No. 21-1827

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DIJON SHARPE,
Plaintiff-Appellant,
v.
WINTERVILLE POLICE DEPARTMENT; Officer WILLIAM BLAKE ELLIS, in his official capacity only; Officer MYERS PARKER HELMS, IV, in his individual and official capacity,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

OPENING BRIEF OF APPELLANT

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INTRODUCTION

This case calls on the Court to protect a crucial clearly established constitutional right in precisely the situation where it most requires the Court's protection. This case involves a physical altercation and a threat of arrest initiated by police officers against the Plaintiff-Appellant Dijon Sharpe for the mere act of livestreaming a traffic stop with his cell phone as a passenger in a pulled-over vehicle.[1]

It is undisputed that the stop was for a mere traffic violation (allegedly running a stop sign), JA32; it is undisputed that Mr. Sharpe was suspected of no wrongdoing, JA32; and it is undisputed that the only justification for Officer Helms attempting to seize Mr. Sharpe's phone and taking hold of his shirt and seatbelt, and Officer Ellis threatening him with arrest, is a fanciful chain of hypotheticals involving a third party seeing Mr. Sharpe's livestream, deducing the location of the traffic stop, driving to the scene, and attempting to harm the officers. *See* JA34, JA63-65, JA80-82. Given those undisputed facts, it is beyond

[1] A full recording of the incident is available on Facebook. https://bit.ly/3pb5FGF. The Court may "view[ ] the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 378, 380-81 (2007); *see Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013) (applying the incorporation-by-reference doctrine to a video).

peradventure that the Officers violated Mr. Sharpe's clearly established First Amendment right to record and broadcast police in the public discharge of their duties.

Yet the district court dismissed Mr. Sharpe's individual capacity claim against Defendant-Appellant Myers Parker Helms IV ("Officer Helms"), reasoning incorrectly that it was not "clearly established" as of the time of the stop—October 2018—that a passenger in a stopped vehicle has a constitutional right to record and live broadcast the interaction. Then the court erred further. The Town of Winterville is a Defendant in this suit because the officers, by their words and actions, suggested during the traffic stop that arresting vehicle passengers for livestreaming is a policy of the Town of Winterville. Unlike Officer Helms, however, Winterville cannot claim qualified immunity. *See Int'l Ground Transp. v. Mayor And City Council Of Ocean City, MD*, 475 F.3d 214, 219 (4th Cir. 2007). So, eleven months after dismissing Officer Helms from the suit on qualified immunity grounds, the district court granted judgment on the pleadings to the Town of Winterville on the grounds that Mr. Sharpe in fact had no constitutional right to live broadcast *at all*, and that even if he did, Winterville's policy of arresting passengers in stopped

vehicles for livestreaming traffic stops is subject to intermediate scrutiny and survives such scrutiny. JA80-86.

The district court erred in every respect. By October 2018 it was clearly established nationwide that individuals have a First Amendment right to record police officers in the discharge of their duties in public. It was also clearly established that such right includes the right to disseminate those recordings in real time (i.e., live broadcast). It was further clearly established that the right could be circumscribed only pursuant to reasonable time, place, and manner restrictions. And it was obvious that the protections of that right extended to passengers in stopped cars as much as they do any other bystander who is not suspected of any wrongdoing and who is not disrupting or interfering with law enforcement in the discharge of their duties in any way.

The blanket ban on livestreaming police officers at issue in this case—apparently imposed exclusively on passengers in stopped vehicles—violates the First Amendment many times over. It is clearly a *content* and *speaker based* restriction on speech designed to limit the kind of information that can be disseminated about a traffic stop—namely real-time video footage that the viewer can be confident is unedited and

unaltered. Footage whose persuasive power does not depend on the eloquence or reputation of its source. Even if the ban could be construed as a content-neutral "time, place, or manner" restriction—and it cannot be—the ban is irrational and therefore unconstitutional under any level of scrutiny. There is no evidence-backed public safety interest in preventing the public from viewing a traffic stop in real time, nor in hiding the location of a traffic stop from public view. And even if there were, there is no relevant distinction between livestreaming and myriad other methods of recording and disseminating information in real time that the Defendants do not restrict, including sending a text message and making a phone call.

This Court should reverse the district court's orders dismissing Mr. Sharpe's individual capacity claim against Officer Helms and his *Monell* claim against the Town of Winterville and remand this case for further proceedings.

JURISDICTIONAL STATEMENT

Plaintiff-appellant sued Defendants-appellees under 42 U.S.C. § 1983 to enforce federal rights provided by the First Amendment to the United States Constitution. The district court had subject-matter

jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on July 9, 2021. JA74-86. Plaintiff-appellant timely filed a notice of appeal on July 27, 2021. JA87-88. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Officer Helms violated Mr. Sharpe's clearly established First Amendment right to record and live broadcast police officers discharging their duties in public.

2. Whether the Town of Winterville's alleged policy, custom, or practice of arresting passengers in stopped vehicles for live broadcasting police conduct during traffic stops violates the First Amendment.

STATEMENT OF THE CASE

A. Factual Background

On October 9, 2018, Winterville Police Officers William Ellis and Myers Helms stopped a vehicle in which Plaintiff-Appellant Dijon Sharpe was a passenger. JA8-9 (Complaint). Like thousands of Americans who are involved in police interactions each year, Mr. Sharpe took out his cell phone and started recording. JA9. He used Facebook Live, an App that records and posts videos to Facebook in real time. JA9.

For Mr. Sharpe the decision to record the stop was deeply personal: He had been the victim of a brutal beating at the hands of police officers in the nearby town of Greenville ten months earlier. JA8. That incident also involved a traffic stop. JA8. Mr. Sharpe was riding as the passenger in a vehicle that was pulled over in Greenville, North Carolina. JA8. During the Greenville traffic stop, Mr. Sharpe was forced by the officers involved to exit the vehicle, whereupon he was tased, choked, and severely beaten by the officers. JA8. Mr. Sharpe was then charged with two counts of violating N.C. Gen. Stat. § 14-223 (misdemeanor resisting a public officer) and one count of violating N.C. Gen. Stat. § 14-34.7(C)(1) (felony assault inflicting physical injury on a law enforcement officer). JA8. Ultimately, all charges against Mr. Sharpe relating to the Greenville incident were dismissed by the District Attorney. JA8. Mr. Sharpe's experience during that incident spurred him to become a civic activist promoting greater accountability for law enforcement. JA8. Mr. Sharpe also took precautions to ensure any future interactions he had with law enforcement would be recorded for protection. JA8.

At the outset of the October 2018 stop, while the driver and Mr. Sharpe waited for the officers to approach the vehicle, the driver

called an unidentified party on his cellphone so that the party was aware the vehicle had been pulled over by police. JA8. Meanwhile Mr. Sharpe began livestreaming the stop on his Facebook account via Facebook Live. JA9.

The livestream shows that, during the stop, the driver continued his conversation with the unidentified party on his cellphone during the entire course of the stop, including while speaking with the officers.[2] *See* JA18-38 (video transcript) (beginning at the [1:37] timestamp of the video). As Officer Ellis ran the driver's license, Officer Helms remained on the passenger side of the vehicle and observed the driver describe the location of the traffic stop by naming the street and nearby landmarks and buildings. JA21-23 (at 4:10-5:17). The videorecording shows Officer Helms asking for Mr. Sharpe's identification and then returning to the patrol vehicle around the [4:50] timestamp. JA23.

During this time, the driver continued his cellphone conversation, explaining that police had begun following the vehicle for some time

[2] The videorecording of the incident available on Facebook at https://bit.ly/3pb5FGF shows most clearly that this conversation continued throughout the stop and in the presence of the officers.

before initiating the traffic stop, and he re-expressed a concern that he and Mr. Sharpe had been racially profiled. JA24 (at 5:27-6:10). Mr. Sharpe is seen at the [8:52] timestamp of the video reassuring viewers that he and the driver are fine, and advocating the practice of recording interactions with law enforcement, stating: "We're good y'all. We just gonna -- I'm recording every time we get stopped, as well as y'all should."[3] *See* JA28.

After emerging from the patrol vehicle, Officer Helms is seen at the [11:42] timestamp of the video returning to address Mr. Sharpe specifically: "What have we got? Facebook Live, cous?" JA31. As soon as Mr. Sharpe responds affirmatively, Officer Helms abruptly thrusts his arm through the passenger window and attempts to seize Mr. Sharpe's cellphone while pulling on Mr. Sharpe's seatbelt and t-shirt. *See* JA31 (at 11:44-11:54). During this altercation, Officer Helms tells Mr. Sharpe:

[3] These quotes are drawn from the Facebook Live video, https://bit.ly/3pb5FGF, at 8:50-8:59.

"We ain't gonna do Facebook Live, because that's an officer safety issue." JA31.

Shortly thereafter, following the issuance of citations to the driver, Officer Ellis states: "Facebook Live . . . we're not gonna have, okay, because that lets everybody y'all follow on Facebook that we're out here. There might just be one me next time . . . . It lets everybody know where y'all are at. We're not gonna have that." JA33-34 (at 12:40-12:47). Officer Ellis continues at the [12:50] timestamp of the video: "If you were recording, that is just fine. . . . We record, too. So in the future, if you're on Facebook Live, your phone is gonna be taken from you. . . . And if you don't want to give up your phone, you'll go to jail." JA34.

Mr. Sharpe replied to these statements: "Is that a law?" JA34. To which Officer Ellis replied "[t]hat's an officer safety issue" and also replied "[t]hat's a RDO."[4] "RDO" is apparently a reference to N.C. Gen. Stat. Ann. § 14-223, which makes it a Class 2 misdemeanor for any person to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office." *See*

[4] These quotes are drawn from the Facebook Live video, https://bit.ly/3pb5FGF, at 13:00-13:07.

State v. Kohler, 811 S.E.2d 244 (N.C. App. 2018) (referring to this offense as "RDO"); *United States v. Horton*, No. 5:16-MJ-02070-FL-1, 2018 WL 6242869, at *2 (E.D.N.C. Nov. 29, 2018) (same).

Officer Helms—an officer trained under the same Winterville policies as Officer Ellis about the authority of officers to arrest citizens for livestreaming—said nothing to correct or amend any of Officer Ellis's statements during this interaction.

B. Proceedings Below

On November 3, 2019, Mr. Sharpe filed a complaint in the United States District Court for the Eastern District of North Carolina against Defendants Winterville Police Department, Officer Ellis, and Officer Helms (collectively, "Defendants"). JA5-13 (Complaint). The Complaint included two claims for relief — the first for violation of 42 U.S.C. § 1983 and the First Amendment against Officers Ellis and Helms in their official capacities, as well as Winterville Police Department; and the second, for violation of 42 U.S.C. § 1983 and the First Amendment against Officer Helms in his individual capacity. JA10-11 ¶¶ 37-48. In addition to nominal damages, fees and costs, the Complaint sought a declaratory judgment that Mr. Sharpe "has the right, protected by the

First Amendment . . . to both (a) record police officers in the public performance of their duties and (b) broadcast such recording in real-time." JA12 at Prayer for Relief, ¶ 3.

After answering the Complaint, JA40-47, Defendants filed a partial motion to dismiss on the grounds that (1) the Complaint failed to state a claim upon which relief could be granted, (2) the Court lacked personal jurisdiction over Winterville Police Department, and (3) Officer Helms was entitled to qualified immunity as to the § 1983 claim asserted against him in his individual capacity. JA50-51 (Partial Motion to Dismiss). On August 14, 2020, the Court heard oral argument on the Motion to Dismiss. *See* JA54 (Dist. Ct. Dkt. No. 32).

On August 20, 2020, the district court issued an order granting Defendants' Motion to Dismiss, and dismissed with prejudice Mr. Sharpe's claim against Winterville Police Department and his claim against Officer Helms in his individual capacity. JA54-70 (Order granting Partial Motion to Dismiss). Specifically, in its Order, the district court dismissed Winterville Police Department under Rule 12(b)(6) as an improper § 1983 defendant. JA57-59.

As to Mr. Sharpe's individual capacity claim against Officer Helms, the court held that, "during the traffic stop, Sharpe did not have a clearly established First Amendment right to record and real-time broadcast with the ability to interact via messaging applications with those watching in real-time. Thus, qualified immunity bars Sharpe's First Amendment claim against Helms in his individual capacity." JA65-66. To the extent the district court explained *why* Mr. Sharpe lacked a clearly-established First Amendment right to livestream, the court noted that "the Third Circuit opined that an activity 'interfer[ing] with polic[e] activity' such that the recording 'put[s] a life at stake' might not be protected." JA65 (quoting *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017)). The court then held that livestreaming by a vehicle passenger poses a "unique" threat to officer safety that mere recording does not and is therefore not clearly First Amendment protected. JA65. Following the district court's order, only Mr. Sharpe's claims against Officers Helms and Ellis in their official capacity remained. JA66.

On October 25, 2020, Mr. Sharpe moved for entry of final judgment of dismissal of his claim against Officer Helms in his individual capacity. *See* Dist. Ct. Dkt. Nos. 34, 34-1. And, on November 18, 2020, Defendants

moved for partial judgment on the pleadings, asserting that Mr. Sharpe had failed to state a claim against Officers Ellis and Helms in their official capacity because Mr. Sharpe had failed to allege a policy, custom, or practice of Winterville sufficient to establish *Monell* liability, and in any case, the alleged policy would not be unconstitutional. JA71-72 (Motion for Partial Judgment on the Pleadings). Mr. Sharpe opposed Defendants' motion, and in particular, explained why a policy against the filming and live broadcasting of police officers in the course of their duties was unconstitutional. Dist. Ct. Dkt. No. 39 at 6-10.

The district court granted Defendants' motion for partial judgment on the pleadings, and denied Mr. Sharpe's motion for entry of final judgment as moot. JA74-86 (Order granting Motion for Judgment on the Pleadings). The district court held that "the First Amendment did not entitle Sharpe to livestream the traffic stop from inside the car during the traffic stop." JA74. The district court recognized that, as several federal circuit courts have held, the First Amendment generally guarantees the right to record the police in the performance of their duties. JA80. The court also stated that it agreed with that general principle. *Id.* Nonetheless the district court held that Mr. Sharpe had

"failed to allege a deprivation of a right secured by the Constitution." JA82. In the alternative, the court held that even if such a right exists, Winterville's policy of banning the live broadcast of traffic stops by passengers was a permissible speech restriction. JA82-86.

In reaching both conclusions, the court rested its analysis on an improbable chain of hypotheticals involving the possibility of an attack on the officers involved in the traffic stop as a result of livestreaming. JA80-86. According to the Court "[r]ecording a traffic stop for publication after the traffic stop versus livestreaming an ongoing traffic stop from inside the stopped car during the traffic stop are significantly different." JA80. "[L]ivestreaming the interaction from inside the stopped car during the traffic stop … allows … those watching, to know the location of the interaction, to comment on and discuss in real-time the interaction, and to provide the perspective from inside the stopped car," JA81. "The perspective from inside the stopped car, for example, would allow a viewer to see weapons from inside the stopped car that an officer might not be able to see and thereby embolden a coordinated attack on the police." JA81. Given this threat to officer safety, the Court held, Mr. Sharpe had no First Amendment right to livestream. JA82.

Additionally, the Court reasoned, the "substantial government interest" in protecting "officer and public safety" in the "unique" context of traffic stops would justify restricting livestreaming even if it were protected by the First Amendment. JA83. This appeal followed.

SUMMARY OF ARGUMENT

1. Officer Helms's attempt to seize Mr. Sharpe's cellphone from his hand, his gripping of Mr. Sharpe's seatbelt and t-shirt, and Officer Ellis's threat to arrest Mr. Sharpe for livestreaming, violated Mr. Sharpe's clearly established rights under the First Amendment. These rights were clearly established for two different reasons. *See Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 543 (4th Cir. 2017). First because, as of October 2018, the Supreme Court's cases established with obvious clarity that Mr. Sharpe had a right to film police in the discharge of their duties in public. *Id.* Second because, as of October 2018, a "consensus of cases of persuasive authority from other jurisdictions" clearly established the rights in question. *Id.*

The First Amendment protects the right of a passenger in a vehicle to film what is happening around him, and that right does not disappear because the car happens to be pulled over by the police. Moreover, a ban

on livestreaming is subject to strict scrutiny because it is a content- and speaker-based restriction on speech: it applies *only* to filming police officers and *only* to passengers in stopped vehicles. Even if it were subject to intermediate scrutiny, it could not possibly survive even that level of scrutiny. A conjectural concern for officer safety cannot justify banning livestreaming. Yet the only justification ever identified for the ban depends on a speculative chain of hypotheticals that have no basis in any evidence of any kind. And the ban is so poorly tailored that it cannot satisfy any test of narrow tailoring.

2. The Town of Winterville's policy permitting officers to arrest passengers in stopped vehicles for livestreaming traffic stops also violates the First Amendment for all the same reasons. There clearly *is* a right to livestream, and the Town of Winterville's ban cannot survive any level of scrutiny. Moreover, contrary to Defendants' arguments below, the Officer's statements and their behavior during the October 2018 traffic stop raise a plausible inference that Winterville has a policy of banning livestreaming of police officers by vehicle passengers.

The Court should reverse the district court's dismissal of the personal capacity claims against Officer Helms and the claims against the Town of Winterville and remand this case for further proceedings.

STANDARD OF REVIEW

This Court reviews "a district court's grant of a motion to dismiss *de novo*." *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020). The Court will "accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff." *Id.* This Court "also review[s] a qualified immunity-based grant of a motion to dismiss *de novo*." *Id.* "To determine whether a complaint should survive a qualified immunity-based motion to dismiss" the Court exercises "'sound discretion' in following the two-prong inquiry set forth by the Supreme Court, analyzing (1) whether a constitutional violation occurred and (2) whether the right violated was clearly established." *Id.* The Court "may consider either prong of the qualified immunity analysis first." *Id.*

ARGUMENT

I. Officer Helms Violated Mr. Sharpe's Clearly Established First Amendment Right to Film Police in the Discharge of their Official Duties In Public

As of October 2018, it was clear to every reasonable law enforcement officer that individuals have a First Amendment right to film police in the discharge of their duties in public subject only to reasonable time, place, and manner restrictions. The Fourth Circuit did not need to have a published precedent specifically adjudicating that right for it to be clearly established. "In the absence of controlling authority that specifically adjudicates the right in question, a right may still be clearly established in one of two ways." *Booker*, 855 F.3d at 543. *First*, "[a] right may be clearly established if 'a general constitutional rule already identified in the decisional law [ ] appl[ies] with obvious clarity to the specific conduct in question.'" *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *see also Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (stating that a right may be clearly established if it is "manifestly apparent from broader applications of the constitutional premise in question"). *Second*, "[a] right may also be clearly established based on a 'consensus of cases of persuasive authority' from other jurisdictions.'" *Booker*, 855 F.3d at 543 (quoting *Owens*, 372 F.3d at 280).

Here, the First Amendment right was clearly established in both ways. *First*, the Supreme Court's cases clearly established before October 2018 that the First Amendment protects the right to gather and disseminate information about the conduct of government officials in public and that such right obviously included filming and broadcasting live. *Second*, the overwhelming consensus of persuasive authority from other circuits adjudicating the precise right at issue here—the right to film and broadcast the conduct of police—further shows that the right at issue in this case is clearly established.

The district court's distinction between recording and live-broadcasting is illusory and not a reason to hold that the right Officer Helms violated in this case was any less clearly established than it is. The very reason the right to record is protected is so that the recording may be disseminated. *See Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (recognizing that filming of police "in a form that can readily be disseminated to others serves a cardinal First Amendment interest"). Before the district court's decisions in this case, no court had ever held that the right to record is in any respect diminished by the speed with which it is distributed to others. The distinction drawn by the district

court—between recording and disseminating later and disseminating immediately—has no basis in First Amendment doctrine and it would leave the right to record unprotected in those circumstances where it is most vital. Live broadcasting is *more valuable* from a First Amendment perspective than mere recording. Telling others what is happening in real time prevents officials from hiding what happened by seizing the camera and deleting the footage, permits the viewer to call police or paramedics for help should anyone on the scene need immediate aid, and assures the viewer the footage is truthful and unedited.

At best, the dangers alleged by Defendants arising from livestreaming traffic stops would go not to *whether* there is a First Amendment right to livestream, but whether it may be permissibly restricted when undertaken by a passenger in a pulled-over vehicle. It cannot be. A ban on livestreaming limited to preventing the creation of depictions of the police by passengers in vehicles is a content- and speaker-based restriction that is subject to strict scrutiny and presumptively unconstitutional. Even if the appropriate level of scrutiny were intermediate scrutiny, rather than strict scrutiny, such a restriction could not survive even that level of scrutiny. Intermediate scrutiny

requires *evidence* that the restriction is necessary to further an important government interest. There is no such evidence. And the ban's unbelievably poor tailoring—which (a) permits bystanders outside the vehicle to livestream, (b) permits passengers inside vehicles to record (as long as they do not livestream), (c) permits passengers inside vehicles to make phone calls, and (d) permits passengers inside vehicles to send text messages, shows that the ban does not reasonably further the purported interest it supposedly exists to serve.

A. The Supreme Court's Cases Clearly Establish a First Amendment Right to Record Police In the Discharge of their Duties

"Basic First Amendment principles," *Glik*, 655 F.3d at 82, long recognized by the Supreme Court establish that citizens have a right to record and broadcast the actions of government officials in public places. This right sits at the convergence of four intersecting lines of First Amendment doctrine, all four of which dictate that there is a right to record and broadcast the actions of police officers: (1) the right to discuss, debate, and criticize the actions of government officials; (2) the right to create and disseminate information; (3) the right of individuals to receive truthful information; and (4) the right to access places traditionally open

to the public, which encompasses the right to listen, observe, and learn what happens there.

First, the right to record and disseminate flows from the right to discuss, debate, and criticize the actions of government officers. "[T]here is practically universal agreement that a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs'. . . ." *ACLU of Illinois* v. *Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012) (quoting *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 753 (2011)). "This agreement 'reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). There is "a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). And "[f]reedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" *Id.* (quoting *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 n.11 (1978)). "Speech is an essential mechanism of democracy,

for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010)).

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

Thus, the Supreme Court has consistently held that individuals have a constitutional right to access criminal proceedings in part because the ability to see what happens there is integral to safeguarding the ability of citizens to hold government accountable. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980) ("The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily."); *Turner*, 848 F.3d at 688 ("'without some protection for seeking out the news, freedom of the press could be eviscerated'" (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). The Supreme Court's campaign-finance cases further illustrate the principle that government may not cut off the ability of people to get their message into the public square by denying them the means to access it: "The Court held long ago that campaign-finance regulations implicate core First Amendment interests because raising and spending money *facilitates* the resulting political speech." *ACLU of Illinois*, 679 F.3d at 596-97 (collecting cases).

Mr. Sharpe's actions filming police officers falls squarely within the ambit of these cases. "Filming the police contributes to the public's

ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy." *Turner*, 848 F.3d at 689. "Filming the police also frequently helps officers; for example, a citizen's recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing." *Id.*

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

Second, the right to record and broadcast the actions of police in public flows from First Amendment rights over "the creation and dissemination of information." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Glik*, 655 F.3d at 82 (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783); *see also id.* ("It is ... well established that the Constitution protects the right to receive information and ideas." (quoting *Stanley v. Georgia,* 394 U.S. 557, 564 (1969)). "An important corollary to this interest in protecting the stock of public information is that '[t]here is an undoubted right to gather news 'from any source by means within the law.'" *Id.* (quoting *Houchins v. KQED, Inc.,* 438 U.S. 1, 11 (1978)).

The Supreme Court has thus held that "[a]n individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated." *Sorrell*, 564 U.S. 552, 568 (2011); *see Citizens United*, 558 U.S. at 339 (invalidating the federal ban on corporate and union spending for political speech because government may not "repress speech by

silencing certain voices at any of the various points in the speech process"); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 582 (1983) (holding that a tax on ink and paper "burdens rights protected by the First Amendment"). "[T]he government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979)); *see also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'").

Third, the right to record and disseminate flows from the First Amendment right of the public to receive information. *See Community Communications Co. v. Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981) ("The First Amendment protects not only the right to disseminate, but also the public's interest in the receipt of diversified communications."). As the Supreme Court has recognized, the First Amendment assumes that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."

Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also Fields*, 862 F.3d at 359 ("Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media."). Livestreaming is thus an essential, protected method of dissemination, not just for the disseminator, but for the millions of people who seek out and receive news through livestreaming platforms.[5]

Fourth, the right to record and disseminate flows from the right of individuals in "public places not only to speak or to take action, but also to listen, observe, and learn" what happens there. *Richmond Newspapers*, 448 U.S. at 578. The fact that Mr. Sharpe's broadcasting happened in a traditionally public place is of tremendous significance. "Such space occupies 'a special position in terms of First Amendment protection.'" *Snyder*, 562 U.S. at 456 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). "[T]he rights of the state to limit the exercise of

[5] This became apparent more than ever during the 24/7 livestreaming of protests that followed the murder of George Floyd. *See, e.g.*, Judy Berman, *Where You Watch the George Floyd Protests Matters*, TIME, June 5, 2020, https://bit.ly/3vzutcw ("Like so many Americans, I've been glued to screens over the past few weeks, sometimes watching Twitter or Instagram video from the demonstrations on my phone as I watch news channels cover the same scenes from a different angle on TV.").

First Amendment activity" in such places "are 'sharply circumscribed.'" *Glik*, 655 F.3d at 84 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). In such "traditional public forum[s]"—namely, public streets or parks—speech restrictions must be "narrowly tailored to serve a compelling government interest." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). And public officials carrying out public functions in such public places "lack any 'reasonable expectation of privacy'" because their actions are "knowingly expose[d] to the public" there. *ACLU of Illinois*, 679 F.3d at 605-06 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

As of October 2018, each of these four lines of First Amendment doctrine established with obvious clarity that individuals had an established right to film police officers during traffic stops subject only to reasonable time, place, and manner restrictions.

Consistent with the above, in 2012, the Department of Justice expressly recognized "individuals' First Amendment right to observe and record police officers engaged in the public discharge of their duties." *U.S. Dep't of Justice, Civil Rights Div., Re: Christopher Sharp v. Baltimore City Police Dep't* at 2 (May 14, 2012), https://bit.ly/2ZNJNXT.

The Government has since reiterated that position in particular cases. See *Statement of Interest of the United States, Garcia v. Montgomery County*, No. 8:12-cv-03592 (D. Md. March 4, 2013), Dkt.15, https://bit.ly/3CLliZn; Consent Decree at 44-45, *United States v. City of New Orleans*, 35 F. Supp. 3d 788 (E.D. La. 2013), Dkt.114-1, https://bit.ly/3BImDif; Settlement Agreement at 20-21, *United States v. Town of E. Haven*, No. 3:12-cv-01652 (D. Conn. Dec. 20, 2012), Dkt.2-1, https://bit.ly/31h74l5.

Moreover, two district courts in this circuit have recognized that the right to record police discharging their duties in public is now clearly established. First, in *Dyer v. Smith*, the United States District Court for the Eastern District of Virginia correctly found that recording a TSA agent in an airport during a pat-down search, though in a nonpublic forum, was "squarely within this 'crystal clear' right" under the First Amendment. *Dyer v. Smith*, No. 3:19-CV-921, 2021 WL 694811, at *8 (E.D. Va. Feb. 23, 2021) (quoting *Tobey v. Jones*, 706 F.3d 397, 391 (4th Cir. 2013) ("[I]t is crystal clear that the First Amendment protects peaceful nondisruptive speech in an airport, and that such speech cannot be suppressed solely because the government disagrees with it."). As

such, the court concluded that "because 'a general constitutional rule' 'applies with obvious clarity' to the First Amendment violations that Dyer alleges, the right he asserts was 'clearly established' at the time of the alleged conduct." *Dyer v. Smith*, No. 3:19-CV-921, 2021 WL 694811, at *8 (E.D. Va. Feb. 23, 2021) (quoting *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017)).

Second, in *Hulbert v. Pope*, the United States District Court for the District of Maryland held that the First Amendment protected the plaintiffs' right to film the police in a public forum. No. SAG-18-00461, 2021 WL 1599219, at *8 (D. Md.). The court then held that this right was clearly established as of February 2018. *Id.* at *1, *9. The court explained that "every circuit considering the question has found the First Amendment right to record police exists," and found this clear consensus controlling. *Id.* at *9.

B. Cases from Six Other Circuits Also Clearly Establish a First Amendment Right to Record Police In the Discharge of their Duties

The right to record police discharging their duties in public not only follows from basic and well established First Amendment principles. A "consensus of cases of persuasive authority," *Booker*, 855 F.3d at 543,

also confirms that the public has the right to record police officers conducting official police activity in public areas. *See Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3d Cir. 2017). Before Officers Helms and Ellis retaliated against Mr. Sharpe for filming them in October 2018, "[e]very Circuit Court of Appeals to address this issue"—the First, Third, Fifth, Seventh, Ninth, and Eleventh—"ha[d] held that there is a First Amendment right to record police activity in public."[6] *Id.* That is still the case: there are six Circuits with published precedents holding that the First Amendment protects the right to film police in the discharge of their public duties.[7]

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[6] These cases often use the right to "record" and the right to "film" interchangeably showing that nothing of significance turned on the fact that they involved recording rather than live filming. *See Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (right to "photograph, film, or audio record"); *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("In addition to the First Amendment's protection of the broader right to film, the principles underlying the First Amendment support the particular right to film the police."); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (the First Amendment protects "the filming of government officials in public spaces").

[7] At least one other circuit has also impliedly recognized a right to film police in an unpublished decision. *See Quraishi v. St. Charles Cty.*, 986 F.3d 831, 836 (8th Cir. 2021) (affirming district court determination that factual disputes precluded summary judgment and qualified immunity on First Amendment claim because officers had no probable cause to

The Ninth and Eleventh Circuits found these rights clearly established more than two decades ago. In 1995, in *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), the Ninth Circuit held there was a clearly established right to "photograph and record" "law enforcement officers engaged in the exercise of their official duties in public places." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (citing *Fordyce*, 55 F.3d at 439). In 2000, in *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000), the Eleventh Circuit held that individuals have "a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct." *Id.* at 1333. Importantly, the decision in *Smith* involved videotaping from within a pulled-over vehicle during a traffic stop, and thus impliedly rejected the defendant police officer's argument that such activity "was distracting and took his focus away from the vehicle stops" or otherwise interfered with his ability to carry out public duties and therefore gave rise to no First Amendment protection at all. *Smith v.*

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believe that reporters peacefully filming protest were interfering with officers in manner that impacted officer safety).

City of Cumming, No. 1:97-CV-1753-JEC, 1999 U.S. Dist. LEXIS 23875, at *14-15 (N.D. Ga. Jan. 12, 1999).

The First Circuit joined these Circuits in 2010, in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), where it held that, subject to reasonable time, place, and manner restrictions, "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." *Id.* at 82-85. Like the Ninth and Eleventh Circuit's before it, *Glik* was a § 1983 damages suit, and like *Fordyce* and *Smith*, *Glik* held that the right to film police was *already* clearly established because it followed so clearly from settled First Amendment principles even though there was no previously decided First Circuit case directly on point. *Id.* at 84-85.

The First Circuit later held in 2014 that a person pulled over in a traffic stop *also* has a clearly established right to record the encounter. *Gericke v. Begin*, 753 F.3d 1, 3-4, 7-8, 9-10 (1st Cir. 2014). The court recognized that "[t]he circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure—for example, a command that bystanders disperse—that would

incidentally impact an individual's exercise of the First Amendment right to film." *Id.* at 8. "However, a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties." *Id.*

The First Circuit further held in 2020 that individuals have a right to record the actions of police officers without the officers' knowledge or consent. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 836-37 (1st Cir. 2020). The court held that "the record provide[d] no support for the conclusion that" the prohibition on secret nonconsensual recording of police officers "reduce[d] interference with official police responsibilities in any meaningful way with respect to at least the mine-run of circumstances—whether involving an arrest in a park, a roadside traffic stop, or a gathering in a foyer following a public meeting in a public building—in which police officers may be 'secretly' recorded without their consent while discharging their official functions in public spaces." *Id.* at 837. As a consequence the Court concluded that the "statute's outright ban on such secret recording [was] not narrowly tailored to further the

government's important interest in preventing interference with police doing their jobs and thereby protecting the public." *Id.*; *see also Kelly v. Borough of Carlisle*, 622 F.3d 248, 259 n.7 (3d Cir. 2010) ("we fail to see how the covert nature of a recording would affect its First Amendment value, which will most often be realized upon the recording's dissemination").

Relying substantially on the holding and reasoning in *Glik*, in 2012 the Seventh Circuit joined the First, Ninth, and Eleventh Circuits, holding that citizens have a First Amendment right to "openly audio record the audible communications of law-enforcement officers … when the officers are engaged in their official duties in public places." *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012). In so holding, the Seventh Circuit court recognized that the "self-authenticating character" of audio and audiovisual recording is unique to such mediums, which "makes it highly unlikely that other methods could be considered reasonably adequate substitutes." *Id.* at 607.

The Third and Fifth Circuits joined these circuits in 2017, holding that the First Amendment protects the right to film police in the discharge of their duties in public. In *Turner v. Lieutenant Driver*, the

Fifth Circuit held, "agree[ing] with every circuit that has ruled on this question" that "the First Amendment protects the right to record the police." 848 F.3d 678, 687 (5th Cir. 2017). Similarly, in *Fields v. City of Philadelphia*, the Third Circuit held "the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public." 862 F.3d 353 (3d Cir. 2017).

To be sure, several circuits declined to characterize the right to record police officers as "clearly established," but those courts made that determination years before the October 2018 incident, and at least one of those courts has subsequently reversed course. This Court in an unpublished per curiam opinion in 2009 held that the "right to record police activities on public property was not clearly established in this circuit," as of June 2007. *Szymecki v. Houck,* 353 F. App'x 852 (4th Cir. 2009) (per curiam); *see Szymecki v. City of Norfolk,* No. 2:08-CV-142, 2008 WL 11259782, at *1 (E.D. Va. Dec. 17, 2008) (providing date of incident).[8]

[8] As the Third Circuit recognized in *Glik*, the "unpublished per curiam opinion" in *Szymecki* "ha[s] no precedential force," 655 F.3d at 85 (quoting *Merrimac Paper Co. v. Harrison (In re Merrimac Paper Co.),* 420 F.3d 53, 60 (1st Cir. 2005) and citing *United States v. King,* 628 F.3d 693, 700 n.3 (4th Cir. 2011)), "and the absence of substantive discussion deprives

The Fifth Circuit held that the right was not clearly established in the Fifth Circuit as of September 2015. *See Turner*, 848 F.3d at 683. The Tenth Circuit held that it was not clearly established in the Tenth Circuit as of August 2014. *See Frasier v. Evans*, 992 F.3d 1003, 1009-10 (2021). And the Third Circuit held that it was not clearly established in the Third Circuit as of September 2013 in conjunction with recognizing that it *was* established by 2017. *See Fields*, 862 F.3d at 356.

Given that, as of the time of the events in this case, six circuits had explicitly held in published decisions that individuals have a First Amendment right to film police officers in the discharge of their duties, and none had held otherwise, the right was clearly established at the time of the events here. Officers Helms and Ellis violated clearly established law by retaliating against Mr. Sharpe for livestreaming the traffic stop.

Szymecki of any marginal persuasive value it might otherwise have had," *id.*

C. The Consequences That Would Flow From Allowing Police to Prevent Individuals from Filming Their Conduct Further Clearly Establishes the Right

Failing to protect the right to film and disseminate recordings of police would have grave consequences. That is why courts that have recognized this clearly established right have remarked in these cases that "the First Amendment interests are quite strong," *ACLU of Illinois*, 679 F.3d at 597, and that "this First Amendment issue is of great importance," *Fields*, 862 F.3d at 357.

The "increase in the observation, recording, and sharing of police activity has contributed greatly to our national discussion of proper policing." *Id.* at 358. Bystanders with cell phones captured the police killing of George Floyd which the Minneapolis Police Department initially characterized as a "medical incident during police interaction." Philip Bump, *How the First Statement From Minneapolis Police Made George Floyd's Murder Seem Like George Floyd's Fault*, Washington Post, Apr. 20, 2021, https://bit.ly/3b8wByR. "It is because of that cellphone video that we all, the Minneapolis Police Department included, understand what preceded Floyd's death." *Id.* "That point was reiterated repeatedly during [Officer Derek Chauvin's] trial: You saw what

happened." *Id.* "Even as the defense tried to again suggest that Floyd had somehow died of a drug overdose, there was that video footage of Chauvin blocking off George Floyd's breath." *Id.*; *see also Index Newspapers LLC v. United States Marshals Service*, 977 F.3d 817, 831 (9th Cir. 2020) ("Indeed, the public became aware of the circumstances surrounding George Floyd's death because citizens standing on a sidewalk exercised their First Amendment rights and filmed a police officer kneeling on Floyd's neck until he died."). Had the right to film been unprotected, the officers on the scene could have ordered those cameras turned off. And had the right to livestream been unprotected, the officers could have seized those cameras to ensure they were not used to engage in impermissible livestreaming.

"Bystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture." *Fields*, 862 F.3d at 359. "Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public." *Id.* These recordings have served as key evidence in investigating those suspected of unlawful behavior, whether it be in cases of law enforcement accused of misconduct or

instances in which police officers lawfully perform their duties and protect their communities.

"Moreover, the proliferation of bystander videos has spurred action at all levels of government to address police misconduct and to protect civil rights." *Fields*, 862 F.3d at 360. A nationwide push to eliminate qualified immunity stems in no small measure from incidents of extraordinary police misconduct captured by ordinary people with their cell phones.

The failure to protect the right to record and disseminate video of police interactions will result in a return to a time when the word of police officers was the only word on what happened during an arrest or a traffic stop. It will mean a return to a time before the advent of the cellphone where individuals brutalized by police have no video evidence to provide as support for their claim. It will result in more people being told that what they say the police did could not possibly have happened because police officers would never engage in that kind of conduct.

D. The District Court Erred In Its Analysis of Mr. Sharpe's First Amendment Claims

In the face of all of the authority that Mr. Sharpe had a clearly established First Amendment right to film and disseminate the traffic

stop in this case, the district court nonetheless held in its first opinion that the right was not clearly established, JA65, and in its second opinion that Mr. Sharpe had no such right at all, JA82. In reaching those conclusions the district court stated that it was highly relevant to the existence of the First Amendment right (1) that Mr. Sharpe was a passenger in a vehicle stopped during a traffic stop, and (2) that Mr. Sharpe was livestreaming, rather then simply recording, the stop. *See* JA62-66, JA80-86. Neither of those distinctions distinguish this case in any way from the principles and cases establishing the right to film police. To the degree "livestreaming" differs from "recording" at all, it is *more* entitled to constitutional protection, not less.

The district court's analysis, at most, goes not to whether Mr. Sharpe had a First Amendment right to livestream the stop, but to whether the restriction on Mr. Sharpe's right to film the stop was permissible. It was impermissible, and clearly so. The conjectural officer safety justification for prohibiting livestreaming—*see* JA63-65; JA80-82—is insufficient to justify the restriction. There is no evidence of any kind that livestreaming by vehicle passengers is uniquely dangerous to police. And the restriction is insufficiently narrowly tailored to survive

any level of heightened scrutiny. Banning livestreaming by vehicle passengers while permitting bystander livestreaming, passenger videorecording, voice phone calls, and text messaging, is utterly irrational.

1. The District Court Conflated Whether A Right to Livestream Exists and Whether the Government Can Permissibly Restrict That Right

At the outset, no court has ever drawn the distinction drawn by the district court between livestreaming and recording for subsequent dissemination. The district court held that livestreaming is different from recording for one reason only: livestreaming poses a potential threat to the safety of the officers that recording does not because it communicates information about what is happening *in real time*. JA81-84; *see* JA63-64. According to the district court's elaborate chain of conjecture, that real time information could be used by a third party to pose a danger to the officers. JA81.

Consider just how many contingent events must happen for that danger to be realized in a traffic stop like the one in this case: (1) someone watching would have to deduce the location of the stop; (2) travel to the location of the stop; and (3) launch some kind of attack on the officers.

Given the amount of time that such stops last—here less than twenty minutes—this hypothetical dangerous viewer would have to be extremely close to the scene, be ready to spring into action at a moment's notice, and be mentally prepared to attack two armed police officers. The audacity and sheer practical difficulty of a third-party posing any threat to police officers because he viewed a livestream of the stop is hard to overstate.

In any event, the district court further erred by claiming that this supposed danger means that there is no right to livestream at all. Nothing about the speculative dangers livestreaming might pose to police officers speaks to *whether* vehicle passengers have a First Amendment right to livestream, only whether a restriction on that right is nonetheless *permissible*. *See Gericke*, 753 F.3d at 8 ("Importantly, an individual's exercise of her First Amendment right to film police activity carried out in public, including a traffic stop, necessarily remains unfettered unless and until a reasonable restriction is imposed or in place."); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1250 (3d Cir. 1992) ("The first issue to be addressed in any challenge to the

constitutional validity of a rule under the First Amendment is whether a First Amendment right exists[.]").

The district court erroneously collapsed these inquiries and treated them as one-and-the-same, holding that because Mr. Sharpe's broadcast of the stop might pose a danger to the officers (which arguably might justify some restriction), that means he had no clearly established right to broadcast at all. JA65-66 ("[T]he court … holds that … during the traffic stop, Sharpe did not have a clearly established First Amendment right to record and real-time broadcast with the ability to interact via messaging applications with those watching in real-time."); JA82 ("In light of existing precedent and the differences between recording and livestreaming from inside the stopped car during the traffic stop, the court rejects Sharpe's argument that the First Amendment provided him a right to livestream a traffic stop from inside the stopped car on October 9, 2018.").

That analysis—which assumes that a government's purported justification in restricting First Amendment activity signifies that the activity is not protected by the First Amendment—is wrong as a matter of first principles, as *United States v. Stevens*, 559 U.S. 460, 464-65 (2010)

clearly established. In *Stevens* the Supreme Court held that 18 U.S.C. § 48, which provided a criminal penalty of up to five years for knowingly "creat[ing] … a depiction of animal cruelty" for commercial gain, violated the First Amendment. *Id.* at 481-82. The Court specifically rejected the Government's argument that the creation of such depictions is unprotected by the First Amendment altogether. *Id.* at 469. The Government's "free-floating test for First Amendment coverage" the Court explained, was "startling and dangerous." *Id.* at 470. "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.* "When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis." *Id.* at 471.

The district court in this case did precisely what the Supreme Court in *Stevens* said is forbidden: it held that Mr. Sharpe had *no right at all* to create a depiction of the police officers who stopped his vehicle based only on "an ad hoc balancing of relative social costs and benefits." *Id.* at 470. The district court erred by holding that Mr. Sharpe lacked a First Amendment right to broadcast the officers at all.

What is more, even if First Amendment coverage *were* subject to "ad hoc balancing" the district court's balancing of the interests was wrong. Livestreaming promotes First Amendment interests more than merely recording for several reasons. Livestreaming establishes the truthfulness of the footage by assuring the viewer that it is raw and unedited.[9] Livestreaming provides the opportunity—impossible for a recording disseminated later—for the viewer to interact in real-time with the broadcast footage, including by calling *other* police officers or emergency responders for help if the person making the live broadcast is in danger from the conduct of the officers on the scene. And livestreaming circumvents police censorship because the officers cannot seize and delete the footage before it can be shared.

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[9] In this respect, livestreaming is a unique and essential method of disseminating information, for which there is no "reasonably adequate substitute" in the First Amendment analysis. *See ACLU of Illinois v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012). *See also* Richard Nieva, *"I wanted everybody to see": How Livestreams Change Our View of Protests*, CNET, June 11, 2020, https://bit.ly/3Bag6fW ("More intimate than a high-definition cable news broadcast and rawer than a tweeted clip, live feeds capture time and place that edited snippets miss. Livestreams record both the mundane and the extraordinary. There are no cuts, no production. … And because they are live, they are spontaneous for all involved, including the person behind the camera.").

2. The District Court's Conjecture About the Risks Posed by Livestreaming Are Insufficient to Justify Restricting It

At best, the district court's analysis goes *not* to whether there was a right to film but rather to whether it was clearly established that the restriction on the right at issue in this case was impermissible.[10] But the district court's conjecture about the dangers posed by Mr. Sharpe's livestreaming remains fundamentally flawed under that analysis. The restriction in this case cannot survive *any* level of First Amendment scrutiny.

Strict scrutiny applies to any restriction on livestreaming police officers during traffic stops because such restrictions are content- and speaker-based. A restriction on speech is content based when it "target[s] speech based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Such restrictions are "presumptively

[10] The district court appeared to grasp this distinction in its second opinion, holding *first* that Mr. Sharpe lacked a right to livestream the stop, and *second*, in the alternative, that even if he had such a right, the Town of Winterville's policy of arresting passengers who livestream traffic stops is permissible because it survives intermediate scrutiny. JA82-86 (first analyzing whether Mr. Sharpe had a right to livestream, then analyzing whether Winterville's policy imposed a permissible restriction on the right).

unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* "[F]acially content neutral" restrictions will also be considered content-based when they "cannot be justified without reference to the content of the regulated speech." *Id.* at 164. Under either formulation, the restriction in this case is content-based. Mr. Sharpe had the right to livestream anything he wished from the passenger seat of the vehicle *except* a traffic stop by police. There is no other restriction on his ability to create live videos unless they are depictions of police conducting traffic stops. And the "justification" for banning the speech is that it will depict certain dangerous *content*. Just as the prohibition on "creat[ing]" "depictions of animal cruelty" in *Stevens* was content-based and thus "presumptively invalid," 559 U.S. at 468, so too the restriction on creating depictions of police officers engaged in traffic stops at issue in this case is content-based and presumptively invalid.

Defendants argued below, citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), that the restriction is "content neutral" "because it is justified by concerns for officer safety related to broadcasting the real-time location of law enforcement activity, which applies regardless of the

content of the video." Dist. Ct. Dkt. No. 37, at 12. But banning speech because its *content* endangers police is a *content-based* restriction. If a restriction on speech that poses a threat to police officer safety were a mere content neutral restriction, the Government could ban anti-police protests, could take books critical of the police off of bookshelves, and could have barred the dissemination of the beating of Rodney King. Moreover, the fact that the restriction itself is limited on the basis of content, to depictions of police officers during traffic stops, means it is content-based regardless of its justification. *See Reed*, 576 U.S. at 163.

Even if the restriction were not subject to strict scrutiny because it is directly content-based, it would be subject to such scrutiny because it is speaker-based. A speaker-based restriction is subject to heightened scrutiny "when the legislature's speaker preference reflects a content preference." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (quoting *Reed*, 576 U.S. at 170). There is plainly such a content preference here. The restriction at issue restricts speech *only* by the individuals inside the stopped vehicle. Those individuals happen to be (1) the most likely individuals to livestream a traffic stop; and (2) the individuals with the greatest interest in disseminating a livestream of

what happened during the stop. If the government wanted to vastly reduce a very specific kind of content—namely live depictions of police officers engaged in traffic stops—a restriction on livestreaming by the individuals in the vehicles during the stops is the way to accomplish that end.

And even if the Court were to conclude that strict scrutiny does not apply, at minimum, the restriction in this case is subject to intermediate scrutiny, as the district court acknowledged. JA82. Heightened scrutiny applies when a restriction results in even "incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). No other court to analyze a similar restriction has imposed a standard more lenient than intermediate scrutiny. *See ACLU of Illinois*, 679 F.3d at 603-08 (applying intermediate scrutiny); *Project Veritas Action Fund*, 982 F.3d at 835-36 (same).

If strict scrutiny applies, the restriction "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). If intermediate scrutiny applies, the restriction must be "narrowly tailored to serve a significant

governmental interest." *Ward*, 491 U.S. at 791 (1989). Regardless of which level of scrutiny applies, the restriction here fails it.

First, and fatally, defendants cannot show that the restriction here is "narrowly tailored to serve a significant governmental interest" because the restriction has no basis in any evidence of any kind. As this Court has repeatedly held—following Supreme Court precedent—"[t]o prove that a content-neutral restriction on protected speech is narrowly tailored to serve a significant governmental interest, the government must, *inter alia*, present evidence showing that—before enacting the speech-restricting law—it 'seriously undertook to address the problem with less intrusive tools readily available to it.'" *Billups v. City of Charleston, S.C.*, 961 F.3d 673, 688 (4th Cir. 2020) (citing *McCullen*, 573 U.S. at 494). "In other words, the government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Id.* "The government's burden in this regard is satisfied only when it presents 'actual evidence supporting its assertion[s].'" *Id.* (quoting *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015)). That accords with the Supreme Court's repeated admonitions that, to satisfy

intermediate scrutiny, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Project Veritas*, 982 F.3d at 837 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion)); *see also id.* (collecting cases).

The district court held that the threat to officer safety from livestreaming was so "obvious" as to require no evidence. JA83 n.2; *see also* JA85 n.3 (using similar reasoning to conclude that "defendants [were] not required to present proof that the Town tried other methods to address its officer and public safety concerns"). But, as support, the district court pointed to Supreme Court cases about the "unique dangers" of traffic stops. JA83. Those cases are about *traffic stops*, not livestreaming, and certainly not livestreaming traffic stops. JA83 & n.2. Those cases have nothing to do with any of the supposed threats the district court identified as arising from livestreaming stops. The one scenario the district court summoned of a risk arising from livestreaming a stop shows this to be true. The Court suggested that livestreaming would potentially "allow a viewer to see weapons from inside the stopped car that an officer might not be able to see and thereby embolden a

coordinated attack on the police." JA81. That risk is neither unique to livestreaming nor unique to traffic stops. That risk is posed anytime anyone with the ability to make an outgoing call on a cell phone witnesses a police interaction. And that hypothetical has no basis in fact: the government has consistently failed to produce evidence that cell phones are in fact used to summon confederates to ambush police. *See Riley v. California*, 573 U.S. 373, 387 (2014) (noting that neither the United States nor the State of California had provided any evidence of this use of cell phones by arrestees). The supposedly "unique" threat to officer safety from livestreaming traffic stops is neither unique nor a genuine threat.

Contrary to the district court's findings, the "obvious" effect of using a cell phone to record traffic stops is to ensure passenger safety by keeping officers accountable for their actions. Diane Reynolds—who began livestreaming to Facebook just moments after a Minnesota police officer shot and killed her partner, Philando Castile, during a traffic stop—testified to this at the trial of the responsible officer. When asked why she made the Facebook video, she explained: "Because I know that the people are not protected against the police, and I wanted to make

sure that everyone could see that if I was to die in front of my daughter, someone would know the truth." *Fearing for Her Life, Philando Castile's Girlfriend Livestreamed Fatal Police Shooting*, CBS News, June 6, 2017, https://bit.ly/30Ybg9f. Indeed, during the traffic stop in this case, Mr. Sharpe assured viewers on his live video feed that he and the driver were "good" and explained that all traffic stops should be filmed as a matter of routine. *See* JA28. In concluding that the threat to officer safety was "obvious," the district court did not appear to consider these facts.

Second, defendants cannot show that the restriction here is "narrowly tailored to serve a significant governmental interest" because the restriction is so vastly underinclusive as to fail any test of narrow tailoring. The narrow tailoring requirement ensures that the "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." 982 F.3d at 839 (quoting *Ward*, 491 U.S. at 799). If the concern truly were with protecting the safety of officers by preventing anyone from knowing where the traffic stop is occurring, or what is transpiring during the stop, the restriction does so little to achieve that end as to be

entirely ineffectual. The restriction does not prevent individuals from using cell phones to simply text message their whereabouts to others. Nor does the restriction prevent individuals from using the "share my location" feature on their smart phones, a readily available feature in every smart phone text-messaging application that could be used to share one's precise GPS location before, during, and after the traffic stop. Nor does the restriction prevent individuals from making cellular phone calls to tell other people where they are or what is happening, as the driver did during the entire duration of the traffic stop in this case. Nor does the restriction prevent a person in another car from livestreaming the interaction.

The restriction is also vastly overinclusive. It apparently prevents *all* livestreaming, no matter the context. The ban would apply even if the Winterville Police pulled over a WRAL news crew, or if the stream were exclusively sent to an OnStar operator through a camera mounted on the dashboard, or if the stop were in a location in North Carolina so remote it was impossible for anyone else to come to the scene and pose a danger to the officers.

II. The Town of Winterville's Alleged Policy of Arresting Vehicle Passengers for Livestreaming Police During Traffic Stops Violates the First Amendment

For the same reasons that Officer Helms's conduct violated the First Amendment under clearly established law, the Town of Winterville's alleged policy, custom, or practice of arresting vehicle passengers for livestreaming police officers during traffic stops violates the First Amendment. Unlike Officer Helms, Winterville cannot claim qualified immunity. *Mayor And City Council Of Ocean City, MD*, 475 F.3d at 219 ("While individual defendants are protected by qualified immunity, municipalities are not."). Thus, even if the Court concludes that it was not clearly established that Mr. Sharpe had the First Amendment right to film Officers Helms and Ellis, the Court still should hold that Mr. Sharpe's claims against the Town of Winterville may go forward because, for the reasons discussed above in Section I.A, I.B, and I.C.2, a policy such as Winterville's, that bars recording or dissemination of a police traffic stop violates the First Amendment.

Defendants argued below, citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), that Mr. Sharpe failed to plausibly allege that the Town of Winterville has an unlawful custom, policy, or practice under *Monell*.

Dist. Ct. Dkt. No. 37, at 5-10. The district court did not pass on this argument. *See* JA78. But it clearly fails. Mr. Sharpe needed only to allege the deprivation of his rights was plausibly the result of an "official policy or custom" of the Town of Winterville. *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003). As this Court has held, "[a]lthough prevailing on the merits of a *Monell* claim is difficult, simply alleging such a claim is, by definition, easier." *Owens v. Baltimore City State's Att'ys Off.*, 767 F.3d 379, 403 (4th Cir. 2014). "The recitation of facts need not be particularly detailed, and the chance of success need not be particularly high." *Id.* "[B]rief, but non-conclusory, allegations" are sufficient. *Id.* "A plaintiff fails to state a claim only when he offers 'labels and conclusions' or formulaically recites the elements of his § 1983 cause of action." *Id.* (quoting *Iqbal,* 556 U.S. at 678).

Here, the video and its transcript raise the plausible inference that Winterville has a policy that bans livestreaming. Though Mr. Sharpe had clearly been openly recording throughout the duration of the stop, Officer Helms immediately and without hesitation attempted to seize Mr. Sharpe's phone only upon learning he was livestreaming, JA9, stating that livestreaming poses an "Officer safety issue" which suggests

Officer Helms was trained to monitor for the distinction between livestreaming and recording. Following Officer Helms's attempted seizure of the phone, Officer Ellis authoritatively and repeatedly stated that recording and livestreaming are distinct and that while recording is protected, engaging in livestreaming would result in future arrest, JA9-10; JA31-36, which suggests Officer Ellis was also trained to monitor for the distinction. In response to the question "Is that a law?" Officer Ellis named a specific provision of North Carolina law—by referring to "RDO," N.C. Gen. Stat. Ann. § 14-223—that he believed gave him the authority to arrest individuals for livestreaming, JA34-35, which suggests the existence of a policy and training regarding the legal basis for the policy. Officer Ellis also expressed support for Mr. Sharpe's desire to livestream, stating "If I had that happen to me [the Greenville incident] I'd probably be in the same situation," JA35, but then immediately reiterated, "but Facebook Live is not gonna happen," JA35, suggesting that Winterville's "no livestreaming" policy is mandatory, not discretionary, further suggesting the existence of a policy. Finally, the fact that *both* officers agreed that livestreaming was prohibited, with Officer Helms physically attempting to seize Mr. Sharpe's phone and Officer Ellis then warning of

future arrest for livestreaming, JA31-36, suggests that these were not the actions of a single renegade police officer but rather the actions of two police officers together carrying out a policy both officers knew about and were trained to follow. All of these facts give rise to the reasonable inference that Officers Helms and Ellis were following an official policy of the Town of Winterville—a policy that clearly violates the First Amendment.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant requests oral argument. Given the complexity and importance of the constitutional issues presented, Appellant believes that oral argument would assist the Court in its decisional process. *See* Loc. R. 34(a).

CONCLUSION

The Court should reverse the district court's dismissal of the personal capacity claims against Officer Helms and the claims against the Town of Winterville and remand this case for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a) and 32(g), the undersigned counsel for appellee certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 12,149 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/ *Andrew Tutt*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on November 3, 2021 and will, therefore, be served electronically upon all counsel.

s/ *Andrew Tutt*
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