields and Geraci here. After all, much like Fields and Geraci, it does not appear that Santana uttered any words at the scene suggesting that he was making the recording to oppose police activity. *See* JA17 (Memorandum Opinion at 11) (writing that “[n]either Fields nor Geraci direct us to facts showing at the time they took or wanted to take pictures, they asserted anything to anyone”). Santana’s conduct appears to have been “non-confrontational.” *Id.* at 12. Thus, under the district court’s rationale, Santana would not have had a First Amendment right to record Officer Slager—a troubling thought considering that Santana’s video has become one of the most important pieces of witness video since George Holliday filmed LAPD officers beating Rodney King in 1991.

All citizens possess a qualified First Amendment right to photograph and film the police in public places. *See also* Mickey H. Osterreicher, *Fields v. City of Philadelphia: Questioning a First Amendment Right*, MediaLawLetter, published by the Media Law Resource Center (Feb. 2016), available at <http://www.medialaw.org/component/k2/item/3205-fields-v-city-of-philadelphia-questioning-a-first-amendment-right>. The district court's erroneous decision stands to have a chilling effect on the creation of important video content.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to overturn the district court's decision and recognize a qualified First Amendment right to photograph and film the police in public places.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word) contains 3,488 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

I hereby certify that I am a member in good standing of the Bar of the Court of Appeals for the Third Circuit, in compliance with Local Rule 28.3(d).

I hereby certify that the text of the electronic and hard copies of this brief are identical, and that the electronic file of this brief was scanned with the up-to-date version of Avast Mac Security 2016 antivirus software, in compliance with Local Rule 31.1(c).

Dated: October 31, 2016

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief *Amicus Curiae* was filed electronically and served on all counsel of record via the ECF system of the United States Court of Appeals for the Third Circuit.

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APPENDIX A: IDENTITY OF AMICI

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 500 members, American Society of News Editors (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is the ninth-largest paper in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 26 million unique visitors each month.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

The Foundation for National Progress is the award-winning publisher of Mother Jones magazine and MotherJones.com. It is known for ground-breaking investigative journalism and impact reporting on national issues.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

Gannett Co., Inc. is an international news and information company that publishes 109 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

The Inter American Press Association (IAPA) is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

The Media Consortium is a network of the country's leading, progressive, independent media outlets. Our mission is to amplify independent media's voice, increase our collective clout, leverage our current audience and reach new ones.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

Metro Corp. is the publisher of Philadelphia magazine, a regional monthly print magazine and accompanying website that cover the city of Philadelphia and surrounding counties. The magazine provides topical, in-depth reports on crucial and controversial issues confronting the region, including law enforcement, sociological and business trends, and political analysis, as well as critical reviews of the cultural, sports, and entertainment scene. It is one of the oldest magazines of its kind, first published as a quarterly in 1908 by the Trades League of Philadelphia.

National Newspaper Association is a 2,400 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Springfield, Illinois.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club

holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. (NPR) is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of more than 26 million listeners each week via more than 1000 noncommercial, independently operated radio stations, licensed to more than 260 NPR Members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including NPR.org and NPR’s applications, which see more than 30 million unique visitors each month. National Public Radio, Inc. has no parent company and issues no stock.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today’s news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and

administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

The Pennsylvania NewsMedia Association (“PNA”), with headquarters located in Harrisburg, Pennsylvania, represents the interests of over three hundred (300) daily and weekly newspapers and other media-related organizations across the Commonwealth of Pennsylvania in ensuring that the press can gather information and report to the public.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center (“SPLC”) is a nonprofit, nonpartisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

TEGNA Inc. owns or services (through shared service agreements or other similar agreements) 46 television stations in 38 markets.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

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