

No. 21-1827

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

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DIJON SHARPE  
*Plaintiff-Appellant,*

v.

WINTERVILLE POLICE DEPARTMENT; WILLIAM BLAKE ELLIS, IN HIS  
OFFICIAL CAPACITY ONLY; MYERS PARKER HELMS, IV, IN HIS  
INDIVIDUAL AND OFFICIAL CAPACITY.,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Eastern District of North Carolina  
No. 4:19-cv-00157

The Honorable James C. Dever III, District Court Judge

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**BRIEF OF THE ELECTRONIC PRIVACY INFORMATION CENTER AS  
*AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND  
REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* the Electronic Privacy Information Center states that it has no parent corporations and that no publicly held corporation owns 10% or more of its stock.

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## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., that focuses public attention on emerging privacy and civil liberties issues. EPIC routinely participates as *amicus curiae* in cases concerning constitutional rights and emerging technologies. *See, e.g.*, Br. for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402); Br. for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15-1194); Br. for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Riley v. California*, 573 U.S. 373 (2014) (No. 13-132); Br. For EPIC et al. as *Amici Curiae* Supporting Appellant, *Sanchez v. L.A. Dep’t of Transportation*, No. 21-55285 (9th Cir. filed July 23, 2021) (arguing against a policy requiring all e-scooter providers in Los Angeles to disclose individual trip data to the government); Br. for EPIC as *Amicus Curiae* Supporting Appellant, *Anibowei v. Wolf*, (5th Cir. 2020) (No. 20-1005) (arguing against warrantless searches of the contents of a person’s cell phone by law enforcement at the U.S. border).

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<sup>1</sup> The parties consent to the filing of this *amicus curiae* brief. In accordance with Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. EPIC law fellow Tom McBrien contributed to this brief.

## SUMMARY OF ARGUMENT

Each year, the police stop tens of millions of cars on public streets and highways—quintessential public fora where exercise of First Amendment rights is protected. Recording and livestreaming police activities is part of the long-established practice of “copwatching” that helps protect the safety of communities of color and provides crucial democratic oversight of police conduct. Smartphones make it possible for everyone to be a copwatcher—including random bystanders and passengers in a stopped car. The Appellee seeks to curtail this important activity, which time and again has exposed police abuse, such as the murder of George Floyd last summer. Passengers livestreaming a traffic stop are performing a vital civic and safety role. This Court should hold that recording and livestreaming police activities in public places is protected by the First Amendment.

Prohibiting passengers from livestreaming traffic stops would not serve any legitimate purpose. Censoring livestreaming would be like blocking one hole in a colander: there are many other ways that the information the police seek to shield can be disclosed in real-time. Traffic stops happen in public and attract onlookers’ attention with flashing lights and sirens. Nothing prevents any other bystander from stopping, watching, or even livestreaming the stop. Passengers and drivers can communicate with and send their location to friends and family in various



ways during a stop. There is also no clear line between livestreaming and recording: individuals can upload segments of their recordings to social media and private chats during a stop, essentially livestreaming with a short delay. The lack of any meaningful distinction between recording, livestreaming, and other methods of broadcasting information about a traffic stop makes a specific prohibition on passengers livestreaming traffic stops unnecessary and impracticable.

Ultimately, allowing police to censor vehicle passengers rests on a set of fictions: the fiction that traffic stops are not public activities, the fiction that banning livestreaming by people in the car will prevent information about a stop from being disseminated, and the fiction that banning livestreaming increases safety. This Court should not curtail a historically important and societally useful practice in service of these fictions.

## **ARGUMENT**

### **I. WATCHING, FILMING, AND LIVESTREAMING THE POLICE ARE MEANS OF SAFETY AND SURVIVAL FOR COMMUNITIES OF COLOR AND NECESSARY FOR COMMUNITY OVERSIGHT OF POLICING.**

The practice of watching and documenting police activities began during 1960s political movements for racial justice. Black-, Latinx-, and indigenous-led groups responded to police violence in their communities by bearing witness to and creating records of police misconduct. This activity is often referred to as

“copwatching.” Copwatching aims to hold police accountable for misconduct and to increase the safety of those policed.

Today, copwatching is not just an activity performed by organized groups. Smartphones allow anyone to record or livestream a stop. Livestreaming a stop allows more people to bear witness to the stop as it is happening, creates an off-device record of the stop, and can lead to immediate accountability for police misconduct. That is why livestreaming a police encounter is a recommended best practice of copwatching and other civil rights groups.

Prohibiting people from livestreaming traffic stops would frustrate the community oversight of police misconduct. Citizens must be able to follow best practices and record police interactions to make civilian oversight boards effective. Without recordings and livestreams from copwatchers, passengers, and persons being detained, there would be few publicly available records of police brutality.

**A. Communities of color subjected to oppressive policing began copwatching to counter police violence.**

In the late 1960s, new organized political groups sprung up in Black, Latinx, and indigenous communities. Groups including the Black Panthers, Young Lords, and the American Indian Movement provided a bevy of resources for safety and community development to under-served and over-policed urban populations. Each group adopted copwatching as a community survival strategy to reduce police harassment and violence.

The Black Panther Party for Self-Defense developed the theory of organized copwatching in the face of intense police harassment and violence against Black people in Oakland, California. Black Panthers co-founder Huey Newton organized the first community patrols that watched the police, used tape recorders to document interactions, and stood as a physical presence to prevent police violence.<sup>2</sup> The idea was to make the police conscious of oversight, and thereby prevent harassment, wrongful arrests, and killings of Black people. The Panthers' patrol program inspired a number of other Black communities to start copwatching. For example, members of the Community Alert Patrol in Watts, California, adopted a copwatching program to document and prevent police brutality.<sup>3</sup>

Inspired by the Black Panthers, the Puerto Rican community and socialist political organization the Young Lords considered copwatching an integral community service alongside providing free meals, education, and organizing for services for poor, Spanish-speaking communities.<sup>4</sup> In the early 1960s, Puerto Ricans were disproportionately targeted for harassment through traffic stops and

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<sup>2</sup> Stephen Shames & Bobby Seale, *Power to the People: The World of the Black Panthers* 47 (2016).

<sup>3</sup> Jocelyn Simpson, *Copwatching*, 104 *Calif. L. Rev.* 391, 408–09 (2016).

<sup>4</sup> Johanna Fernandez, *The Young Lords: A Radical History* 125–26 (2020).

police killings.<sup>5</sup> In one of the touchstone events of the civil rights movement, two Puerto Rican men, Victor Rodriguez and Maximo Solero, were shot dead in the back of a police car after being arrested due to a noise complaint.<sup>6</sup> Police violence against Puerto Ricans escalated through the 60s, with nine fatal shootings and five non-fatal shootings of Puerto Rican boys in a one-year period from 1964-65.<sup>7</sup> The Young Lords began a neighborhood police patrol project in 1969, following the death of East Harlem community member Mingo El Loco.<sup>8</sup> Mr. El Loco was injured while breaking up a street fight and was denied access to medical care by the NYPD.<sup>9</sup> His death was emblematic to the Young Lords of a police force that was uninterested in the well-being of the Puerto Rican community.

Unlike the Panthers, whose members patrolled the streets directly, the Young Lords organized “people’s patrols” out of autonomous networks of neighbors, primarily Puerto Rican working men and women in their forties.<sup>10</sup> These patrols operated for more than two years with substantial community support.<sup>11</sup>

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<sup>5</sup> *Id.* at 70–74.

<sup>6</sup> *Id.* at 71.

<sup>7</sup> *Id.* at 73.

<sup>8</sup> *Id.* at 125.

<sup>9</sup> *Id.* at 125–26.

<sup>10</sup> *Id.* at 126.

<sup>11</sup> *Id.*

At the same time in the Midwest, an urban pan-indigenous political organization, the American Indian Movement (“AIM”), built a robust copwatching operation to counter police violence. Indigenous communities in Minneapolis faced severe over-policing, including the intentional targeting of so-called “Indian bars,” leading to the weekly arrests of up to two hundred Ojibwe citizens for drunk and disorderly conduct.<sup>12</sup> The arrested Ojibwe were used for free labor in workhouses or sent to clean stadiums before being released.<sup>13</sup> At the time, indigenous peoples comprised 1 percent of Minnesota’s population but made up 30 percent of the prison population.<sup>14</sup>

Taking inspiration from the Panthers, AIM members used the tools of “observation, documentation, and their own physical presence to prevent police mistreatment.”<sup>15</sup> AIM started “Indian Patrols,” cars painted red and equipped with radios, tape recorders, and cameras to document harassment and substantiate complaints to the police department.<sup>16</sup> AIM was likely the first organization to make widespread use of cameras to document police misconduct. AIM

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<sup>12</sup> Julie L. Davis, *Survival Schools: The American Indian Movement and Community Education in the Twin Cities* 31 (2013).

<sup>13</sup> Dennis Banks, *Ojibwa Warrior: Dennis Banks and the Rise of the American Indian Movement* 59-60 (2004).

<sup>14</sup> *Id.*

<sup>15</sup> Julie Davis, *supra* note 12 at 31–32.

<sup>16</sup> *Id.* at 32.

subsequently expanded its operations beyond copwatching to address housing insecurity, treaty rights, state violence, and the erasure of indigenous cultures.<sup>17</sup>

In the late 1960s and early 1970s the concept of copwatching spread across the country as a key tool for minority communities to save lives and reclaim power in the face of police violence.<sup>18</sup> Today, there are many organized and informal groups throughout the country that engage in copwatching.<sup>19</sup> Smartphones have also allowed random bystanders and those stopped to perform critical copwatching duties. Interest in copwatching expanded greatly after the murder of George Floyd at the hands of Minneapolis police officer Derek Chauvin, which was recorded by

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<sup>17</sup> See generally Bruce D’Arcus, *The Urban Geography of Red Power: The American Indian Movement in Minneapolis-Saint Paul, 1968-70*, 47 *J. Urban Studies* 1241 (2010).

<sup>18</sup> See Simpson, *supra* note 3 at 408-09; Jennifer Taylor, *The 1965 Freedom Patrols & the Origins of Seattle's Police Accountability Movement*, Seattle Civil Rights & Labor History Project (2006), [https://depts.washington.edu/civilr/freedom\\_patrols.htm](https://depts.washington.edu/civilr/freedom_patrols.htm).

<sup>19</sup> See Simpson, *supra* note 3. at 408. Current copwatching groups include Berkeley Copwatch, <https://www.berkeleycopwatch.org/about>, L.A. Copwatch, <https://lacopwatch.org/other-resources/>, the New York based Justice Committee Covid ICE/Copwatch group, <https://www.justicecommittee.org/covid-copwatch>, the Anti Police-Terror Project in Oakland, <http://www.antipoliceterrorproject.org>, the Peaceful Streets Project in Austin, <http://peacefulstreets.com/about/>, and the People’s Response Team in Chicago, <http://www.peoplesresponseteamchicago.org>. There are also many informally organized copwatching groups that do not have web presences.

bystanders.<sup>20</sup> Copwatch trainings are routinely held online and training materials are widely available.<sup>21</sup>

**B. Livestreaming police encounters is the most effective way to document police misconduct.**

Livestreaming police interactions is a widely accepted technique for both copwatchers and individuals being stopped. While there are a number of ways to film the police, livestreaming is significantly better than basic videorecording at providing safety in the moment and creating an evidentiary record of misconduct. Banning livestreaming traffic stops would take away a safety technique relied upon by over-policed minority communities and advocates for police oversight.

Livestreaming enhances safety for the individual being detained in three ways. First, viewers of the livestream like friends and family can send help to the person if police escalate the situation to dangerous levels. Second, the officer is aware that their actions are being watched and recorded, potentially preventing abuses. Third, a culture of livestreaming enhances overall safety as officers

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<sup>20</sup> See e.g., Meka Boyle, *Interest in Community Police Watch Training Soars as Courses Go Online*, S.F. Pub. Press (Aug. 2, 2020), <https://www.sfpublicpress.org/interest-in-community-police-watch-training-soars-as-courses-go-online/>.

<sup>21</sup> See e.g. Center for Urban Pedagogy, *We're Watching: A Guide to Recording the Police and ICE* (2018), [http://welcometocup.org/file\\_columns/0000/1743/were\\_watching-estamos\\_vigilando.pdf](http://welcometocup.org/file_columns/0000/1743/were_watching-estamos_vigilando.pdf).

become aware that their actions are routinely recorded, removing the veil of secrecy that facilitates police violence.

Every copwatching group active today uses videorecording as their main tool to document and prevent police violence. Many of these groups have been livestreaming their activities since the early 2010s to reach a broader audience and provide an additional layer of safety. Both the Minnesota-based Communities Against Police Brutality and the nationwide CopBlock organization began recommending livestreaming police interactions in 2016.<sup>22</sup> The ACLU of Southern California's policing expert Peter Bibring considers livestreaming to be the best practice for documenting police misconduct because livestreaming creates an off-device recording and is immediately viewable.<sup>23</sup>

Livestreaming is an important tool for copwatchers because recording the police can trigger harassment and could result in confiscation or destruction of the watcher's phone. Stories of police confiscating people's phones for recording

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<sup>22</sup> Daniel Victor & Mike McPhate, *Critics of Police Welcome Facebook Live and Other Tools to Stream Video*, N.Y. Times (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/critics-of-police-welcome-facebook-live-and-other-tools-to-stream-video.html>.

<sup>23</sup> Joseph Bien-Kahn, *7 Tips for Reporting Live Via Your Phone From Anywhere*, Wired (Nov. 16, 2016), <https://www.wired.com/2016/11/how-to-livestream-police-brutality-from-your-phone/>.



police activities are common.<sup>24</sup> Because livestreaming creates an off-device record of the interaction, individuals can still access and distribute the footage if their phone is confiscated or destroyed.

Livestreaming can also trigger oversight and deter aggression towards copwatchers that are targeted for violence because of their recording activities. In just a few examples of copwatchers targeted for recording police activities, a San

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<sup>24</sup> Pat Grossmith, *City to Pay Man \$20k After Police Seized His Phone With Recording of 7-Eleven Melee*, Manchester Ink Link (Oct. 12, 2021), <https://manchesterinklink.com/court-city-to-pay-man-20k-after-police-wrongfully-seized-phone-with-recording-of-7-eleven-melee/>; Alex Rose, *Collingdale Family Sues Borough, Cops Over Arrests*, Del. County Daily Times (Aug. 19, 2021), <https://www.delcotimes.com/2014/09/24/collingdale-family-sues-borough-cops-over-arrests/>; Kyla Asbury, *Dellwood Woman Sues Police Officer Over Allegations First Amendment Rights Were Violated When He Took Cellphone*, St. Louis Record (Oct. 28, 2019), <https://stlrecord.com/stories/515471951-dellwood-woman-sues-police-officer-over-allegations-first-amendment-rights-were-violated-when-he-took-cellphone>; ACLU of Oregon, *Victory! ACLU of Oregon Settles Lawsuit on Behalf of Portland Woman Whose Phone was Seized While Filming the Police in 2013* (Apr. 10, 2017), <https://www.aclu-or.org/en/press-releases/victory-aclu-oregon-settles-lawsuit-behalf-portland-woman-whose-phone-was-seized>; Zack Kopplin, *Alton Sterling Witness: Cops Took My Phone, My Surveillance Video, Locked Me Up*, Daily Beast (Apr. 13, 2017), <http://www.thedailybeast.com/articles/2016/07/11/alton-sterling-witness-cops-took-my-phone-my-surveillance-video-locked-me-up.html>; ACLU of Pennsylvania, *ACLU Files Suit on Behalf of Fayette County Man Arrested for Recording Police Officer* (July 19, 2012), <https://www.aclupa.org/en/press-releases/aclu-files-suit-behalf-fayette-county-man-arrested-recording-police-officer>; Sabina Kuriakose, *Questions Raised After Cell Phone Confiscated*, NBC Connecticut (Sept. 13, 2012), <https://www.nbcconnecticut.com/investigations/questions-raised-after-cell-phone-confiscated/1914045/>.

Jose, California security guard was arrested and beaten for observing a traffic stop in 2018,<sup>25</sup> a Waterbury, Connecticut man was arrested for filming outside a police station in 2018,<sup>26</sup> and an Omaha, Nebraska copwatcher was arrested for filming police on March 31, 2021.<sup>27</sup>

Livestreaming a police encounter is also a common safety measure among Black Americans targeted by police. In one prominent example, Grammy-award-winning artist Chance the Rapper livestreamed his 2017 traffic stop to Instagram, “in case it gets out of hand.”<sup>28</sup> Last summer, Black Lives Matter activist Derrick Ingram’s livestream was essential to safely resolving an hours-long standoff in which the NYPD laid siege to his apartment to arrest him without a warrant for

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<sup>25</sup> Madelyn Reese, *San Jose Man Faces Restraining Orders, Court Battle After Watching Police*, San Jose Spotlight (May 19, 2019), <https://sanjosespotlight.com/san-jose-man-faces-restraining-orders-court-battle-after-watching-police/>.

<sup>26</sup> Dave Collins, *Man Arrested for Filming Police Station Sues Officers*, AP (Aug. 24, 2021), <https://apnews.com/article/arrests-a63bfde993816607fd2efb98ebe84e1c>.

<sup>27</sup> Alexandra Kukulka, *Video Captures Lake County Sheriff’s Deputies Arresting Man Filming from Sidewalk: ‘They All Came to Me. I Didn’t Go to Them,’* Chi. Trib. (Mar. 31, 2021), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-first-amendment-arrest-st-0401-20210331-i364mnnxtzf4xosegmnd5xeg3u-story.html>.

<sup>28</sup> Tom Schuba, *Chance the Rapper Livestreams Traffic Stop on Instagram*, Chi. Sun-Times (Oct. 8, 2017), <https://chicago.suntimes.com/2017/10/8/18331291/chance-the-rapper-livestreams-traffic-stop-on-instagram>.

allegedly shouting in an officer's ear during a protest.<sup>29</sup> This July, a passenger in a car of several Black men and women used Facebook Live to document a traffic stop in which a Caledonia, Wisconsin police officer appeared to plant evidence by tossing a plastic bag into the backseat of the vehicle.<sup>30</sup> The footage triggered an internal investigation that revealed police had searched and handcuffed one of the other passengers without cause.<sup>31</sup>

In the last few years, a number of apps were developed to facilitate livestreaming and recording the police. The Just Us mobile app, created by a Black mother in California concerned for the safety of her teenage son, allows users to livestream a stop to a designated group of family and friends, alert designated contacts that a traffic stop is happening, and push out a call for help.<sup>32</sup> Built with

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<sup>29</sup> Liam Stack, Annie Correal and Juliana Kim, *N.Y.P.D. Besieges a Protest Leader as He Broadcasts Live*, N.Y. Times (Aug. 9, 2020), <https://www.nytimes.com/2020/08/07/nyregion/nypd-derrick-ingram-protester.html>.

<sup>30</sup> Drake Bentley, *Caledonia Police Chief Says Officer in Viral Video Did Not Plant Evidence, But Shouldn't Have Put Baggie in Pulled-over Car*, Milwaukee Journal Sentinel (July 25, 2021), <https://www.msn.com/en-us/news/us/caledonia-police-investigating-after-viral-video-appears-to-show-officer-toss-bag-into-back-seat-of-pulled-over-car/ar-AAMwyhf>.

<sup>31</sup> *Id.*

<sup>32</sup> Aryana Azari, *Mother Creates Just Us Mobile App to Help Protect Black Drivers*, Good Morning America (Apr. 1, 2021), <https://www.goodmorningamerica.com/family/story/mother-creates-us-mobile-app-protect-black-drivers-76794246>.

the dangers of a traffic stop in mind, Just Us is designed to be wholly voice-controlled so that detained persons can keep their hands in view of an officer.<sup>33</sup> Similarly, the Shortcuts app adds features to Apple’s Siri voice control, allowing iPhone users to start recording a traffic stop hands free with the command “Siri I’m getting pulled over.”<sup>34</sup> The Mobile Justice app also allows people to record their traffic stops and submit complaints of wrongful treatment to the ACLU directly.<sup>35</sup> The growth of police recording apps demonstrates the widespread fear of traffic stops and other police actions and the demand for public oversight of policing.

### **C. Livestreaming police interactions is necessary for community oversight of policing.**

Both copwatching in general and livestreaming in particular can be forms of participation in the democratic process. Copwatchers create records of police action to substantiate complaints submitted to police departments and civilian oversight boards. These records can supplement or replace missing evidence from police departments to enable meaningful review of police misconduct.

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<sup>33</sup> *Id.*

<sup>34</sup> Dalvin Brown, *Pulled Over While Connected: Siri Can Quietly Video Record the Police*, USA Today (Oct. 4, 2018), <https://www.usatoday.com/story/tech/2018/10/04/siri-shortcut-can-discreetly-record-cops-during-traffic-stops/1509065002/>.

<sup>35</sup> See American Civil Liberties Union, *Mobile Justice* (2021), <https://www.aclu.org/issues/criminal-law-reform/reforming-police/mobile-justice>.

Community oversight of police is an increasingly popular demand. Based on a 2020 survey, nearly two-thirds of cities in the U.S. have some form of civilian oversight of police.<sup>36</sup> Cities have established at least 22 new civilian oversight entities since 2014, part of a resurgence in organizing for greater review of police departments.<sup>37</sup> At least 13 more cities have either completely restructured or enhanced the authority of their civilian oversight systems.<sup>38</sup> There is a clear, nationwide trend in favor of greater civilian control of police departments.

However, many established civilian oversight entities have been unsuccessful in addressing police misconduct due to a lack of subpoena and other investigatory powers, close ties between oversight board staff and police, and obstruction from police leadership and unions.<sup>39</sup> Oversight boards often lack the resources to fully investigate misconduct or the power to compel police departments to turn over evidence.<sup>40</sup>

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<sup>36</sup> Sharon R. Fairley, *Survey Says? U.S. Cities Double Down on Civilian Oversight of Police Despite Challenges and Controversy*, *Cardozo L. Rev. De Novo* 9 (2020) [https://cardozolawreview.com/wp-content/uploads/2020/01/FAIRLEY.DN\\_.2019.pdf](https://cardozolawreview.com/wp-content/uploads/2020/01/FAIRLEY.DN_.2019.pdf).

<sup>37</sup> *Id.* at 14.

<sup>38</sup> *See id.* at 21–30.

<sup>39</sup> *See id.* at 33–50.

<sup>40</sup> Nicole Dungca and Jen Abelson, *When Communities Try to Hold Police Accountable, Law Enforcement Fights Back*, *Wash. Post* (Apr. 27, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/civilian-oversight-police-accountability/>.

Copwatching can shore up civilian review of police by providing evidence from sources outside the police department. Where civilian oversight boards struggle to obtain a neutral record of an alleged complaint, videos from copwatchers add to the record. Copwatch videos also add value because, unlike body-worn cameras, they record the actions of the officer, not just the detained individual.

Videos from copwatchers are also often much easier for civilians to access than body camera footage. A 2017 study by Upturn and The Leadership Conference found that the rollout of police worn body cameras resulted in a “nationwide failure to protect the civil rights and privacy of communities of color.”<sup>41</sup> The study found that a growing repository of body camera footage was often difficult for civilians to access and rarely resulted in meaningful oversight. In contrast, video from copwatchers, livestreamed and then saved online or archived by police accountability groups, presents no barriers to civilian review.

Copwatching and the livestreaming of police activities are vitally important to ensuring that the public understands how police conduct themselves, and particularly how they often treat people of color. The same footage can also be

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<sup>41</sup> Upturn & The Leadership Conference, *Police Body Worn Cameras: A Policy Scorecard* (2017), <https://www.bwccscorecard.org>.

used by civilian oversight bodies investigating misconduct. Livestream footage can also serve a vital role when police are unwilling to comply with oversight investigations.

## **II. POLICE CANNOT DEMAND SECRECY FOR ACTIVITIES CONDUCTED IN PUBLIC.**

Traffic stops are not secret and prohibiting passengers from broadcasting these public police actions serves no legitimate purpose. The district court worried that livestreaming a traffic stop revealed too much information about the location of a stop, showed the inside of the vehicle, and created a platform for viewers to discuss the livestream. But even under the district court's rule, other bystanders can still livestream the traffic stop and the passengers inside the vehicle still have other ways to broadcast the same details even if livestreaming is prohibited. Ultimately, citizens have privacy rights against government agents, not the other way around. Because traffic stops occur in public and because a healthy democracy requires transparency for government officials, the Court should reverse.

### **A. Traffic stops are public events that attract the attention of onlookers.**

Asking for secrecy in a traffic stop is like asking for secrecy in a parade: The nature of the activity obviates the idea that it can or should be kept secret. Police conduct stops on streets and highways where hundreds of people may pass during the course of a stop. These areas are traditional public fora in First Amendment

law. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). The police often use flashing lights and loud sirens during a stop, drawing even more attention to their location and activities. Traffic stops are so public that they can engross nearby drivers and lead to “rubbernecking.”<sup>42</sup> It makes little sense to prohibit passengers from publicizing activities that are public by their very nature.

Modern devices and applications enable the public to track police locations and conversations during traffic stops and beyond. For example, Waze is a popular driving app downloaded by 30 million people in the United States.<sup>43</sup> Waze enables users to alert other drivers of officers’ exact location by marking where they see police cars on a public map.<sup>44</sup> Other users can confirm whether the police have remained in the previously marked location or mark a new one if the police have moved.<sup>45</sup> Similarly, police radio scanners allow people to listen to police

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<sup>42</sup> Sensible Driver, *National Safety Council: Most Motorists Rubberneck at Emergency Scenes* (Apr. 4, 2019), <https://sensibledriver.com/article/national-safety-council-most-motorists-rubberneck-at-emergency-scenes>.

<sup>43</sup> Craig Smith, *14 Interesting Waze Statistics and Facts*, DMR (May 28, 2021), <https://expandedramblings.com/index.php/waze-statistics-facts>.

<sup>44</sup> Steven John, *How to Report Police Sightings on Waze and Help Other Users Drive More Carefully*, Bus. Insider (Apr. 23, 2020), <https://www.businessinsider.com/how-to-report-police-on-waze>; wikiHow, *How to Report Police Activity in Your Area Using Waze on iPhone* (Aug. 3, 2018), <https://www.wikihow.com/Report-Police-Activity-in-Your-Area-Using-Waze-on-iPhone>.

<sup>45</sup> wikiHow, *How to View All Local Reports on Waze* (June 27, 2017), <https://www.wikihow.com/View-All-Local-Reports-on-Waze>.



communications and find out where the police are at any given time.<sup>46</sup> These devices are widely available for less than \$100 and are legal in almost every state, including in North Carolina.<sup>47</sup> Some copwatching groups use police scanners to find where the police are so that they may document and broadcast their activities.<sup>48</sup>

Copwatching groups, journalists, and other bystanders can communicate essentially the same information as a passenger in a traffic stop: real-time video of the scene, geolocation information, and commentary about the stop. The bystander could also facilitate a discussion of the stop on social media. The district court conceded that Appellee's anti-livestreaming policy did not prevent bystanders from exercising their right to livestream a traffic stop. *Sharpe v. Ellis*, No. 4:19-CV-157, 2021 WL 2907883, at \*15 (E.D.N.C. July 9, 2021). But if bystanders can livestream the same information that a passenger is prohibited from

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<sup>46</sup> ScannerMaster, *All About Police Scanners* (2021), [https://www.scannermaster.com/learn\\_about\\_police\\_scanners\\_a/165.htm](https://www.scannermaster.com/learn_about_police_scanners_a/165.htm).

<sup>47</sup> Zip Scanners, *Are Police Scanners Legal?*, <https://www.zipscanners.com/blogs/learn/are-police-scanners-legal> (explaining states in which scanners are legal); Erica Rawes, *The 7 Best Police Scanners of 2021*, Lifewire (Jan. 28, 2021), <https://www.lifewire.com/best-police-scanners-4132378> (showing popular scanners available for less than \$100).

<sup>48</sup> Berkeley Copwatch, *Berkeley Copwatch Handbook: An Introduction to Monitoring the Police* 38 (2021), available at <https://www.berkeleycopwatch.org/handbook>.

communicating, the sensitivity of the information cannot be the basis for the distinction—only a desire to restrict the set of people who can livestream the police.

When police locations and conversations are lawfully tracked by the public, the police cannot claim that their public locations and activities must remain secret. That secrecy never existed to begin with, so it is not a legitimate interest that justifies infringing passengers' First Amendment rights.

**B. It is impossible for the police to stop passengers from broadcasting traffic stop information.**

There are myriad ways that those in a stopped car can broadcast their location and information about their traffic stop beyond Facebook Live. Stopping the flow of information would be practically impossible. Disclosure of this information can occur before police arrive at the car. Once at the car, police could only effectively stop many of these activities by confiscating a passenger's phone or otherwise impinging on their recognized First Amendment rights; even then, the phone or other devices may still be broadcasting information to friends and family.

People in a stopped car can communicate a traffic stop's existence and exact location through a text message, phone call, or social media before the officer even approaches their car. Modern smartphones enable users to share their exact location with their contacts at the push of a button. An Apple iPhone user could share their location with dozens of contacts with only three or four taps of a phone

screen.<sup>49</sup> And with only a few extra seconds, the passenger could also include a message such as “Just got pulled over” or include a picture of the police car behind them. A passenger could even trigger discreet livestreaming with a simple voice command.<sup>50</sup> This would communicate the same information that Appellees believe must be kept secret: the existence of a stop, its geolocation, information about the vehicle’s interior, and a forum for discussion. *Sharpe*, 2021 WL 2907883, at \*10–11. The person in the car could also ask friends, family, or members of the public to come to the scene of the stop and begin livestreaming. Because all of this can happen before the police approach the vehicle, it is—from a practical perspective—impossible for police to stop this information disclosure.

People in the car may also unknowingly disclose some information about a traffic stop to their networks. Many smartphone users continuously share their location with family and friends using popular applications such as Apple’s “Find My” or Google’s “Google Maps.”<sup>51</sup> Under these circumstances, a simple text that a

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<sup>49</sup> For example, someone could open a new or existing group message, tap the “Info” icon at the top, and tap “Send my current location.”

<sup>50</sup> See *supra* text accompanying note 32.

<sup>51</sup> Julie Beck, *It’s 10 P.M. Do You Know Where Your Friends Are?*, Atlantic (Aug. 20, 2019), <https://www.theatlantic.com/family/archive/2019/08/why-people-use-find-my-friends/596386>; Apple, *iCloud - Find My* (2021), <https://www.apple.com/icloud/find-my/>; Sandy Writtenhouse, *How to Find Your Family and Friends Using Google Maps*, How-To Geek (Mar. 6, 2021),

person has been pulled over conveys both the fact of a stop and the stop's location. There is no legal or practical way that the police could prevent this. Prohibiting a passenger from sending a message that they have been pulled over would require the police to use cell jammers every time they stopped a car—an illegal practice for state and local law enforcement.<sup>52</sup>

The distinction that the district court drew between recording and livestreaming also rests on shaky technological grounds. The only meaningful difference between recording and livestreaming is the timing of publication, and even this distinction is thin because social media platforms enable publication with the tap of a button.<sup>53</sup> A person in the stopped car could record a segment of the stop, upload it to Facebook, go back to recording, and repeat, effectively communicating the same information as a livestream with a short delay. Minor differences in publication method should not result in major distinctions about the scope of constitutional rights. Further, prohibiting a passenger from publishing a recorded video in real-time would require an officer to monitor that passenger's

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<https://www.howtogeek.com/710447/how-to-find-your-family-and-friends-using-google-maps/>.

<sup>52</sup> Fed. Comm'n's Comm'n, *Warning: Jammer Use By the Public and Local Law Enforcement Is Illegal* (Dec. 8, 2014), <https://www.fcc.gov/document/warning-jammer-use-public-and-local-law-enforcement-illegal>.

<sup>53</sup> See, e.g., Facebook Help Center, *How Do I Post a Video on Facebook?* (2021), <https://www.facebook.com/help/166707406722029>.

phone screen throughout the entirety of a traffic stop—difficult to do when an officer is in their car running records or focused on communicating with the driver.

Ultimately, it is simply not possible for law enforcement to effectively maintain the secrecy of a traffic stop, begging the question of why prohibiting Facebook Live or other livestreaming is necessary at all, especially given its government transparency and safety benefits. *See supra* Section I. Rules that cannot be consistently enforced are more likely to be applied discriminatorily.<sup>54</sup> Upholding the district court’s rule would likely increase discriminatory policing, further endanger communities of color, and frustrate efforts for meaningful police oversight.

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<sup>54</sup> *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 Vand. L. Rev. 1497, 1524, 1527–28 (2007).

## CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to reverse the district court's grant of judgment on the pleadings in favor of Defendants.

**Date:** November 10, 2021

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## CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(4) because this brief contains 4844 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

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**Signature:** /s/ Megan Iorio

**Date:** November 10, 2021

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I certify that on November 10, 2021, this brief was e-filed through the CM/ECF System of the U.S. Court of Appeals for the Fourth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

**Date:** November 10, 2021

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