Nos. 16-1651 (lead), 16-1650

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMANDA GERACI,

Plaintiff-Appellant

v.

CITY OF PHILADELPHIA, *et al.*,

Defendants-Appellees

RICHARD FIELDS,

Plaintiff-Appellant

v.

CITY OF PHILADELPHIA, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

The United States Department of Justice (the Department) has a substantial role in ensuring that the conduct of law enforcement officers adheres to constitutional requirements. The Department has authority to prosecute officers acting under color of law who violate individuals' federal rights, 18 U.S.C. 242, or who conspire to injure an individual in the exercise of those rights, 18 U.S.C. 241. These prosecutions may rely on bystanders' photographs or videos. See, *e.g.*,

Koon v. *United States*, 518 U.S. 81, 86-87 (1996) (describing the beating of Rodney King based on material "captured on videotape by a bystander").[1]

The Attorney General also has authority to seek civil relief against police departments whenever she has reasonable cause to believe that law enforcement officers have engaged 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. 42 U.S.C. 14141. Pursuant to this authority, the United States has secured settlements with police departments in cities across the country that have included provisions to protect the right to record police. These settlements include those in New Orleans, Louisiana; East Haven, Connecticut; Ferguson, Missouri; and—within the Third Circuit—Newark, New Jersey.[2]

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[1] See also Indictment, *United States* v. *Slager*, No. 2:16-cr-00378-CRI (D.S.C. May 10, 2016), https://www.justice.gov/opa/file/850216/download (prosecution of officer for a deadly shooting); Michael E. Miller *et al.*, *How a cellphone video led to murder charges against a cop in North Charleston, S.C.*, Wash. Post, Apr. 8, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/04/08/how-a-cell-phone-video-led-to-murder-charges-against-a-cop-in-north-charleston-s-c/ (reporting that a bystander recorded the fatal confrontation).

[2] See Settlement Agreement at 20-21, *United States* v. *Town of E. Haven*, No. 3:12-cv-01652-AWT (D. Conn. Dec. 20, 2012); Consent Decree at 44-45, *United States* v. *City of New Orleans*, 35 F. Supp. 3d 788 (E.D. La. 2013) (No. 2:12-cv-01924-SM-JCW), https://www.justice.gov/crt/about/spl/documents/nopd_agreement_1-11-13.pdf;

(continued...)

Recordings of police conduct also may aid the United States' enforcement of antidiscrimination provisions in the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789d(c), and in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. These two provisions prohibit discrimination by police departments receiving federal funds.

Even where there is no federal prosecution or other action, increased recording of police conduct furthers the United States' interest in promoting constitutional policing. It has already done so in Philadelphia. In May 2008, for example, a news helicopter filmed a traffic stop where several Philadelphia police officers pulled three men from a car and beat them. After the use of excessive force was recorded and publicized, the City disciplined its officers. Four officers were fired, and four others were punished after the incident.[3] More recent police activity caught on tape has also prompted local investigations and indictments in

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(...continued)
Consent Decree at 26-30, *United States* v. *City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Apr. 19, 2016), https://www.justice.gov/crt/file/883846/download; Consent Decree at 21-22, *United States* v. *City of Newark*, No. 2:16-cv-01731-MCA-MAH (D.N.J. May 5, 2016).

[3] Jon Hurdle, *Four Philadelphia police fired over filmed beating*, Reuters, May 19, 2008, http://www.reuters.com/article/domesticNews/idUSN1956317820080519; see also Jon Hurdle, *Police Beating of Suspects Is Taped by TV Station in Philadelphia*, N.Y. Times, May 8, 2008, http://www.nytimes.com/2008/05/08/us/08philadelphia.html?_r=0.

Philadelphia.[4] And increased recording also can have a deterrent effect on misconduct by officers who know their behavior is being documented.[5]

The United States has consistently supported bystanders' right to record police conduct on public streets. The United States has, for example, addressed the First Amendment protections for bystanders in statements of interest filed in district courts. In *Garcia* v. *Montgomery County*, the United States argued that "recording police officers in the public discharge of their duties is protected speech" under the First Amendment. U.S. Statement of Interest at 4, *Garcia* v. *Montgomery Cnty.*, 145 F. Supp. 3d 492 (D. Md. 2015) (No. 8:12-cv-03592-JFM). The United States also filed a statement of interest in *Sharp* v. *Baltimore City Police Department*, explaining that "[t]he First Amendment protects the rights of private citizens to record police officers during the public discharge of their

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[4] See Michael R. Sistak, *Philadelphia Police Probing Violent Arrest Caught on Video*, NBC10 Philadelphia, July 9, 2015, http://www.nbcphiladelphia.com/news/local/Philadelphia-Police-Probing-Violent-Arrest-Caught-on-Video-313079751.html; Susanna Capelouto, *Tape of beating leads to charges against Philadelphia officers*, CNN, Feb. 7, 2015, http://www.cnn.com/2015/02/07/us/philadelphia-police-beating.

[5] See Int'l Ass'n of Chiefs of Police (IACP), *The Impact of Video Evidence on Modern Policing: Research and Best Practices from the IACP Study on In-Car Cameras* 22-23 (2007), https://www.bja.gov/bwc/pdfs/IACPIn-CarCameraReport.pdf (IACP, *Impact of Video Evidence*).

duties." J.A. 1749.[6] In that case, the United States also issued a technical assistance letter to the parties, stating that "[r]ecording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers."[7]

STATEMENT OF THE ISSUE

Whether individuals must criticize or challenge police conduct to have a First Amendment right to record officers in the public discharge of their duties.[8]

STATEMENT OF THE CASE

1. This case combines claims of two Philadelphians, Amanda Geraci and Richard Fields, who recorded or attempted to record police performing their duties

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[6] J.A. __ refers to page(s) in the parties' joint appendix on appeal. "Geraci R. __" refers to the district court documents in *Geraci* v. *City of Philadelphia*, No. 2:14cv5264 (E.D. Pa) by docket number. "Fields R. __" refers to district court documents filed in *Fields* v. *City of Philadelphia*, No. 2:14cv4424 (E.D. Pa) by docket number.

[7] Letter from Jonathan M. Smith, Chief, Special Litig. Section, U.S. Dep't of Justice, to Mark H. Grimes, Baltimore Police Dep't, *Re: Christopher Sharp v. Baltimore City Police Department, et al.* 2 (May 14, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf (*Sharp* letter).

[8] The United States does not take a position on any other issue presented in this case. This brief will use "record" and "recording" to encompass video recording, audio recording, and photographing.

on public streets—until, they alleged, the police forcibly stopped them from doing so. Because this case comes to this Court following a grant of summary judgment, their allegations must be accepted as true. *Groman* v. *Township of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995). Geraci describes herself as a "legal observer" and monitors police during protests. J.A. 9 (Feb. 19, 2016 Op.). She attended a protest near the Pennsylvania Convention Center in September 2012 and attempted, from about ten feet away, to video record police arresting a protester. J.A. 9-10 (Feb. 19, 2016 Op.); Geraci R. 1, at 5 (Compl.). An officer physically restrained her, pinning her against a nearby pillar. J.A. 10 (Feb. 19, 2016 Op.). She told the officer she was "just legal observing." J.A. 10 (Feb. 19, 2016 Op.). The officer did not cite or arrest Geraci. J.A. 10 (Feb. 19, 2016 Op.).

Fields, a university student, used his cell phone to take a picture of 20 police officers standing outside a home in September 2013. J.A. 8 (Feb. 19, 2016 Op.). An officer approached him and asked, "[d]o you like taking pictures of grown men?" J.A. 8 (Feb. 19, 2016 Op.) (brackets in original). Fields said, "No, I'm just walking by." J.A. 8 (Feb. 19, 2016 Op.). The officer asked him to leave. J.A. 8 (Feb. 19, 2016 Op.). Fields, who was about 15 feet away, refused because he felt that he had "do[ne] nothing wrong." J.A. 8 (Feb. 19, 2016 Op.). The officer detained Fields, took and searched his phone, handcuffed him, and put him in a police van. J.A. 9 (Feb. 19, 2016 Op.). The officer cited Fields for obstructing a

public passage before returning his phone and then releasing him. J.A. 9 (Feb. 19, 2016 Op.). The officer did not appear at the court hearing for the citation. J.A. 9 (Feb. 19, 2016 Op.). Fields later reported that he took the photograph because "it was an interesting scene" and "would make a great picture." J.A. 8 (Feb. 19, 2016 Op.).

2. Both plaintiffs sued the officers and Philadelphia (the City) under 42 U.S.C. 1983, alleging retaliation for exercising their First Amendment rights to observe and record police. J.A. 9-10 (Feb. 19, 2016 Op.). They claimed that the City was liable under *Monell* v. *Department of Social Services*, 436 U.S. 658, 659 (1978), because "notwithstanding a widely publicized Department policy" protecting bystanders' First Amendment rights, "serious deficits in training, supervision, and discipline" led to "routine[]" violations of those rights. Fields R. 1, at 5 (Compl.); Geraci R. 1, at 1 (Compl.).

The district court granted summary judgment to defendants on plaintiffs' First Amendment retaliation claims, holding that there is no First Amendment right to record police without engaging in additional forms of expressive conduct. J.A. 11, 18 (Feb. 19, 2016 Op.). The court clarified that it was "not addressing a First Amendment right to photograph or film police when citizens *challenge* police conduct." J.A. 8 (Feb. 19, 2016 Op.) (emphasis added). The court found that neither Fields nor Geraci engaged in "customary expressive conduct," as each

merely sought to document events. J.A. 11-13 (Feb. 19, 2016 Op.). "Neither uttered any words to the effect he or she sought to take pictures to oppose police activity," the court observed (J.A. 11 (Feb. 19, 2016 Op.)), or expressed intent to share the images, (J.A. 17 (Feb. 19, 2016 Op.)). The court further found that there was "no evidence any of the officers *understood* them as communicating any idea or message." J.A. 12 (Feb. 19, 2016 Op.). The court rejected plaintiffs' arguments that because "'observing' and 'recording' police activity" are "component[s] of 'criticizing,'" they are protected activities. J.A. 13, 18 (Feb. 19, 2016 Op.).

The district court concluded that there was "no controlling authority compelling" it to recognize a "right to photograph police absent any criticism or challenge to police conduct." J.A. 7, 13 (Feb. 19, 2016 Op.). The court reasoned that case law within this Circuit supported such a conclusion. J.A. 13-16 (Feb. 19, 2016 Op.). It pointed out that in *Kelly* v. *Borough of Carlisle*, 622 F.3d 248, 260 (2010), this Court held that there was no *clearly established* First Amendment right to videotape a police officer during a traffic stop. J.A. 13 (Feb. 19, 2016 Op.). The district court explained that, in applying *Kelly*, other district courts within the Third Circuit consistently required "some element of expressive conduct or criticism of police officers" before finding a First Amendment right to record them. J.A. 14-16 (Feb. 19, 2016 Op.) (citing, among other cases, *Gaymon* v. *Borough of Collingdale*, 150 F. Supp. 3d 457 (E.D. Pa. 2015)). In a more recent, unpublished

decision, the district court noted, this Court affirmed a lower court's dismissal of a 42 U.S.C. 1983 action against police officers on qualified immunity grounds. J.A. 14 (Feb. 19, 2016 Op.) (citing *True Blue Auctions* v. *Foster*, 528 F. App'x 190, 193 (3d Cir. 2013)). In *True Blue Auctions*, this Court found that the district court had correctly concluded that, at the time of the underlying event, circuit "case law [did] not clearly establish a right to videotape police officers performing their official duties." J.A. 14 (Feb. 19, 2016 Op.) (quoting *True Blue Auctions*, 528 F. App'x at 193). *Other* circuits, the district court acknowledged, had supported a right to photograph police without any element of criticism, but those opinions did not align with "the present law in this Circuit." J.A. 16 (Feb. 19, 2016 Op.); see also J.A. 14 (Feb. 19, 2016 Op.) ("No Third Circuit case since *True Blue Auctions* holds there is a blanket First Amendment right to videotape or photograph officers.").

Although the district court acknowledged that Fields and Geraci needed to prove that they had a clearly established right to record police to overcome the individual officers' qualified immunity, (J.A. 11 (Feb. 19, 2016 Op.)), the court went further and held that there was no such right, (J.A. 18 (Feb. 19, 2016 Op.) ("We need not apply a qualified immunity standard as we do not find a right *ab initio*.")). Finding no violation of First Amendment rights, the court did not consider the City's potential liability under *Monell.* J.A. 11.

SUMMARY OF ARGUMENT

Individuals have a First Amendment right to record police officers discharging their duties in public. *Glik* v. *Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). This right does not depend on individuals criticizing police, commenting on their behavior, or engaging in any other expressive conduct beyond making the recording. The First Amendment generally protects audio recordings, photographs, and videos as expressive works, and those works are not adequately protected if making them is prohibited. Furthermore, First Amendment protections extend to gathering information about the public activity of public servants, particularly in this context. Indeed, all the circuit courts that have addressed the issue have concluded that recording police is protected. 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, 560 (1976) (citation omitted). While limits on recording police (including time, place and manner restrictions) may be justified in certain circumstances, defendants did not offer any justification here for retaliating against the plaintiffs for recording them.

ARGUMENT

INDIVIDUALS HAVE A FIRST AMENDMENT RIGHT TO RECORD POLICE ACTIVITY IN PUBLIC WITHOUT HAVING TO CHALLENGE OR CRITICIZE POLICE OFFICERS' CONDUCT

This case raises an important issue that has not yet been addressed by this Court: whether individuals have a First Amendment right to record police activity in public without criticizing police or engaging in other expressive conduct beyond making a recording.[9] In *Gilles* v. *Davis*, 427 F.3d 197, 212 n.14 (2005), this Court acknowledged that "videotaping or photographing the police in the performance of their duties on public property may be a protected activity." Since then, however, this Court has twice declined to decide whether such a right exists, resolving claims instead on qualified immunity grounds. *Kelly* v. *Borough of Carlisle*, 622

[9] This case does not require any inquiry into when recording is permissible in non-public areas or when it captures non-public information. It may be that the First Amendment right to record police officers in public is subject to reasonable time, place, or manner restrictions, see *Glik* v. *Cunniffe*, 655 F.3d 78, 82, 84 (1st Cir. 2011); *Smith* v. *City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.), cert. denied, 531 U.S. 978 (2000), or to a standard of scrutiny under which some restrictions will be permissible in light of significant governmental interests, see *American Civil Liberties Union of Ill.* v. *Alvarez*, 679 F.3d 583, 604-605 (7th Cir.), cert. denied, 133 S. Ct. 651 (2012). The United States does not take a position on those subsidiary questions in this brief because it is unnecessary to do so to resolve this case. In their summary judgment papers in the district court, the defendants did not offer any justification for retaliating against the plaintiffs for recording them. In the absence of any asserted justification, the defendants cannot satisfy any potentially applicable standard of First Amendment scrutiny. For that reason, to dispose of this appeal this Court need only decide that the First Amendment applies to recording police officers in public, regardless of whether the recorder engages in speech or conduct critical of the police.

F.3d 248, 262-263 (2010); *True Blue Auctions* v. *Foster*, 528 F. App'x 190, 191-193 (2013). Because this issue has repeatedly arisen in this Circuit in recent years, resolution of whether the right exists in the first place would aid police, bystanders, and courts as they confront similar circumstances in the future.

A. The First Amendment Protects Activities That Enable Speech

The Constitution protects non-speech actions "intimately related to expressive conduct protected under the First Amendment." *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706-707 & n.3 (1986). Accordingly, the First Amendment protects activities that, while not inherently expressive, "*enable*[] speech." *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). One example is donating to a political campaign. "[A] decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech." *Ibid.* Protections for these speech-enabling activities recognize that government action "to control or suppress speech may operate at different points in the speech process." *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 336 (2010). Protecting first steps, such as procurement of ink and paper for a news publisher, safeguards subsequent expression. See *Minneapolis Star & Tribune Co.* v. *Minnesota 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").

In this case, photographing, video recording, or audio recording police activities is protected because each recording act enables production of an expressive work. The act of recording also is protected as an information-gathering activity that enables later protected speech. This information gathering enables subsequent critical commentary on police activities, including documentaries, news reports, or complaints to oversight authorities.

1. First Amendment Protection For Photographs And Videos Extends To Their Production

a. Photographs, videos, and other recordings are inherently expressive works meriting First Amendment protection. The Supreme Court has "long recognized" that constitutional "protection does not end at the spoken or written word." *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989). Other forms of communication and "purely expressive activities" are also protected. See *Anderson* v. *City of Hermosa Beach*, 621 F.3d 1051, 1060-1062 (9th Cir. 2010). Thus a statute regulating "'visual [and] auditory depiction[s],' such as photographs, videos, or sound recordings" warrants First Amendment scrutiny. See *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (brackets in original; citation omitted) (noting such a statute is "presumptively invalid" (citation omitted)). Photographs, in particular, are among those objects courts have distinguished as inherently communicative. "[P]aintings, photographs, prints and sculptures * * * always communicate some idea or concept to those who view

[them]," the Second Circuit has explained, "and as such are entitled to full First Amendment protection." *Bery* v. *City of N.Y.*, 97 F.3d 689, 696 (1996), cert. denied, 1520 U.S. 1251 (1997). Because photographs and videos are inherently expressive, they do not need an additional indication of expression (such as a criticism) to qualify as protected speech.

Photographing, video recording, and audio recording generally involve creative choices. A photographer controls "[e]lements of originality," including "lighting, angle, selection of film and camera, * * * and almost any other variant involved." *Rogers* v. *Koons*, 960 F.2d 301, 307 (2d Cir.), cert. denied, 506 U.S. 934 (1992). A photographic portrait, as this Court has observed, "does not simply convey information about a few objective characteristics of the subject but may also convey more complex and indeterminate ideas" and may qualify as a work of art. *Southco, Inc.* v. *Kanebridge Corp.*, 390 F.3d 276, 284 (2004) (en banc), cert. denied, 546 U.S. 813 (2005). Fields's photograph incorporated his choices of subject, angle, and framing. Geraci's video would have involved similar elements.

Even where a finished work entails minimal creative action and relies instead on selection of visual elements from the environment, it is still protected. The Supreme Court has recognized that speech need not be original to qualify as expression for First Amendment purposes. Editorial choices are protected. "Cable operators, for example, are engaged in protected speech activities even when they

only select programming originally produced by others." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995). The First Amendment protects pure communication whether it is active or passive and encompasses "the right to *receive* information and ideas." *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-763 (1972) (emphasis added; citation omitted). Even mere possession of literature, for example, is protected, as is listening to a speech or tuning in to television broadcasts. *Ibid.*; *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 390 (1969); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Thomas* v. *Collins*, 323 U.S. 516, 534 (1945).

It cannot be said that a final recording deserves First Amendment protection, but that the act of recording does not. Courts are rightly reluctant to separate "the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." *Anderson*, 621 F.3d at 1061. A government could not, as a practical matter, ban videography and photography without also banning videos and photographs. In an analogous case the Ninth Circuit considered and rejected arguments that the business of tattooing, unlike the resulting tattoo, is not expressive and therefore not entitled to full First Amendment protection. *Id*. at 1061-1062. The court held that the tattoo and its production could not be meaningfully separated. *Id.* at 1062. "[A]s with writing or

painting," the court explained, "the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection." *Ibid.* Accordingly, courts have "never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities" entitled to the same protections as are their products—newspapers, paintings, and music. *Ibid.* In Fields's and Geraci's situation, the process of photography and videography cannot be separated from the expressions they create: photographs and videos.

b. Fields's and Geraci's recording activities are entitled to First Amendment protection even though the court found that they did not engage in expressive conduct beyond the act of recording itself.[10] A requirement for a probable audience or an expressive goal is particularly unworkable in the context of bystanders' recordings of police.

First, and perhaps most important for the bystander who spontaneously takes out a cellphone camera when spotting a commotion, the bystander may not know the value and potential use of her work until the scene she captures has played itself out. Indeed, its significance may not emerge until much later—when the

[10] In the United States' view, the district court clearly erred in finding that Geraci expressed no intent to criticize police. At least after she told the officer that she was "legal observing" (J.A. 10 (Feb. 19, 2016 Op.)), the potential for criticism of police conduct was clear. But this Court need not evaluate the district court's findings on intent. Instead, it should hold that no such findings are needed.

event subsequently stirs controversy. See, *e.g.*, *Lambert* v. *Polk Cnty.*, 723 F. Supp. 128, 130-131 (S.D. Iowa 1989) (noting bystander's video of a street fight became newsworthy when a participant later died).

Second, the bystander may not wish to confront police with her assessment of their conduct and her plans to publicize their behavior. Yet the district court's decision in this case would *require* a confrontation, as a practical matter. In distinguishing this case from those where recording was protected, the court pointed to *Gaymon* v. *Borough of Collingdale*, 150 F. Supp. 3d 457 (E.D. Pa. 2015), "where plaintiff videotaped police while verbally protesting police harassing her husband." J.A. 14 (Feb. 19, 2016 Op.). The woman was effectively informing police that her videography was intended as a criticism. But obviously not every bystander is so bold as to engage police in an argument; nor would it be wise to incentivize such behavior as a prerequisite for the right to record.

Finally, as a practical matter, there may be no opportunity for the bystander to express her objectives. Geraci, for example, was able to explain she was "legal observing" only after the officer forcibly restrained her and blocked her from recording. J.A. 10 (Feb. 19, 2016 Op.). And if there was a requirement for a contemporaneous justification as the district court assumed, officers would have an additional incentive to shut down recording quickly, before a bystander can provide any account of her intentions. This rule could lead to further practical

problems where an officer later denies hearing a bystander's proffered explanation before stopping the recording.

c. The district court's requirement that bystanders express their intent when recording is in considerable tension with the Supreme Court's recent decision in *Heffernan* v. *City of Paterson*, 136 S. Ct. 1412 (2016). There, the Court held that an appropriate First Amendment analysis must consider the *consequences* of government suppression, rather than the subjective, expressive intent of the speaker. See *id*. at 1418-1419. As the Court explained, "the First Amendment begins by focusing upon the activity of the Government" and not of an individual. *Id*. at 1418. The Court held that a local government violated an employee's First Amendment rights by firing him for *perceived* political activity, even though the employee was not politically engaged when he was observed picking up a campaign sign as an errand for his bedridden mother. *Id*. at 1416, 1418. Heffernan, like Fields here, disclaimed any expressive intent. *Id*. at 1416.

Regardless of whether the employee in *Heffernan* or the plaintiffs in this case intended to engage in expression, the government's restriction has a chilling effect on speech. The "constitutional harm" at issue in these circumstances "consists in large part of discouraging [others] * * * from engaging in protected activities." *Heffernan*, 136 S. Ct. at 1419; see also *Keyishian* v. *Board of Regents of Univ. of N.Y.*, 385 U.S. 589, 604 (1967). Police confrontations to prevent or

punish recording have, as their consequence, a chilling effect on speech because they discourage even bystanders who would be inclined to engage in expressive conduct from recording. These are important First Amendment harms even if Fields and Geraci did not orally challenge or criticize police while recording and even if they did not express an intent to share their recordings with others.

2. The First Amendment, As Construed By Longstanding Supreme Court Precedent, Generally Prohibits Government Interference With Information-Gathering Activities

Even if the First Amendment does not protect recording as a necessary step in creating an inherently expressive work (in this case, a photograph or video), Fields's and Geraci's recording activities may nonetheless be protected as information gathering. The Supreme Court has explained 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).

Gathering of public information is protected because it enables critical commentary on public affairs. "[W]ithout some protection for seeking out the news," the Supreme Court has explained, "freedom of the press could be eviscerated." *Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972). Especially in modern times, recording is a first step in "seeking out the news." See *ibid.* It often

serves as "the front end of the speech process" by documenting and preserving events the speaker intends to evaluate and criticize. See *American Civil Liberties Union of Ill.* v. *Alvarez*, 679 F.3d 583, 596 (7th Cir.), cert. denied, 133 S. Ct. 651 (2012). "Whatever 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); see also *Snyder* v. *Phelps*, 562 U.S. 443, 451-452 (2011) (explaining "[s]peech on matters of public concern * * * occupies the highest rung of the hierarchy of First Amendment values" and lies "at the heart of the First Amendment's protection") (citations omitted).

Recordings of public police activities such as Fields's and Geraci's can serve as the raw materials for an assessment of the criminal justice system. As is clear from the United States' enforcement experience, see pp. 1-4, *supra*, recordings of police conduct (when later publicized or given to the proper authorities) may aid prosecutions, enable institutional discipline, promote constitutional policing, and facilitate government reform. Recordings also may help exonerate officers who have acted appropriately and may help deter baseless complaints, preserving government resources for situations where discipline or reform is truly warranted.[11]

[11] See IACP, *Impact of Video Evidence* 23-24 (reporting that numbers of complaints sustained against officers decreased in many departments after in-car (continued...)

Members of the public also record and publicize officers' commendable actions. Such recordings enhance confidence in law enforcement and improve community relations.[12] These uses of bystanders' recordings are social benefits the First Amendment was intended to secure.

Because recording is often the first step in speech about police conduct, denying bystanders the right to record would eliminate those materials that prove

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(...continued)
cameras were adopted); Luciana Lopez, *Tigard police cars are now recording it all*, The Oregonian, Sept. 29, 2005, at 01 (reporting local police official's opinion that video footage can quickly disprove unfounded allegations of officer misconduct).

[12] See, *e.g.*, Perry Stein, *'The Dancing Beyoncé Deputy': He has gone viral twice for his dance moves*, Wash. Post, Oct. 19, 2016, https://www.washingtonpost.com/news/local/wp/2016/10/19/the-dancing-beyonce-deputy-hes-gone-viral-twice-for-his-dance-moves/ (recounting how a video of an officer's participation at a local high school pep rally "at a time when the national spotlight is on law enforcement and discriminatory police tactics" is "an example of positive policing," helping to dispel what, in the officer's words, is "the negative stereotype that law enforcement is bad"); Maureen Groppe, *Indiana officials testify on need to improve police image*, The Indianapolis Star, Oct. 6, 2015, http://www.indystar.com/story/news/crime/2015/10/06/wayne-county-sheriff-jeff-cappa-indiana-attorney-general-greg-zoeller-rep-luke-messer-law-enforcement-task-force/73473000/ (reporting "examples of positive police reactions go[ing] viral," including an online posting by a ticketed driver who took a picture of himself with an officer, in his words, "to show that a black man and a white officer could interact without violence"); Amy B. Wang, *This photo of an officer comforting a baby went viral. But there's more to the story*, Wash. Post, Sept. 6, 2016, https://www.washingtonpost.com/news/inspired-life/wp/2016/09/03/touching-photo-shows-police-officer-comforting-baby-whose-parents-overdosed/ (describing positive response to an online posting of an officer holding a sleeping, month-old baby in the aftermath of her parents' drug overdose).

useful for criticism or reform, those that turn out to be useless, and those that might exonerate or shed a positive light on police officers' conduct, thereby improving relations between police and the communities that they serve. The value of recordings to facilitate speech often will not be clear until after they are made and, in some cases, contextualized through additional research. It makes no sense then to require, as the district court did here, some *contemporaneous* criticism for a recording of police activity to merit First Amendment protection. See J.A. 11 (Feb. 19, 2016 Op.).[13]

B. All Courts Of Appeals That Have Considered Whether The First Amendment Applies To Recording Police Activity Have Concluded That It Does

Those courts of appeals that have considered First Amendment protections for recording police conduct have *all* ruled that such activity is protected.[14] The First, Seventh, Ninth, and Eleventh Circuits have so decided. *Glik* v. *Cunniffe*, 655

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[13] In *Whiteland Woods, L.P.* v. *Township of West Whiteland*, 193 F.3d 177, 180, 183-184 (1999), this Court held that it did not violate the First Amendment to restrict video recording of a public planning commission meeting where other "effective" means—such as audio recordings, notes, minutes, or transcripts—were available to "compile an accurate record of the proceedings." This Court did not address restrictions on recording of police conduct on a public street.

[14] While several courts of appeals have addressed the issue of recording police activity, courts have not had to confront the issue of contemporaneous expressive intent because, in those cases, the plaintiffs' objectives or opinions were apparent from context. In this respect, Fields's case in particular is one of first impression.

F.3d 78, 82, 85 (1st Cir. 2011); *Alvarez*, 679 F.3d at 595-596; *Fordyce* v. *City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Smith* v. *City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.), cert. denied, 531 U.S. 978 (2000).[15] District court decisions also have recognized the right. See *Alvarez*, 679 F.3d at 601 n.10 (concluding that circuit court decisions and "the weight of district-court decisions" align in favor of the right); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 368 n.113 (2011) (collecting cases).[16]

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[15] This Court has stated that the Ninth Circuit, in its *Fordyce* opinion, "recognize[d] such a right only in passing." *Kelly*, 622, F.3d at 261. But the Ninth Circuit itself has treated the case as dispositive. Recently, in *Adkins* v. *Limtiaco*, 537 F. App'x 721, 722 (2013), it cited *Fordyce* as showing that a bystander's right to photograph police activity was clearly established.

[16] This view is also accepted by many law enforcement leaders. See IACP Law Enforcement Policy Ctr., *Recording Police Activity: Concepts and Issues Paper* 1 (Dec. 2015), http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/RecordingPolicePaper.pdf ("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." (citing *Glik*, 655 F.3d at 82)); IACP Law Enforcement Policy Ctr., *Recording Police Activity: Model Policy* 1 (Dec. 2015), http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/RecordingPolicePolicy.pdf ("Members of the public, including media representatives, have an unambiguous First Amendment right to record officers in public places, as long as their actions do not interfere with the officer's duties.").

No circuit court presented with the issue has held to the contrary. And outside of this Circuit, only the Fourth Circuit (in an unpublished decision) has held that the right, if it exists, is not clearly established. *Szymecki* v. *Houck*, 353 F. App'x 852, 853 (2009).[17] In 2010, this Court concluded in *Kelly*, 622 F.3d at 263, that there was no *clearly established* First Amendment right to videotape a police officer during a traffic stop. But the *Kelly* court acknowledged that the issue of First Amendment protections for videotaping police was an open one, "not addressed directly" in this Court's precedent. *Id*. at 260. In *True Blue Auctions*, 528 F. App'x at 193, this Court similarly relied on a finding that the right to record police, if it existed, was not clearly established for purposes of qualified immunity. Since *Kelly*, scrutiny of police conduct and the availability of cellphone camera technology have increased, while the issue of First Amendment protection to record police has continued to arise in this Circuit. Accordingly, this Court should

[17] The Tenth Circuit recently rejected, on qualified immunity grounds, a First Amendment retaliation claim brought by an airline passenger who filmed special screening procedures at a Transportation Security Administration checkpoint. *Mocek* v. *City of Albuquerque*, 813 F.3d 912, 930, 932 (2015). The court held that the plaintiff failed to show that his arrest for creating a disturbance was retaliatory, concluding that the right to film screening procedures at an airport security checkpoint was not clearly established in the Tenth Circuit at the time of his arrest. *Id.* at 931-932.

resolve the issue and join other circuits in holding that the First Amendment protects bystanders' right to record police activity.[18]

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The First Amendment protects bystanders' right to record police activities even when the bystanders, during recording, do not expressly criticize or challenge police. Photographing, video recording, and audio recording are entitled to First Amendment protection because they are speech-enabling activities—part of the process of making expressive works in the form of finished recordings or images—and because they enable the later critique of officer conduct, a topic of public

[18] To be sure, police may ask bystanders, including those who are recording, to leave or to stand back if their presence jeopardizes public safety or impairs law enforcement. "While an officer surely cannot issue a 'move on' order to a person *because* he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs," the Seventh Circuit has explained. *Alvarez*, 679 F.3d at 607. And "[t]he same restraint demanded of law enforcement officers in the face of 'provocative and challenging' speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." *Glik*, 655 F.3d at 84 (internal citation omitted). An officer may act when circumstances justify restrictions, such as when "the filming itself is interfering, or is about to interfere, with his duties." *Gericke* v. *Begin*, 753 F.3d 1, 8 (1st Cir. 2014). This is consistent with the United States' position on recording police. See *Sharp* Letter 6-7 (stating that onlookers should be able to record police "unless their actions interfere with police activity"; that officers may recommend that bystanders move to a less intrusive location to record; and that there are "narrow circumstances" where a recording individual's interference with police could warrant arrest). This case, which involves bystanders recording on public streets and from a distance, does not raise the issue of any potential restrictions on recording in other circumstances.

importance. This Court should join several other circuits and now hold that the First Amendment protects the recording of police activity.

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(a), I hereby certify that I am exempt from the Third Circuit's bar admission requirement as counsel representing the United States.

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Date: October 31, 2016

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1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains no more than 6200 words, excluding the parts of the brief exempted by Federal Rue of Appellate Procedure 32(a)(7)(B)(iii).

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s/ April J. Anderson
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Date: October 31, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I further certify that on October 31, 2016, seven (7) paper copies, identical to the brief filed electronically, were sent to the Clerk of the Court by U.S. first class mail.

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I further certify that on October 31, 2016, one paper copy of the foregoing brief was sent to the following counsel by first-class mail, postage prepaid:

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